

COMPETITION COMMISSION OF INDIA

Case Nos.7/28, 25/28, 8/28, 9/28 & 10/28

Dated: 31.05.2011

Case No. MRTP Cases: Banks

- (i) Shri V. Ramachandra Reddy
 - (ii) Shri A. K. Baviskar
 - (iii) Shri Charanjit Singh
 - (iv) Shri Shiv Kumar Gupta
 - (v) Ms. Swapna Muthukrishnan
- Informants

Vs.

M/s HDFC Bank Ltd.
M/s ICICI Bank Ltd.

Opposite Parties

ORDER

Per R. Prasad, Member (dissenting):

A complaint was received from Shri V. Ramachandra Reddy by the Additional DG, MRTP Commission regarding charging of interest on home loans by HDFC stating it be unfair trade practice. The informant had taken a housing loan from HDFC on floating rate of interest during the year 2003. According to the informant when the interest rate went down, as per the newspaper reports, HDFC did not automatically reduce the interest rate. In the consequence Shri Reddy decided to switch loan to another bank and at that point of time HDFC agreed to reduce the interest rate but with great difficulty. According to Shri Reddy HDFC is indulging in unfair trade practice. Further, HDFC did not agree to reduce the interest rates with retrospective effect. As proof of the assertion made Shri Reddy enclosed details that a drop in interest rate by 2% occurred in December 2003 but HDFC was not willing to reduce the interest rate for home loans on floating basis. This complaint was received by the additional DG in respect of unfair trade practice on 26.11.2007.

2. The second complaint was received from Shri A. K. Baviskar. His complaint was submitted on 04.12.2007 and it was addressed to Director General (I & R), MRTTP Commission. Shri Baviskar had taken home loan from the ICICI Bank on floating rate of interest. The loan was taken on an earlier date in March 2005. Shri Baviskar switched his loan from a fixed rate of 9.99% to floating rate of 8%. For the switching he paid penalty of Rs. 4119/-. After switching the loan in March 2005 the interest rate started going up and in May 2005 interest rate charged by the bank on the loan came to 12.5%. According to Shri Baviskar for calculating the home loan rate, a discount of 1% to 2.5% on the benchmark rate has to be given. As the benchmark rate was 12.5% the home loan rate should be 10.5%. Shri Baviskar treats the entire transaction as one of unfair trade practice.

3. The third complaint is by Shri Charanjit Singh and it is addressed to DGIR, MRTTP and the complaint was filed on 10.04.2008 against the ICICI bank. Shri Charanjit Singh had taken a loan of Rs. 26 lacs from ICICI Home Finance on a floating rate of interest for the purpose of purchasing a new house. Interest rate chargeable then was 11%. Subsequently at the time of disbursement the bank increased the rate by 1% to 12%. In May 2007 the bank again revised the rate up to 11.5% i.e. downward revision of 0.5% but the informant Shri Charanjit was not passed on the benefit of the reduced rate. The reason given by the ICICI bank was that the downward revision was not available to a person who had taken a loan more than more than 20 Lacs. In his view this was also an unfair trade practice as this provision was not explained to him at the time of taking the loan.

4. Shri Shiv Kumar Gupta also filed a complaint against the ICICI bank to the DG, (I&R) on 29.02.2008. He had also taken a home loan on floating rate of interest from the ICICI bank in May 2007. The bank raised the interest rate on the home loan from 10.5% to 12.5%. In October 2007 Shri Gupta wanted to switch over from the ICICI bank to another bank to avail of a lower rate of interest. In the proposal made by Shri Gupta the bank agreed to reduce the rate of interest to 10.7%. Shri Gupta wanted the refund of extra interest paid by him from May 2007 to December 2007 of Rs. 9600/- but inspite of efforts made by Shri Gupta no refund was given to him. This was stated to be an unfair trade practice.

5. The fifth complaint was of Ms. Swapna Muthukrishnan. The informant in this case stated that HDFC bank was charging interest rate of 8.75% for new loans taken from January 2009 and charging old loan account customers at 11% interest. This according to the informant was restrictive trade practice and the informant wanted that the new interest rate should be applicable to her also. The complaint was received on 09.03.2009 of DGIR, MRTP Commission.

6. These cases were clubbed together and transferred by the DGIR, MRTP to the Competition Commission of India on 11.05.2010 after the work of the MRTP Commission was wound up. The Commission took up these five cases together and after a perusal of the facts in these cases came to a prima facie view that there appears to be a contravention of section 3(3), 3(4) and 4 of the Competition Act. The Commission therefore directed an investigation by the Director General under section 26(1) of the Competition Act.

7. The DDG took up the case and he gave notices to HDFC Ltd. and ICICI Bank. He also examined the RBI regulations on the subject. The DDG found that home loans are offered on fixed rate interest or floating rate interest. Under the floating rate interest regime, the issue is that the interest rate can vary i.e. it can go up or down. The fixing of home loan rate is based on the base prime lending rate (BPLR). The issue of fixed and floating rate is governed by RBI's Monetary and Credit Policy statement for 2000-01. RBI by this circular deregulated the fixing of interest rate and the banks could fix their lending and deposit rates. The banks could not fix a lending rate below the cost of funds. The DDG has reported that some banks started giving loans below their BPLR. The RBI carried out a study and found that lending and fixing rates suffered from opacity and therefore they introduced a concept of base rate system.

8. In its response to the DDG, ICICI Bank accepted that out of the five complaints, three of them namely Shri A.K. Baviskar, Shri Charanjit Singh and Shri Shiv Kumar Gupta had taken home loans from it. The bank stated that the floating rate of interest was linked to the benchmark Prime Lending Rate (PLR) / Floating Reference Rate (FRR) and that the interest rate varies with changes in PLR/FRR. It was stated that the final rate offered to a customer was a function of FRR and the margin associated with the loan. The margin contracted at the time of

the sanction remained constant over the entire period of the loan. It was stated that interest rate on floating rate of interest was increased or decreased depending on the fluctuations of the FRR. It was also stated that while fixing the floating rate the following factors are taken into consideration:-

- (i) Profile of the customer (salaried, self employed)
- (ii) Loan amount
- (iii) Classification of priority/non-priority sector
- (iv) Past behaviour of the customer
- (v) Tenure of the loan
- (vi) Nature of property (residential, commercial etc.)
- (vii) Competition rates
- (viii) Prevailing credit conditions and outlook for current demand.

9. On behalf of the ICICI Bank, it was submitted that as and when the interest rate increased, it was passed on to the borrower by increasing the tenure of the loan and not a higher equated monthly instalment (EMI). The details of the increase in FRR between the period May 06 and April 09 was submitted. It was stated that when the FRR decreased the benefit was passed on to the consumer.

10. As far as HDFC Ltd. is concerned, it accepted that it had given loans to Shri V. Ramachandra Reddy and Ms. Swapna Muthukrishnan. It was stated on behalf of the bank that interest calculation on all floating interest loan depends on the Retail Prime Lending rates (RPLR) and spreads. RPLR is fixed on the basis of the cost of funds, operating expenses minimum margin to cover regulatory requirement of provisions/capital charge and profit margins. It was stated that the spread depends on other factors such as timing of the loan, type of loan, risk perception of the borrower, marginal cost of funds & tenure of the loan. It was also stated that RPLR and the spread determined that rate of interest chargeable from a borrower. It was also explained that the spread could not be unilaterally changed by the HDFC. The details of interest charged to new and existing customers in the period 22.12.2008 to 07.05.2009 was furnished.

11. The DDG examined the submissions of the two banks and came to the conclusion that the banks have two components in the interest charged on the floating rate interest scheme. The components are benchmark lending rate and the spread. The benchmark lending rate can vary i.e. increase or decrease as and when there is a change brought in by the RBI. But the rate of spread cannot be changed. The spread / margin can be negotiated or altered on payment of switching charges. The DDG found non transparency and information asymmetry with reference to the benchmark rate as well as spread. In fact on the same day, loans taken by two different borrowers could carry different rates. To get over this opacity, now the RBI has introduced a concept of base rate which can be passed on to old customers also.

12. The DDG then examined the facts of the case with reference to the provisions of section 3(3) of the Act. He found that as there was no agreement between the banks section 3(3) was not applicable. The DDG is of the opinion that though there was information asymmetry, there was no violation of section 3(3) of the Act. The DDG also found no violation of Section 3(4) of the Act as according to him none of the factors mentioned in the section were brought into play. DDG has examined the market share of HDFC and ICICI and found that as their market share were 17% and 13% respectively they cannot be taken to be dominant. He then examined the other factors enumerated in Section 19(4) of the Act and found that none of these factors and found that none of these factors are applicable to the facts of these five cases. The DDG therefore did not find any contravention of the Competition Act.

13. After the receipt of the notice of the DG, notice was given to the information providers and the two banks namely the ICICI bank and HDFC. Out of the five information providers only Shri Shiv Kumar Gupta submitted a reply. He has stated that the report of the DDG is a biased one and against natural justice favouring cartel banks such as ICICI Bank and HDFC Bank. It is also the contention of Shri Gupta that the figures given by the DDG were faulty, wrong and biased and were used to favouring cartel members. It was argued that the methodology used was against the public at large and it encouraged the cartel bankers so that they could run officially the biggest fraud in the country under the umbrella of liberalization policy of the RBI. It was stated that his data compiled from the RBI official records was not considered by the DDG while preparing the report. In the view of Shri Gupta DDG knowingly

narrowed the area / scope of investigation for home loan ignoring overall market position of the bankers in personal finance. According to Shri Gupta the RBI data was a significant one showing cartelization structure of the banks. It was stated that the report of the DDG is a biased one on the ground that the banks did not enjoy a dominant position. It was therefore stated that the CCI should use its statutory power in the larger interest of the consumers of the banks and that a broader investigation in a transparent manner should be carried out about the cartelization of the banks and their dominant position. It has been stated that all the other bankers also follows the same practice due to the loose policy of the RBI.

14. ICICI bank in response to the notice issued by the CCI has stated that there is no contravention of any provision of Competition Act specially in respect of differential rate of interest for new customers qua existing customers. It was therefore requested that as the DDG found no contravention of any of the provision of the Act the notice should be withdrawn and the case should be closed. As far as HDFC bank is concerned it was stated on its behalf that as the DDG had not found contravention of any provision of the Act the inquiry should be closed.

15. All these five cases relate to a period when the provisions of section 3 and 4 were not on the statute. In fact the provisions of section 3 and 4 were brought into force w.e.f. 20.05.2009. In the case of Shri V. Ramachandra Reddy the loan taken from the HDFC has been paid as Shri Reddy switched his loan to another bank after paying the prepayment penalty. This happened much before 20.05.2009. But as far as the other cases are concerned, the home loan is still continuing and the practices carried out by the banks are still continuing. The practices followed by the banks even in the case of Shri Reddy are still continued by the banks. Therefore all the five cases need to be considered.

16. The facts of the case are that the five information providers had taken home loans from the two banks on a floating rate of interest. The practice followed by the banks/HFCs in the home loan market are that home loan is given at a fixed rate of interest or a floating rate of interest. Under the fixed rate of interest scheme, the interest is fixed over the entire period of the loan. Under the floating rate of interest scheme, the rate of interest is pegged to the market rate of interest i.e. they would vary with the fluctuation of interest rate in the market.

17. The methodology of fixing interest by the two banks are similar and probably the other banks/HFCs follow the same practice. The interest rate offered to a customer is a function of Prime Lending Rate or Floating reference rate and margin / spread. The spread / margin is worked out by considering the following factors

- (i) Profile of the borrower (salaried/self employed) & past behaviour of the customer.
- (ii) Risk perception of the borrower
- (iii) Loan Amount
- (iv) Type of loan such as priority/non-priority, residential / commercial
- (v) Tenure of the loan
- (vi) Timing of the loan such as prevailing credit conditions and outlook for current demand

The margin/spread remains constant over the period of the loan though the prime lending rate/floating reference rate could vary depending on the market conditions. If someone wants to prepay the loans, he has to pay penalty for the foreclosure of loans. Thus it becomes difficult for a borrower to prepay his loan and shift to another bank which offers a better product or loan at a lower rate of interest. Thus, a borrower cannot switch to another bank as the switching costs can be quite high.

18. The main grouse of the five information providers is that though the market rate of interest had dropped, ICICI Bank and HDFC were not willing to reduce the interest. In fact in two of the cases i.e. in the case of Shri Reddy and Shri Shiv Kumar Gupta the banks agreed to reduce the interest as and when they wanted to shift the loan to another bank. Therefore in these two cases, the banks admitted in a implied manner that they were overcharging their customers. But no benefit was given to the borrowers with retrospective date and in this manner, the two banks profited. The case of Shri Charanjit Singh shows that the proper information was not provided by the banks the borrowers at the time of taking the loans. In the case of Ms. Muthukrishnan, HDFC was charging interest from the new borrowers at 8.75% but the old borrowers were charged interest at 11%. This is certainly discriminatory.

19. In spite of these discriminatory and abusive practices the borrowers had to silently bear them as they could shift to another bank only by paying switching costs. The issue of switching costs i.e. penalty for the prepayment of loans was considered by me in the case of Neeraj Malhotra vs. Deutsch Bank & ors. Case No. 5 of 2005. Extracts of my orders in the said case are reproduced as under:-

20. *We also have to examine the economic considerations for the levy of penalty charged by the banks for the foreclosure of loans. We have to examine the economies of treatment of this phenomena of penalty for the foreclosure of loans in other countries. We also have to examine the home loan market in India and its contribution to the Indian economy and vice versa. We also have to examine whether the banks/financial companies are losers or gainers if their customers prepay their loans.*

21. *In India, the shortage of homes for living is approximately 70 million. The economy in India was liberalized in 1991. Home loan concept was introduced in India and tax breaks were introduced for home loan takers. After the opening of the economy, the G.D.P. in India increased substantially and from 2003 to 2008, the G.D.P. growth was approx. 8.9%. Due to liberalization of the home loan market, increase in disposable income, the requirement for home loans increased and the home loan market grew by 43% between 2000 and 2005. Many new banks and finance companies entered the home loan market. The market is very big and demand is so high that many more enterprises want to enter the market.*

25. *An economy would grow in the short run if consumer spending increases. If consumer spending increases the savings rate would go down. Savings rate increase in the long run may be beneficial but consumption spending in the short run is beneficial for the economy. Thus it is necessary to put surplus cash in the hands of the consumers. But the banks by having a prepayment fine on the consumers is decreasing the cash availability. Further, a cap has been put on the banks and other companies as far as housing loan is concerned. If a filip is given to housing by having cheap property prices and cheap loans, the housing industry would receive a boost. This in turn would lead to higher employment, higher industrial growth, higher growth of person income and increase of G.D.P.*

26. *It is therefore necessary that as India faces shortage of houses, the home loan market should be expanded. Mobility in the market for the customer should be encouraged. Competition in home loan banking is important in order to ensure an efficient banking industry and should not be viewed as dangerous to the banking sector. In fact in Norway mortgages are the main source of income for customers constituting 75% of the total income. In India as well as in various countries, the banks charge customers for terminating services. This reduces the mobility of customers. The ability of the customers to switch banks helps the competitors the benefits of a competitive banking market. Any obstacle which reduces customers' ability to switch banks will correspondingly reduce the competitive pressure on banks. High switching cost may result in increased bank market power and enable the banks to extract extra rent from the customers. High switching costs may also constitute barriers to entry as they make it harder for new entrants to attract customers and hence discourage new market entry. Further high switching cost may discourage product innovation, as customers would be reluctant to switch to new products and services.*

27. *The European Commission carried out a study of retail banking. Even the EFTA Authority had carried out a study of retail banking in the EFTA countries. The European Commission found potential competition concerns and consumer harm in some of the areas such as list of coordinated behaviour in the banks to the detriment of customer mobility through a non-transparent treatment of certain products such as mortgages. There are some economists who consider that banks form a big cartel but most of the economists are not of this view. The European Commission observed that the mortgages generated largest share of income in retail banking in European banks. It has also been stated in the said report that before customers change banks he considers all the factors which help him in switching banks. This would include switching costs also. It was also observed by the Commission that switching costs in the retail bank industry has three significant effects (i) it increases the bank market power and this leads the bank to discriminate between new customers and old customers. The bank would charge low charges to attract new customers and once the customers are locked, the banks would charge higher prices which may be in the form of switching costs. (ii) Switching costs served as an entry barrier because it does not allow switching to consumer to bank with cheaper and better product. If the switching costs are high it was uneconomic for new*

entrants in the market to induce customer to switching. (iii) The third aspect was it discourages product innovation. When a new product is introduced in the market due to innovation and the switching costs are low the customer would like to switch to the new product. But if the switching costs are high there would be no reward and no customer would like to switch. In the EFTA report it has been stated that in order to have the benefits of the competition in the banking sector the customers should be able to choose their banks. Any obstacle that reduces consumers' ability to switch banks would reduce the competitive pressure on the banks. If closing charges are charged by bank this would reduce the mobility of the customers. High level of switching cost in the banking industry results in increasing the bank market power and enables banks to extract extra rent form the customers. High switching costs also constitute barriers to entry as it makes harder for new entrants to attract new customers and hence it discourage new market entry. High switching costs also discourage product innovation as customers would be reluctant to switch to new products and services. The finding of the both European Commission and EFTA authority are similar.

28. A study was also carried out by Amsterdam Centre for Law and Economics. In this paper it has been mentioned that switching costs may be a reason for consumers' immobility as they remain locked-in one supplier. Switching costs also influence on behaviour as the firms should attract new customers by charge low prices and in order to exploit captured customers. The firms cannot discriminate between old and new customers due to high switching costs they have been giving incentives to keep their prices high and exploit their old customers instead of attracting new customers through lower prices. Therefore, it has been stated in the report that switching costs played an important role in consumers' decision. In another report the European Commission had analyzed the switching costs in the electricity market. In this report the Commission held that in the market of retail banking a policy of the mobility of the competitors has got to be followed.

35. It is thus clear that the main aim of the banks or housing finance companies is to find the customers and not allow them to switch to other institutions. It also allows the banks to overcharge the customers as they are giving loans to new customers at lower rate of interest. Because of these facts,

competition between the banks is killed and no new products would come and no innovation would be introduced. This practice also does not allow new banks/institutions with lower rate of interest to garner new business. Therefore, by charging pre-payment penalty, the banks/institutions are following anti-competitive practices which is having an appreciable adverse effect on competition in India.

36. Another argument which has been advanced is that if the customers prepay their loans what would the banks/HFCs do with the case which would be available with them. The market of home loan in India is very large and there is a very big shortage of houses in India. Further there is a cap placed on the banks as far as housing loans are concerned. The banks/HFCs would be in a position to loan the amount received as pre-payment to new loan creditors. This in turn would lead to construction of new houses or the purchase of new flats and would help in the economic development of India.

62. But before examining competition in the home loan market it is necessary to examine the behaviour pattern of consumers i.e. behaviour economics. Before a theory or hypothesis is formed, it is necessary to have certain axioms. In economics, the axiom is that in a perfect market, a consumer would make a rational choice which would increase his economic well being. The question is as to how this rational choice can be made. This choice depends on whether a person wants to improve his economic well being. It also depends on the information which is available to person in the market. This choice is dependent on the advertisements which flood any market, it depends on brand value, it depends on the services which are given in the market or it could depend on the perceived advantage to the consumer. The consumer can suffer from processing overload. Consumer biases can set in the processing of information. For a market to function properly a consumer should be able to assess access and process information. Because of the bulky information which the consumer has to go through before he enters in the agreement he can enter into an agreement which is anticompetitive. This can happen due to processing overload. The agreement may lead him to high switching costs. If there are high switching costs, mobility of the consumers would be affected. Thus, a new entrants would not get customers and innovation would suffer. Even the allocative efficiency of the markets would suffer. Competition Authorities such as the OFT and others thus realize that behaviour economics plays a major role in the competition in the market. It is

recognized that agreements are not sacrosanct as God's Ten Commandments. Even if a consumer has signed the agreement, it could be due to misinformation fed by the sellers of the products. Further, as discussed above, switching cost are being recovered even if there was no such factor in the agreement.

63. In the background of these facts, this case has to be decided. The facts are that the Indian home loan market is very large and is expanding at a very fast pace because of the growth of G.D.P. at a rate nearly 9%. There is a shortage of houses in the country and if the credit in the home loan market increases, due to high pent up demand for loan, the gross domestic product of the country would increase substantially. This in turn would give a boost to the cement and steel industry mainly because housing contributes nearly 6% to 7% to the G.D.P. of India.

64. But the banking industry and the home finance companies have introduced the concept of fines on the foreclosure of loans before the loans come to an end. When HDFC entered this segment of home loans in 1978, there was no penalty on the prepayment of loans. When competition came in the market in the form of L.I.C. Housing Finance in 1993, HDFC introduced the concept of penalty on the foreclosure of loans. L.I.C Housing finance introduced the system of penalty in 1995. National Housing Bank which is the regulator in the area of home finance and which lends to banks/HFCs introduced the concept of penalties in 1997. ICICI Bank which entered this field later introduced the concept of penalties on prepayment in 2001. The PSU banks entered the field of home loan at a later date and initially they did not charge any penalty. But after the meeting of the banks in September, 2003 the P.S.U. banks started charging penalties varying from 0.5% to 2%. Subsequently, many of the banks did not levy penalties from customers who prepaid the loans from their own funds. But if the loans were prepaid after taking loans from another bank, the banks levied penalty. Incidentally, according to a report of ICRA, HDFC and SBI have a market share of nearly 17% in the home loan market. ICICI Bank has a share of 13%. Even LIC Housing is a significant player in the market.

67. During the course of hearing of the banks, it was conceded by some of the banks that the concept of penalties for the foreclosure of home loans was introduced because the banks did not want to lose customers who could have migrated to banks giving loans at a lower rate. They thus wanted to reduce the

mobility of consumers and reduce their choice. The banks also wanted to discipline the consumers. The banks wanted to extract rent out of the consumers by charging the penalty as they perceived losses. But what losses they had incurred to would have incurred was not worked out. The banks were also not aware of how much they had earned out of the prepayment penalties. The data was not available because home loans constituted a very small percentage of their total loan portfolio. In fact even today S.B.I. which is the largest bank in the country, has a total home loan portfolio of 13%. Most of the banks talked of asset liability mismatch when the consumers prepaid their loans. But no material to support this claim was furnished. On the contrary, as worked out above no loss is suffered by a bank if a consumer prepays his loan. In fact the prepayment enlarges and deepens the home loan market because there is an insatiable demand for home loans in India. I have already dealt with the arguments raised by the banks.

68. In view of the above noted factual position, the issues are to be examined with reference to the Competition Act, 2002. The question here is of switching charges which a consumer has to pay in the form of prepayment penalties. There is no doubt that by charging pre-payment penalty the banks reduced the choice of the customers. As a consequence of the prepayment penalty, a customer cannot shift from one bank to another. Further when a new bank enters the market it would not be able to get customers from the other banks because the customer would not like to shift in view of the penalties which he would have to pay if he shifts to a new bank. Thus by levying the pre-payment penalties banks are killing competition in the home loan market. This also leads to decrease in the allocative efficiency of the market and a reduction of innovation. Under the provisions of Section 3(1) of the Act, no supplier of goods and services can enter into an agreement which causes or is likely to cause an appreciable adverse effect on competition. In all the cases where the banks enter into an agreement with a consumer for home loans, the banks have envisaged penalties provided the consumer pre-pays his loans. As already discussed the levy of switching charges in the form of pre-payment penalties causes an appreciable adverse effect on competition. Therefore, under Section 3(2) of the Act of these agreements entered into by the banks are anti-competitive agreements and therefore void.

69. Before declaring an agreement to be void the provisions mentioned in Section 19(3) of the Act have to be looked into. An appreciable adverse effect

on competition under Section 3 cannot be determined without regard to the facts enumerated in Section 19(3) of the Act which are:

- (i) Creation of barriers to new entrant in the market.
- (ii) Driving existing competitors out of the market.
- (iii) Foreclosure of competition by hindering entry into the market.
- (iv) Accrual of benefits to consumers,.
- (v) Improvements in production or distribution of goods or provision of services.
- (vi) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of service.

In this particular case for the foreclosure of the loans, a barrier has been created for new entrant in the market as no consumer would shift to the new entrant as he would suffer a loss as prepayment penalties would have to be paid. Competition has also effected as hindrance is caused to the consumers by the levy of the penalties when a person shifts to another bank. The next issue is the accrual of benefits to the customers. When pre-payment penalty is levied there is no benefit to the consumer. In fact there is a decrease of benefits to the consumer as he has to pay penalty. Further the choice of the customer decreases. Therefore, the provisions of clauses (a), (c) and (d) are applicable to the facts of this case. Therefore, by the levy of the switching charges by the banks an appreciable adverse effect on competition within India is created. Therefore the agreement by the banks with the consumers for the levy of penalty for the foreclosure of loans is an anti-competitive act and therefore void in accordance with the provisions of Section 3(1) and 3(2) of the Act.

70. *The provisions of Section 3(4) may also be applicable to this case because home loans enterprises operate in the home loan markets whereas consumers who take a loan from the home loan enterprises operate in the market of construction or purchase of premises from realtors. Thus, the banks and customers operate in different markets. By entering into an agreement where there clauses for the levy of penalty for the foreclosure of loans an exclusive supply agreement is entered into by the banks which its customers. This restriction placed on the customers by the banks also creates an adverse effect on competition in India as the customer is unable to switch to a bank with*

better and innovative products. It also debars new banks to enter the home loan market even though they may be having better products.

71. *The D.G. has carried out investigation in this case and he has found a contravention by the banks/HFCs under Section 3(3) (b) of the Act.*

The findings of the DG are based on following facts/evidences:-

- (i) The Circular dated 10th September, 2003 issued by IBA suggests that there is a concerted action on the part of the banks.*
- (ii) The internal circulars issued by the banks justifying their actions of charging pre-payment penalty are anti-competitive in nature.*
- (iii) The origin and history of this practice.*
- (iv) Regulatory position.*
- (v) Judicial decisions, and;*
- (vi) International practice.*

In order to find out whether the DG has applied the right provisions of law in the given situation, it is important to re-look into the provisions of the Act and find out whether this case fits into the entire scheme of things as provided therein.

Section 3(3) of the Act deals with the following situations:-

- (i) the agreements entered into between the entities of the class described therein, or*
- (ii) any practice carried on by them, or*
- (iii) any decision taken by them and*
- (iv) Containing the terms set out in clauses (a) to (d) which in substance are fixing prices, limiting or controlling supply of goods or services or technical development, sharing the market, and bid-rigging or collusive bidding.*

If the above conditions are satisfied, it shall be presumed to have an appreciable adverse effect on competition. They are deemed to be in per se violation of Section 3 and the onus is on the party to disapprove this claim.

The classes of parties to an agreement dealt with by section 3(3) are; enterprises, associations of enterprises; persons or associations of persons and they could act in any combination. It is that they are to be an association of

persons or enterprises of services. Where the association of persons or enterprises is publicly identified as a group with a unity of purpose they are named as Cartel.

However, before applying this section, it is important to understand the definition of following “terms” of the provision.

“Practice carried on” – “Practice” has been defined in Section 2(m) of the Act and includes any practice relating to the carrying on of any trade by a person or an enterprise.

“Service”- “Service” means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking.....financing.....and advertising.

In view of the above definition, following questions need be answered in the present case:-

- a. Is ‘Retail Home Loan Financing’ is a service being provided by the banks?
- b. Is there any practice of pre-payment penalty being carried by the banks?
- c. Is there any association of banks?
- d. Is there any concerted action on the part of the banks?
- e. Are they engaged in identical or similar trade?
- f. Are these association of banks is in any way limiting or controlling this provision of services?

If the answer is “yes” then Section 3(3) (b) is clearly attracted in this case because as per definition, the “practice carried on by any association of enterprises or association of persons....., engaged in identical or similar trade of goods or provisions of services, which- limits or controls.....provision of services;” is covered under Section 3(3) (b) of the Act and once the conditions mentioned in Section 3(3) of the Act are fulfilled, it is deemed to have “appreciable adverse effect on competition”.

But before reaching a conclusion that the provisions of section 3(3) of the Act are attracted in this case the most important thing to find out is:-

- (i) Whether there is any agreement, arrangement or understanding or action in concert in writing or informal?

- (ii) *Does this agreement or arrangement or understanding or action in concert cause or likely to cause an appreciable adverse effect on Competition within India?*

As per Section 2(b) of the Competition Act, 2002, "Agreement includes any arrangement or understanding or action in concert–

- (i) *Whether or not, such arrangement, understanding or action is formal or in writing or,*
- (ii) *Whether or not, such arrangement, understanding or action is intended to be enforceable by legal proceedings.*

This means that in order to fall under this definition, a concerted action on the part of enterprises or persons is a pre-requisite. Even when party to such an arrangements do not intend to create any legally enforceable mutual duties and liabilities, it shall be considered as an agreement under this act.

In Technip S.A Vs S.M.S holding private Ltd. (2005) 5 SCC 465, the Court observed that the term "agreement" covers an arrangement or understanding which may be informal as well as formal. No written proofs of agreements are required, as writing has been done away with.

The definition is designed in such a way as to produce a vast and sweeping coverage for joint and concerted anti-competitive actions. There is no need for an explicit agreement in cases of conspiracy where joint and collaborative action is pervasive in the initiation, execution and fulfillment of the plan- United States Vs General Motors 384 US 127.

It has been a contentious issue as to what constitutes an agreement to come within the ambit of competition enquiry. In CFI Judgment in Volksawagen AG Vs Commission (2003), it has been held that there is no need for an explicit agreement in writing but there should be consensus between the parties concerned also referred to as meeting of minds or concurrence of wills.

It has further been held in Commission vs. Bayer AG (2004) 4 CMLR 13, that it is sufficient that the parties to the agreement have expressed there joint intention to conduct themselves in the market in a specific manner. As regards the form in which the common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms.

However, there have been practical difficulties to establish the existence of an anti-competitive agreement between the firms. The fact is the firms engaging in anti-competitive behaviour have developed sophisticated mechanics of hiding their behaviour so that they escape the liability under the anti trust laws. Lord Denning in RRTA Vs W. H. Smith & Sons Ltd. have observed "People who combine together to keep up prices do not shout it from the house tops. They keep it quite. They make their own arrangements in the cellar where no one can see. They will not put anything into writing nor even into words. A nod or wink will do."

From the above definition of "agreement", it can be concluded that if following conditions are there, then it can be said that there is an agreement:--

- Any formal or informal arrangement or understanding*
- No need to have an explicit agreement in cases of conspiracy where joint and collaborative action is pervasive in the initiation, execution and fulfillment of the plan*
- No need for an explicit agreement in writing but a consensus, between the parties concerned which referred to as meeting of minds or concurrence of wills, is sufficient.*
- It is sufficient that the parties to the agreement have expressed their joint intention to conduct themselves in the market in a specific manner.*
- As regards the form in which the common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms.*
- No need to have anything into writing or even into words. A nod or wink will do.*

However, there is a feeling of some different inference on the term "agreement". There is a view that Section 3(3) is wider in scope than Section 3(1) as Section 3(1) deals only with any agreement whereas Section 3(3), in addition to any agreement, also covers practices carried on or decision taken by which results in AAEC. The fact that the Act uses, these three terms also indicates that "agreement", "practices carried on" and "decision taken" are envisaged as distinct and distinguishable. A "follow the leader" syndrome may lead to anti-competitive "practices carried on" and "decision taken" without being an "agreement". But these would still be actionable under Section 3(3) if they result in acts covered under sub-clauses (a) to (d).

The inference drawn can not be subscribed to. Section 3(1) is the covering section of the entire Chapter on “Prohibition of agreements” and it is the broader provisions which covers both Section 3(3) and Section 3(4). In fact, in Section 3(1) two situations i.e. 3(3) and 3(4) have been envisaged. It means that any contravention of Sections 3(3) and 3(4), the contravention of Section 3(1) has to be there. Section 3(1) is inherent and implicit in Section 3(3) and 3(4). It also can not be concluded that “practices carried on” or “decision taken by” as provided in section 3(3) can be without any “agreement”. Agreement is a necessary element in all the sections provided under section 3. It is the crux of the Chapter “Prohibition of agreements”. Unless there is an agreement, there can’t be prohibition of agreements. Thus, a contravention of section 3(3) without having an agreement can not be visualized. This presumption is further strengthened by the fact that in Section 19(3) also it is clearly mentioned that ‘while determining whether an agreement has an AAEC under section 3, have due regard to all or any of the following factors, namely (a) to (f).

There is a feeling that to establish an “agreement” between persons, there has to be conclusive evidence. This is not a correct presumption. Even under Evidence Act two types of evidence have been prescribed to establish an offence – i.e. direct and circumstantial. As has been stated above and is a settled position also that in the case of cartels or anti-competitive agreements to establish an “agreement” of being anti-competitive in nature direct evidence can not be found unless through dawn raids, so, one has to depend on circumstantial evidence or the preponderance of probabilities. In the present case there is both circumstantial evidence as well as preponderance of probabilities which establishes that there was an “agreement” among the banks to carryout the practice of charging pre-payment penalty. Further, Evidence Act is strictly not applicable to these proceedings.

73. *Now, coming to the “Practice carried on” by these Banks“ which is limiting or controlling the provision of services”, it is a fact that the banks have adopted the practice of imposing prepayment penalty to Borrowers who wish to either repay their loan in advance or to the Borrowers who wish to migrate the said loan to another lender. The Banks are charging a rate of prepayment penalty varying from 1% to 4% on the outstanding loan amount. The banks have formed an association of banks known as Indian Banks Association (IBA). Though the Circular dated 10th September, 2003 issued by the IBA was not binding on any banks and it was optional for any bank to impose pre-penalty*

charge, it can not be denied that the practice adopted by most of the banks is a concerted action on the part of the banks in view of the settled legal position discussed as above. These banks are indulged in the restrictive practice as the consumers are not allowed to switch over from one bank to another because of this prepayment penalty clause. Switching costs are costs that existing customers have to incur when changing suppliers. Customer mobility and choice is essential to stimulate retail-banking competition but, here, consumers are tied to their bankers due to the existence of switching costs i.e., pre-payment penalty charge.

Secondly, the loans were provided to those customers by the banks on floating rate of interest were made to understand that the rates will fluctuate as per the prevailing conditions of the market, however, in practice, it is observed that interest rates were revised upward and not downward. Whenever there was condition in the market to lower the interest rate, lower rate of interest were being offered to the new customers and the existing customers were not being benefited.

Differential treatment were being given to the new loan customers by the banks by providing very lower interest rate on loan amount in comparison to the existing loan consumers. If the existing customer asked banks to lower the interest rate at par with the new customers, it was conditioned by the banks to pay pre-payment penalty/ foreclosure amount on the outstanding loan, and then to apply for fresh loan.

If any customer decides to pre-pay/foreclose the loans, they had to pay a certain percentage as penalty amount i.e. normally 2%-5% on the outstanding loan amount to clear their account. Is not this practice anti-competitive, and the practice is limiting the provision of services?

74. Now, what is to be seen by the Commission? Under Section 19(3) of Competition Act, 2002, the Commission, while determining whether an agreement has an appreciable effect on competition under section 3, is required to consider the all or any of the following factors: -

- (a) creation of barriers to new entrants in the market;*
- (b) driving existing com[editors out of the market;*
- (c) foreclosure of competition by hindering entry into the market;*
- (d) accrual of benefits to consumers;*

(e) *improvements in production or distribution of goods provision of services;*

(f) *promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services,*

However, it is a wrong presumption that the parameters prescribed under Section 19(3) are not required to be applied while assessing an “agreement” under Section 3(3) as it is a deeming provision. Merely because it is a deeming provision, it does not mean that the Commission is deprived of its powers to apply these factors while determining AAEC. Section 19(3) is a mandatory provision and the Commission is bound to apply these factors for arriving at AAEC. In my opinion the deemed provisions of Section 3(3) is for forming a prima facie opinion and not the final one. The parameters given in Section 19(3) are not the ‘cause’ of AAEC but a result thereof. For example, if an “agreement” results into the creation of barriers or driving existing competitors or forecloses the competition and so on, there has to be AAEC.

So, what Commission is to determine is that due to the practices followed by the banks are there any entry barrier is being created? Is the competition is being foreclosed by hindering entry into the market or due to such practice any benefit is being accrued to the consumers? Because, the principle objective of competition law is to maintain and encourage competition as a vehicle to promote economic efficiency and maximize consumer welfare. The focal point of competition should be the actual and / or potential business conduct of firms in a given market and not on the absolute or relative size of firms. What needs to be seen by the commission is that whether a firm can exercise “market power”, i.e. engage in business practices which substantially lessen or prevent competition. The relevant product market in this case is “retail market of home loan financing” and the relevant geographic market is whole of India.

75. *The case was, therefore, examined from the point of view of Section 19(3) and it is found that:-*

(i) *The practice of imposing prepayment penalty to borrowers who wish to either repay their loan in advance or to borrowers who wish to migrate the said loan to another lender, is rampant in the market and there is only one exception to that. The rates of prepayment penalty vary from 1% to 4% on outstanding loan. The said prepayment penalty charged*

from borrowers appears to be arbitrary, anti competitive and without any basis.

- (ii) The asset liability mismatch argument does not support a charge of 1-4% penalty. Moreover, at least in an increasing interest rate scenario, the lender is actually benefited by the prepayment because it should have raised the money at cheaper rate and now it can lend it at much higher rate, so there is no reason to levy a charge on the prepayment. Secondly, ALM is not account specific and it matches the tenors of all deposits with all loans. This aggregation effect should render the impact, if any, to an insignificant amount.*
- (iii) Large corporate prepay hundreds of crores of loans (which should cause bigger ALM issue for banks) whenever they get cheaper funds, but it is a common knowledge that the banks do not charge any prepayment penalty. Moreover, the same corporate are given funds below PLR rates. It goes to prove that loss due to ALM is not the reason to charge prepayment penalty. It is mainly to restrict small borrowers from choosing a cheaper loan.*
- (iv) The prepayment penalty is clearly to stop a borrower from going to a competitor for a cheaper interest rate or for better service. Through the pre-payment of loan, the principal money is repaid well in advance to the banks through foreclosure. Even if it is paid through switching over from one bank to another, the banks get their principal money returned well before the tenure and this provides opportunity to the banks to further pump money in the market.*
- (v) Prepayment penalty is in effect an enhancement of interest rate from back door. The lenders advertise a lower interest rate but in effect it is higher due to such penal charges.*
- (vi) At the time of sanction of loans the lenders recover processing and other charges over and above the interest charge which is sufficient to cover all their risks plus a reasonable profit. There is no reason to impose prepayment penalty to the tune of 1-4% of outstanding amount.*
- (vii) Most borrowers fail to reckon and compare the exit loads mentioned by the lender because they are not clear when they will need to repay the loan and what will the outstanding at that time. This situation is exploited by the lender.*
- (viii) There appears to be no financial calculation to establish that prepayment charge of 1-4% is reasonable and justified as the concept of*

'time value for money' is not recognized by these Banks. As the money received today has better value than the same amount of money received in future. If we calculate the EMI and the 'time value for money' it will be evident that banks are unreasonably charging foreclosure amount as the consumer is bound to pay more first in terms of interest portion in the initial months of the payments and later he is made to pay in terms of pre-payment charges, if he decides to foreclose for better options. This practice is fleecing the consumers and also it is not generating any economic value and restricting the consumer to exercise the right of freedom to choose better financial options for the loan.

- (ix) *Moreover, the practice of pre-payment penalty on loans is not helping the banks to be more service efficient and competitive on the interest rate being charged on loans to the existing customers as banks are sure of their secured customers due to the anti competitive agreement of pre-payment penalty.*
- (x) *There has been a tacit agreement among banks to follow the practice of pre-payment penalty and foreclosure fees on loans as to hold back their customers from switching over to other banks. Since all lenders have imposed prepayment penalty, it indicates of a concerted action leading to suspicion of cartelization. In fact, many lenders have already admitted that this practice is being adopted by them to stop their customers to switch over from one bank to another.*
- (xi) *Even if it has not all the elements of cartel, which is prohibited under section 3(3) of the competition Act, 2002, customers were prevented from significantly reducing their property debts as it represented the most substantial household and repayment accounted for 50% of their disposable income. This restricts competition, as it restricts a consumer to avail banking services of another bank which is ready to offer the loan at lower interest rates.*

20. The issue is here again of a practice carried out by the banks. The issue of practice has already been discussed in the case of Neeraj Malhotra vs. Deutsche Bank and the extracts of the said judgement is reproduced above. In the section 3(3) there is a reference practice carried on which limits are control provisions of services i.e. according to the section 3(3)(b) of the Act. In this particular case proper

information at the time of taking loan is not provided to the borrowers and this leads to any information asymmetry. Further, as the old borrowers are charged at a higher rate of interest as compared to the new borrowers. The main aim is to get more borrowers and then capture them. Subsequently, the interest rates of the new borrowers are also increased. Thus there is not only an information asymmetry but the banks tried to control the provision of services. As and when a customer wants to switch the banks then the banks agree to give a discount or charge lower rate of interest. Further, even though the market interests goes down and as the loans were on floating rate of interest, the banks are obliged to reduce the interest but it is not done. Even if somebody wants to shift to another bank he can only do so after paying penalty for foreclosure of loans. Thus the penalty acts as a disincentive for switching of banks for switching of loans from one bank to another. There is also lack of transparency when the loan is sanctioned to a borrower. A number of factors considered when the interest rate offered to a borrower at the time of taking of a loan is offered. The factors have already been discussed above and there is no need to mention them again. Each of the factors should have explained by the banks to the borrower at the time of getting the loan and this is never done. In fact two borrowers on the same date can be offered different rates depending on a perception of the banks of borrowers. As no transparency is there in these transactions and a customer has no choice, it has an appreciable adverse effects on Competition in India. A borrower again switch banks and this act has a disincentive against the growth of the loan market and stop other competitors from getting customers in the long run as many of the borrowers are captured. Thus there is a violation of section 3(3) of the Act.

21. The above discussions shows that some other factors in section 19(3) of the Competition Act are attracted such as the practice followed by the banks:

- (a) Acts as a creation of barriers to new entrants in the market;
- (b) There is a new growth benefits to the consumers when the consumers suffered in the long run.
- (c) It hampers economic development as the consumers' surplus discreate and an entrant caused in the market following practices.

22. The DDG has stated that there is no case under section 4 of the Competition Act. Section 4 of the Competition Act is about abuse of dominant position. The finding of the DG that there was no case for dominance for either of the case is not correct. In the explanation to section 4 dominant position has been defined as a position of strength, enjoyed by an enterprise, in the relevant market in India which enables it to affect its consumers in its favour. In this case, before these five persons took the loan from the two banks, they were in a competitive market where lot of banks and other home finance companies were in a position to offer them loans. But after they signed the agreements with one of the banks then they were out of the competitive market and entered in a different market. This market may be called as a loan recovery market or an aftermarket. If one looks clause (g) of section 19(4) of the Competition Act, this dominant position can be acquired either through the statute or being a Government company or being a public sector company or "otherwise". In this particular case the banks got the dominant position by virtue of the agreement with the consumers signed with the bank at the time of taking the home loan. Thereafter the banks were in a position to affect their consumers in their favour. Thus the banks were in a position of dominance as far as their consumers are concerned as they were tied to them for a period of time. In the consequence the banks who are obliged to decrease the interest rate when in the market fell did not reduce the interest and charged the consumers at the old rates. On the other hand, in order to get more customers the banks were giving them home loans at a lower rate of interest. There is no material to hold that the banks were giving new loans at a low rate of interest and were incurring a loss. The action of the banks is therefore unfair and discriminatory and therefore hit by the provisions of section 4(2)(a)(ii).

23. A case came up the U.S. Supreme Court known as the Kodak case. In this particular case the Supreme Court of the USA came up with the concept of aftermarket where a consumer can be abused. This ratio of Supreme Court is incorporated in our Act by legislation which defines dominance.

24. I have already indicated that the banks have abused dominance in terms of clause (g) of section 19(4) of the Competition Act. The other factors under section 19(4) have to be got examined with reference to the facts of this case. There is no

doubt that the size and resources of the enterprises i.e. the banks in this case is very large compared to the resources of the consumers and therefore they are in a position of influence consumers in their favour. Consumers are totally dependent on these banks as and when they take loans from these banks. Even the social obligations i.e. equity and lower cost of credit to the borrowers has not been followed by the banks. This reduced the economic surplus of the consumers and as a consequence it leads to lower economic development. Therefore the other factors in the section 19(4) are applicable to the facts of this case.

25. In this particular case the banks were willing to lower the rate of interest as and when the consumers wanted to switch loans to a different bank. As already discussed above the behaviour of the banks are hit by the provisions of section 3(3) and section 4 of the Competition Act. Therefore the agreement between the banks and the consumers are hit by section 3(1) of the Competition Act as the said agreements led to an appreciable adverse affect on competition within India. Therefore such agreements are void in accordance with section 3(2) of the Competition Act.

26. To some up the two banks have contravened of provisions of section 3(1), 3(2), 3(3) and section 4 of the Competition Act.

27. By the virtue of section 27 of the Competition Act the banks are hereby directed

- (i) to stop the practice by which they charge higher rate of interest to the old borrowers and low rate of interest to the new borrowers. The banks can not charge discriminatory interest rate when loans are given to a consumer.
- (ii) the banks are directed that they should decrease the interest whenever the rate of interest goes down and they cannot take the plea that the public lending rate has not come down and therefore the interest rate is not being reduced.

(R. Prasad)
Member, CCI