

## 2<sup>ND</sup> CCI-NLUD COMPETITION LAW MOOT 2019

### CLARIFICATIONS

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1. Is the list of issues enumerated in the Moot Proposition (like those in ¶ 6 pertaining to clauses of S. 3 & 4) exhaustive, or can new issues be added for the arguments?

**Clarification:** It is not exhaustive – it simply lists the claims Funes made in its Complaint. That said the ECC's *prima facie* order and the IB's report only cover the allegations listed in ¶ 6.

2. At what prices are the other Firms/Companies/Broadcasters charging the DPOs and the consumers?

**Clarification:** Relative pricing has been provided in ¶ 3 and ¶ 4, and that should be sufficient information.

3. Is the issue of Aleph-Labyrinth Acquisition also under challenge?

**Clarification:** Counsel for Funes are free to challenge it.

4. Other than the Subscription fee, what are the charges imposed on a TV consumer?

**Clarification:** Assume no other fee is charged by the DTHO or the MSO to the TV Consumer.

5. As the laws of India & Erehwon are *para-materia*, then under S. 19 of the Competition Act, what meaning shall be construed for the following terms for the purpose of our interpretation?

- a. Size & Resource of the Enterprise

**Clarification:** As is understood by the CCI.

- b. Integration & Market Share of Aleph, prior to the implementation of the said policy.

**Clarification:** Relevant details are there in ¶ 5.

- c. The Historical establishment of Aleph as a broadcaster; Whether by a statute, Govt. Company, or Public Sector Undertaking or otherwise.

**Clarification:** Private enterprise.

6. What are the various facts and figures pertaining to factors enumerated under S. 19(6), 19(7) & 20(4) of the Competition Act, 2002?

**Clarification:** The facts given in the problem are sufficient.

7. As the laws of India and Erehwon are *pari-materia* to each other, whether EU and USA's precedents will have a binding value on the ECC?

**Clarification:** Erehwonian laws are *pari materia* to Indian laws – EU and US precedents are persuasive but not binding.

8. It is not made clear in the ¶ 2 whether the Indian Supreme Court's decisions will hold binding value on the ECC. The paragraph leaves it to the reader to determine the order in which the Court/Commissions/Tribunals will have the order of precedence?

**Clarification:** Same order of precedence as in India. Indian Supreme Court's decisions will hold binding value on the ECC.

9. Considering the fact that the competition law precedents of EU and USA apply in the instant case, so does this mean that even the laws, rules and regulations of the EU and USA also apply?

**Clarification:** Specific rules and regulations of the EU/US do not apply, but general principles of competition law as understood and held by courts/tribunals/authorities from these jurisdictions hold persuasive value.

10. Does the MRTP Act, 1969 apply in the instant case?

**Clarification:** No.

11. Considering the fact that majority of the judgments were given before 2009 under the MRTP Act, 1969; whether those Precedents (the ones before 2009) shall have the same effect as the ones given post 2009 under the Competition Law?

**Clarification:** No. Decisions under the MRTP Act have no value as precedents.

12. What is the source of income for DTHOs who have made arrangement with Aleph?

**Clarification:** See ¶ 4 – Aleph-Priority-Fee and the Stick-Ad-Fee.

13. Are SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 applicable and binding on the ECC?

**Clarification:** Assume they are not binding.

14. Has the notice of Aleph-Babel acquisition been properly filed?

**Clarification:** Assume that the filing is valid and properly made.

15. Is the power of Investigation Bureau in the instant case similar to Director General appointed under the Competition Act, 2002?

**Clarification:** Yes.

16. In how many countries does the Aleph's business as a broadcaster span?

**Clarification:** Irrelevant.

17. What is the year of the present incidents/facts?

**Clarification:** Assume the year of the hearing to be 2018.

18. If the laws of Erehwon & India are *para materia*, then do the orders & judgments of the Telecom Dispute Settlement & Appellate Tribunal would hold any persuasive or binding value over the ECC?

**Clarification:** Not binding and not relevant.

19. Meaning of "and those that are not" in footnote number 5.

**Clarification:** The footnote clarifies that as a broadcaster, Aleph has the technology which allows it to provide Sticky-Ads only on TV-channels being viewed *via* DTH mode and not the MSO mode.

20. Total TV viewership % of Funes?

**Clarification:** Assume less than 5% TV viewership share.

21. Whether in ¶ 8. the last word should be Ficciones instead of Babel?

**Clarification:** Yes, the last word should be Ficciones.

22. Whether in ¶ 9. the first word should be Ficciones instead of Babel?

**Clarification:** Yes, the first word should be Ficciones.

23. Whether Aleph's Business model applies to MSOs?

**Clarification:** No.

24. ¶ 8 line 5 and line 10 mentions Babel which should have been Ficciones listed.

**Clarification:** ¶ 8 line 5 should read "**Ficciones**' Memorandum of Association...". Line 10 should read – "*Babel has no other special rights in, or a seat on the board of directors of Ficciones.*"

25. Similarly, ¶ 9 line 1 again mentions Babel which should have been Ficciones (as it is a DTHO).

**Clarification:** ¶ 9 line 1 should read as – "**Ficciones** is the largest DTHO in Erehwon..."

26. As stated in ¶ 7, Babel is another TV broadcaster in Erehwon. Further ¶ 9 states that Babel is the largest DTHO in Erehwon. Whether Babel is a broadcaster or DTHO?

**Clarification:** Babel is a broadcaster.

27. ¶ 8 talks about a DTHO Ficciones, whose 60% of the equity share is held by Menard India Ltd. Whether Menard India Ltd. is another DTHO or Broadcaster?

**Clarification:** Menard has no business other than its shareholding in Ficciones.

28. In ¶ 5, it is written that Aleph's business model is successful and its distribution, as well as viewership, has witnessed 15% growth in the last quarter. Whether it is before or after Babel's acquisition?

**Clarification:** The Aleph-Babel-Acquisition is not complete. Therefore, the growth is for a period before the Aleph-Babel-Acquisition.

29. Does Funes has entered only in DTHO market or of MSO's as well?

**Clarification:** Only DTHO.

30. ¶ 8 states that "Babel has no other special rights in, or a seat on the board of directors of Babel". Is it a printing error in this line or any other line in this para?

**Clarification:** It should read "*Babel has no other special rights in, or a seat on the board of directors, of Babel*".

31. Whether Babel is working in both broadcasting as well as downstream market of distribution?

**Clarification:** Babel is a broadcaster.

32. In ¶ 9 Babel is mentioned to be largest DTHO in Erehwon. Whether this share is of Babel as an independent DTHO, or also includes its market share through its subsidiary Ficciones?

**Clarification:** ¶ 9 reference is to Ficciones. See clarifications above.

33. In ¶ 8, it is written that as per Babel-Menard-SHA, Babel is required to exercise its voting rights in a manner as directed by Menard. Whether the exception provided thereto is in regard to the amendment of Babel's Memorandum of Association and Articles of Association, or that of Ficciones?

**Clarification:** See clarifications above. Reference is to Ficciones' MoA and AoA.

34. Does the 3rd stanza first footnote of the moot problem means online streaming market exist where free channels can be accessed?

**Clarification:** Assume that live-feeds of pay-TV channels can only be accessed via DTHO or MSO.

35. Does Aleph follow the same business model with MSOs as it does with DTHOs? Are sticky ads possible on MSO distribution system?

**Clarification:** Assume it does not, and it is not possible.

36. Does 5th stanza last line represents the current market share of Aleph? Does this share include acquisition of Babel?

**Clarification:** Current market share. Does not include Babel.

37. In relation to which date the time period of Babel acquisition shall be calculated?  
Date of oral hearing or the release of moot problem?

**Clarification:** Release of moot problem.

38. What is the general arrangement of sequence of channels on the DTHOs and MSOs platform in the absence of Aleph Priority?

**Clarification:** No further detail is necessary.

39. Is 'Babel is the largest DTHO in Erewhon' in the 9th stanza a typing error? Is it supposed to be Ficciones instead of Babel?

**Clarification:** Yes, it is a typo – should read as "**Ficciones** is the largest DTHO in Erewhon."

40. The footnotes state that the conditions imposed by Aleph are not violative of any telecom regulations in Erewhon. Is there any provision in telecom regulations of Erewhon specifically permitting the conditions imposed by Aleph?

**Clarification:** No.

41. ¶ 9 says that "Babel is the largest DTHO in Erewhon". But Babel is a broadcaster. It should instead be "Ficciones is the largest DTHO in Erewhon." Kindly clarify.

**Clarification:** Yes, it is a typo – should read as "**Ficciones** is the largest DTHO in Erewhon."

42. What is the relative market share of DTHOs and MSOs? This would be required to calculate the effective market share of Aleph as a Distribution Platform Operator.

**Clarification:** Assume DTHOs account for ~40% and MSOs for ~60% of all TV-viewers.

43. ¶ 13 states that "written submissions covering their arguments in relation to both the Aleph-Babel-Acquisition, and the IB's investigation report." Do both parties, particularly Aleph, also have to include the Labyrinth acquisition as a part of their submissions?

**Clarification:** There is no statutory bar to raising the Labyrinth acquisition as an issue. Choice to raise the issue rests with counsel.

44. What are the exact dates of acquisition of Babel and Labyrinth?

**Clarification:** See clarification on timeline above. No other time-detail is relevant/necessary.

45. Did Funes file a complaint against Aleph before the Aleph-Babel Acquisition and Aleph-Labyrinth-Acquisition happen?

**Clarification:** Yes.

46. In ¶ 8, the last sentence says "... on the board of directors of Babel". Should it be "... on the board of directors of Ficciones"?

**Clarification:** Yes.

47. ¶ 8, last line: "Babel has no other special rights in, or a seat on the board of directors of Babel." Is it meant to say directors of Ficciones instead of Babel?

**Clarification:** Yes.

48. ¶ 9: "Babel is the largest DTHO in Erehwon - it accounts for 35% of all DTH subscribers, and 15% of all subscribers of TV channels in Erehwon." Is it meant to say Ficciones instead of Babel?

**Clarification:** Yes.

49. Which are the other broadcasters (apart from Aleph and Babel) in Erehwon and their respective market shares?

**Clarification:** Assume that there are 4 major broadcasters competing with both Aleph and Babel, and they have viewership shares around 12-14% each.

50. Can company law cases be used to build arguments in aleph babel acquisition part of the problem?

**Clarification:** Not relevant.

51. What is the market share of Ficciones as there no mention of it in the problem?

**Clarification:** Clarified above.

52. Do other broadcasters use sticky ads?

**Clarification:** No.

53. In the allegations levelled against Aleph by Funes:

a. Who was denied access to market? Funes or DTHOs.

**Clarification:** Counsel to think this through.

b. For whom did the agreement between Aleph and DTHOs amounted to 'refusal to deal'? Funes or DTHOS.

**Clarification:** Counsel to think this through.

54. The Babel-Menard Shareholders' Agreement should talk about the matters connected with Ficciones and not Babel. However, ¶ 8 mentions -

- a. "In relation to Ficciones, Menard and Babel have an existing shareholders' agreement whereby, for any matter (except the amendment of Babel's {1} MOA and AOA, etc.) requiring approval by shareholders, Babel is required to exercise its voting rights in a manner as directed by Menard".
- b. Here, in place of Babel in mark-up {1}, it should mention Ficciones since the Shareholders' Agreement is about Ficciones and not Babel.

**Clarification:** Clarified above.

55. ¶ 8: "Babel has no other special rights in, or seat on the board of directors of Babel {2}".

- a. Since the Shareholders' Agreement between Babel and Menard is regarding Ficciones, any special rights in, or seat on the board of directors of Babel should always be against Ficciones and cannot be against itself, i.e., Babel.
- b. Hence, the mark-up {2} should say Ficciones instead of Babel.

**Clarification:** Clarified above.

56. Whether Investigation Bureau or Director General are the same authority in order to conduct investigation and their function and power are similar or IB and DG are not equivalent?

**Clarification:** Clarified above.

57. In ¶ 7, it is provided that Babel is another TV broadcaster in Erehwon, However, ¶ 9 states that Babel is the largest DTHO in Erehwon. Whether Babel is a broadcaster or DTHO or instead of Babel it is talking about Ficciones Ltd.?

**Clarification:** Clarified above.