ABUSE OF DOMINANT POSITION : A COMPARATIVE STUDY OF ENFORCEMENT MECHANISM IN INDIA WITH REFERENCE TO UNITED STATES

DISSERTATION

Submitted in the Partial Fulfilment for the Degree of

MASTER OF LAW'S (LL.M.)

SESSION: 2019-20

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LL.M. (2019-20)

AKNOWLEDGEMENT

This project owes its completion to many people, to enlist their contribution is beyond my personal capacity but to acknowledge their effort is practicable.

I extend my special thanks and gratitude to Dr. T.N. Prasad, Dean School of Legal Studies, B.B.D. University and my supervisor Ms. Trishla Singh, Assistant Professor, for not only helping me to choose the dissertation topic but also for her valuable suggestion and co-operation till the completion of my dissertation. She provided me every possible opportunity, guidance and being a support in completing my work and for giving me opportunity to work on the research assignment for the dissertation based on the topic "ABUSE OF DOMINANT POSITION : A COMPARATIVE STUDY OF ENFORCEMENT MECHANISM IN INDIA WITH REFERENCE TO UNITED STATES" and for providing me all sort of help and guidance related to the topic.

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ABBREVIATIONS

CCI	Competition Commission of India
MRTP	Monopolistic and Restrictive Trade Practice
EC	European Commission
UK	United Kingdom
US	United States
ICN	International Competition Network
MCC	Minimum Commitment Charges
CAT/COMPAT	Competition Appellate Tribunal
NCLAT	National Company Law Appellate Tribunal
EU	European Union
ECJ	European Court of Justice
CIL	Coal India Limited
NCDC	National Coal Development Corporation
BCCI	Board of Control for Cricket in India
SSNIP	Small but Significant and Non-transitory Increase in Price
DG	Director General
NSE	National Stock Exchange
TFEU	Treaty on the Functioning of the European Union
FTC	Federal Trade Commission
USDOJ	United States Department Of Justice
SC	Supreme Court
CJ	Chief Justice
USC	United States Court
HHI	Herfindahal –Hrischman Index
UNCTAD	United Nations Conference on Trade and Development
OECD	Organisation for Economic Co-operation and Development
WTO	World Trade Organisation
EEC	European Economic Community

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- France Telecom SA v. Commission
- M/S Bull Machines Pvt India Ltd V M/S JCB India & Ors
- AKZO Chemie BV v. Commission of the European Communities
- Janich Bros Inc Vs American Distilling Co
- William Inglis & Sons Baking Co. v. ITT Continental Baking Co
- MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd 2011 SCC Online CCI 52
- Shri Shamsher Kaaria v. Honda Siel,:2014 Comp LR 1 (CCI).
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CHAPTER I

INTRODUCTION

The Competition Act, 2002 focuses to sustain competition, protect the interests of the consumers and ensure freedom of trade in markets in India. It enables a healthy competitive culture that inspires the business to be fair, competitive and innovative. This enhances consumer welfare and supports economic growth.

There is nothing like "Pure" or "perfect" competition as expressed in a theoretical market structure. This is just a benchmark which is used to satisfy the actual working market structures. But in a situation where not the buyer or the seller has a direct implication over the price of the product or services it produces, the demand and supply are influenced by the price. The independent bargaining of buyers and suppliers is the way by which the price is established. None of the parties involved are not that financially big to have the market power to manipulate the price of a homogeneous product. Customers business which leads to competition forces the producers to battle for achieving the required needs for the same by innovating and developing new products.[1]

The Competition Act regulates to make a safe and fair environment which in turn prohibits or prevents the "abuse of dominance" by an enterprise or undertaking" for a smooth and healthy competition. The Competition Commission of India (CCI) in Reliance Big Industries & Others v Karnataka Film Chamber of Commerce & Others, held that only the actions of an undertaking can be explained under the provisions of section 4 of the Competition Act. For the idea and the moral behind the Act, a person or a department of the government engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, would constitute an enterprise.[2]

To understand the existence of dominance we need to also understand the CCI's definition of the relevant market as it differs from case to case, which is based on the kind of factual matrix. In the non-presence of regulations for defining the relevant market, the CCI does not follow

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[1]Sneha Singh & Syed Ahmed, Abuse Of Dominant Position Academike (2015), http://www.lawctopus.com/academike/perfect-competition-and-abuse-of-dominant-position/ (last visited Feb 15, 2015).

[2] Competition Act Sec 2(h).

the general approach in delineating the relevant market. As such, the CCI has restricted the relevant geographic market to particular suburbs in some cases (such as Belaire Owners' Association v DLF Limited[3] and Mr. Om Datt Sharma v M/s Adidas AG & Others)[4] and has, without any specific differentiation, defined the relevant market on an, all India basis in other cases. A narrow definition of the relevant market only facilitates establishing an entity's dominance.[5]

Dominance on the other hand is dependent upon the position of economic superiority cherished by an undertaking, which gives it the power to prohibit any kind of efficient competition being followed in a relevant market by giving it the authority to act to an appropriate extent irrespective of its competitors. Dominance means acquiring the market power, which authorizes the undertaking to manipulate the price or its production independently of its competitors. Dominant position has to be determined in the relevant market and the factors for such determination are provided in the Act. On the face of it "Dominance" is not bad it is the "Dominant position" which is prohibited by the law. The anti-competitive entrepreneur action encourages a dominant undertaking to involve it with practices, to increase its position in market. Competition rules and laws prohibit such kind of behaviour, as it damages true spirit of competitions between the undertakings and exploits the relationship between them and consumers[6]

Dominance in law implies that a firm has a high degree of immunity from the normal disciplining forces of rival's competitive reactions and consumer behaviour, on the other hand, dominance as an economic concept is associated with the notion of market power. The Indian Competition Law, the Competition Act of 2002, like other modern competition laws covers agreements, abuse of dominant position and mergers. Under the Competition Act of India, section 4 deals with Abuse of Dominance or dominant position by an enterprise or a group. The ultimate concern of the competition law is about market power and its abuse. The Law of Competition in India seeks to ensure fair competition by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India. Market power is used to mean the ability of enterprises to raise price above the level that would prevail under the competitive conditions.

[3] Belaire Owner's Association v. DLF Ltd., Case no. 19 of 2010. Decided on 12 August 2011.
[4] Mr Om Datt Sharma v M/s Adidas AG & Ors Case No. 10 of 2014
[5] D. P. MITTAL, COMPETITION LAW & PRACTICE (3 ed. 2010).
[6]Abuse of Dominant Position, Legalservicesindia.com (2002), http://www.legalservicesindia.com/article/article/abuse-o-dominant-position-729-1.html

The Competition law prohibits the use of market controlling position to prevent individual enterprises or a group from driving out competing businesses from the market as well as from dictating prices. The concept of abuse of dominant position of market power refers to anticompetitive business practices in which dominant firm may engage in order to maintain or increase its position in the market. This paper includes a study on what is dominance in market and how this dominant position is abused it also deals with collective dominance and the concept of predatory pricing, also how dominant position is dealt with in US and other nations of EU.

RESEARCH PROBLEM

Dominance in law implies that a firm has a high degree of immunity from the normal disciplining forces of rival's competitive reactions and consumer behaviour, on the other hand, dominance as an economic concept is associated with the notion of market power.

The present paper is put to forth as critical study of Dominant Position, its abuse and the impact. The problem upon which such vast research is conducted is how much does a dominant position damage the competition market or is, only its abuse is harmful and not the dominant position itself. Is assessing of dominant position a real concern and can Predatory pricing be an essential factor in assessing abuse of dominant position. What is the impact of dominant position in present scenario that is the E-Commerce market. Is the US Competition law and its enforcement more strict than India.

HYPOTHESIS

A hypothesis can be forwarded with observation, an undertaking withholds a position which is dominant does not mean it is breaking or not abiding by the law. The Act on the face of it prohibits abuse of dominance not dominant position.

As dominance does not exists in abstract, assessing dominance before assessing any abuse by it is a major concern for the CCI. US has both Civil and Criminal enforcement of Anti-trust laws [competition law] while in EU it is administrative and India follows the administrative model in EU.

LITERATURE REVIEW

Competition law and practices is a subject of contemporary interest and adequate literature and data is available on the subject. In section below, researcher has briefly outlined the studies that have come across and are relevant to the topic.

- **Jhanvi Mitra July 2012 "Predatory Pricing and Competition Law"** When a firm charge a price lower than the production cost so as to restrict competition, it is called predatory pricing. But a pre-condition for it is a position of dominance in the market or otherwise it will not be in a position to effect competition. The study discusses the causes, effects and various tests to determine predatory pricing. The causes include a dominant position and physical and financial backing up resources. The effects of predatory pricing are entry and exit barriers in the relevant market. Recoupment text, cost or price texts and predatory intent text are different text of predatory pricing. Secondary source of data based on verdicts of judges, opinion of experts of the field are employed. The paper concludes that the responsibility to safeguard the consumers rests with the competition law and therefore the texts suggested in the study can reasonably employed to check the implementation of predatory pricing.

- **Ankita Kashyap "Enterprise 'And' Dominant Position 'Under Competition Act"** Indian Streams Research Journal Volume-3, Issue-11, Dec-2013 ISSN 2230-7850' This paper analyses the definition of 'enterprise' as defined under the Competition Act, 2002. It highlights that only business entities are not considered as an enterprise but revenue generating organizations including National Sports Federations fall under the purview of definition of an 'enterprise'. The author attempts to explain this with the help of the BCCI case study, a recent case decided by the Competition Commission of India. This paper also throws light on the factors that determine the dominant position and the abuse of the said dominant position.

- **Mallika Ramachandran "Comparative Study: Law on Abuse of Dominant Position", University School of Law and Legal Studies Guru Gobind Singh Indraprastha University January- May 2006** This paper attempts to compare the provisions of competition law on the abuse of dominance and corresponding concepts of the United States, United Kingdom, European Communities, Germany, South Africa

and India. In the Competition laws of all the jurisdictions studied, the size of a firm or its dominant position as such is not prohibited. But, abuse of dominance /misuse of market power/ monopoly or the attempt to monopolize are considered bad under all competition laws despite the differences in concepts enumerated in the law and manner of determination. Under the laws of most jurisdictions, the first step in determining whether there is an abuse of dominance, misuse of market power or ―monopoly or an attempt to monopolize‖ is defining the relevant market. In defining the relevant market, both the relevant product market and the relevant geographic market have to be defined. The second step is determining whether the concerned undertaking or enterprise or firm is dominant or has monopoly power or a major degree of market power. Dominance or monopoly power or market power of undertakings is defined in most jurisdictions on the basis of the undertakings ability to operate independently of competition or to raise/control prices. A number of factors are to be taken into consideration to determine dominance/ economic power / monopoly power. Such criteria may have been specified in the statute itself such as in Germany and India or may have to be determined from decided cases. Market share seems to be the most important criterion in all jurisdictions. Barriers to entry to the market‖ seems to be another criterion taken into account in all jurisdictions. Other criteria taken into account such as regulatory barriers, size and structure of the market, links with other undertakings etc, and the importance attached as such criteria vary in different jurisdictions although there may be some common factors. The author highlights that total market power or the complete elimination of opportunity for competition is not necessary in order to attract the provisions regarding the abuse of dominance. What is required is a dominant position or a substantial degree of market power.

- **Ritu Sharma "Google: Abuse of Dominant Position", Internship Report at CCI, July 2012** The research study is based to find out various competition issues involved in the case and to find out whether Google has misused its dominant position in the market of relevance. It also brings forth the legal remedies available under Indian and foreign laws to make case for or against google. The researcher collects data from both primary and secondary sources, interpretation of cases and library search. The author suggests that investigation against Google is required because once in such a situation, Microsoft tried to kill the competition in the browser market by bundling in Internet Explorer for free with Windows Operating System. However, after a case against

Microsoft for maintaining this exclusivity, the company changed its policy and gave users the option to use any browser. However, despite the provision of an option of browser, the user still retained considerable control over the services it chooses to use it. On the other hand, in case of Google, the Google's Chrome, android smart phones and Chrome OS all encourage use of Google's Search, which makes a thorough investigation even more essential. The issues identified in respect of Google definitely raise doubt about the conduct of the Google and needs in- depth investigation to determine whether such practices relating to search engines and advertising search market are also being resorted to in India. This is because Indian market also has number of vertical search engines which may be feeling the brunt. Moreover, the issues are very complex due to the technology involved and can be understood well with the in-depth investigation.

RESEARCH METHODOLOGY

The research paper presents the various aspects of dominant position, how the legal framework is made to prevent the abuse of dominant position in the market and competition law enforcement comparison with US. The Methodological approach used in the research paper is Doctrinal and Case study method. The data use in the research is collected from both Primary and Secondary sources to make analysis and to approve or disapprove the hypothesis. The Primary sources and secondary sources of data used are the court decisions, statutes, acts, relevant articles, books and relevant information regarding Dominant Position available from internet sources. The Hypothesis is tested through Doctrinal method and Case Studies.

CHAPTER II

DOMINANT POSITION

The Indian position regarding dominance is currently governed by the Competition Act, 2002, which deal with the matter in detail. But before going into that it will be worthwhile to take a look at the position under the old law, which is The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. The provisions of this Act were targeted at “dominant undertakings” and as a result firms were being hit merely due to their size. The term “dominant undertaking” was defined under Section 2(d) which is as follows: “dominant undertaking” means-

i. An undertaking which by itself or along with inter-connected undertaking produces, supplies, distributes or otherwise controls not less than one-fourth of the total goods that are produced, supplied or distributed in India or any substantial part thereof; or
ii. An undertaking which provides or otherwise controls not less than one-fourth of any services that are rendered in India or any other substantial part thereof.

The **SVS Raghavan Committee** set up by the Government laid down in crystal clear terms that although dominance is a necessary condition for establishing violation of provision regarding abuse of dominant position; it is by no means a sufficient condition. Therefore the committee suggested that “dominance" and "dominant undertaking" may be appropriately defined in the competition law in terms of "the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its actions"

“Overriding” or “influential” are the dictionary meanings to the term “Dominant.” Predatory in this sense on the other hand means dominating exploitation for acquiring financial purpose or gains. An undertaking holding a position which is “dominating” is only possible if it has the ability to behave independently or separately without the fear of its competitors, customers, suppliers and, the ultimate consumer. Market being held by such power of the dominating undertaking gives it the control of manipulating the price as per its wishes or needs. This will enable them to sell products or services of lower quality or lower cost of innovation below the level in which it actually exists in a competitive market.

Dominant position has two major aspects:

Firstly, dominant enterprise's position such as it enables it to operate independent of competitive forces generated by its rivals. This is important because healthy competition among competitors promotes productive and allocate efficiencies and optimizes consumer surplus. So if an enterprise takes measures with intention to create entry barriers, drive out existing rivals, control output or price, it causes concerns.

Secondly, the aspect of dominance given in explanation (a)(ii) to section 4 of the Act relates to the ability of an enterprise to affect its competitors or consumers or the relevant market. In sense, this is higher degree of strength where an enterprise may be freely able to adopt price or nonprice strategy to overcome downward pressures on its profit from its competitor, or to capture or bind consumer or to create a market environment that would deter newer competition, both in terms of competing enterprises or rival products.8

Determination of dominant position depends upon two main factors – market share and entry conditions. It is important to note that to achieve a dominant position by legitimate means, such as through product innovation, superior production or distribution techniques or through greater entrepreneurial efforts. The Competition Commission of India has recognized certain conditions while determining the agreements dominant status as per section 19 of the Competition Act. The determination of the dominant position through market share, sales figures and active stock. But in most cases the market power is determined on the basis of the functional characteristics, of the products on the pattern of consumer behaviour.

Section 19 basically highlights the duty on the Competition Commission to look at these aspects while dealing with the factors of dominant position by this we can conclude as to consider these crucial steps while establishing whether an enterprise holds a dominant position and whether it is abusing it -

1. Defining the relevant market.

2. Assessing the market strength to ascertain whether the enterprise holds significant power.

3. Consider whether the conduct of the undertaking amounts to abuse.9

The Competition Act defines what constitutes a 'dominant position'. However, the holding of a dominant position by an enterprise or a group in itself is not prohibited. The Competition Act

prohibits abuse of such a dominant position by an enterprise or a group. The commission is empowered to enquire whether an enterprise or group has the dominant position and whether it has abused such dominant position on the basis of:

- its own motion;
- information received from any person, consumer or association or any trade association; or
- on a reference received from the central government, state government or a statutory authority.

Following the recommendations of the Raghavan Committee, Competition Act, 2002

It was enacted which includes Section 4, prohibiting the abuse of dominant position by enterprises. Section 4 of the Competition Act, 2002 reads as follows:

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service,

Explanation (a) to this section defines dominant position as: (a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

It is interesting to note that dominant position is not defined on the basis of any arithmetical parameters or any particular share of the market as is the case in the MRTP Act, 1969. On the other hand, dominance of an enterprise is to be judged by its power to operate independently of competitive forces or to affect its competitors or consumers in its favour. Thus, an enterprise with a share of say less than 25% of the market could possibly be determined to be the

“dominant” if it satisfies the above criteria; on the other hand, an enterprise with higher market share may not be considered as “dominant” if it does not meet the criteria mentioned in the Act. The Act also lays down a number of factors which the Commission needs to take into consideration in determining whether an enterprise enjoys a dominant position or not, such as market share, size and resources of the enterprise, size and importance of competitors, economic power of the enterprises, vertical integration of the enterprises, entry barriers, etc. which would involve a fair amount of economic analysis.

DOMINANT POSITION IN OTHER JURISPRUDENCES

The laws of numerous countries prohibit or declare illegal the abuse of dominant position/monopoly or attempt to monopolize/ the misuse of market power or provide for a prohibition of certain conduct by undertakings in a dominant position/ having a substantial degree of market power. But the manner in which "dominant position", 'monopoly' or 'substantial degree of market power' is defined is different in different countries. The general definition of dominant position or market power followed in jurisdictions such as the European Commission, United Kingdom, Australia, Germany and India take into account the ability of a firm or enterprise to behave independently of its competitors and the absence of competition or constraint from the conduct of competitors.

GERMANY

Section 19(2)of the German's Act against Restraints on Competition gives a general definition and takes into account factors such as predominant position in the market and absence of competition completely or no substantial exposure to competition. It states, "An undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services, it-

1. Has no competitors or is not exposed to any substantial competition, or

2. Has a paramount market position in relation to its competitors; for this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the area of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.

EUROPEAN COMMSSION

Article 86 of the EC Treaty prohibits the abuse of dominance, but does not contain a definition of the term 'dominance', leaving it to judicial discretion. It was defined by the Court of Justice in the United Brands case: a dominant position is "a position of economic strength enjoyed by

an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers". This is often quoted as characterization of a dominant position. Similar observations were made by the court in Hoffman-La Roche case and in N. V. Netherlands Banden Industrie Michelin v. Commission of the European Communities[7]

UNITED KINGDOM

According to the Competition Act of the United Kingdom, Section 18 (3), "dominant position" means a dominant position within the United Kingdom; and "the United Kingdom" means the United Kingdom or any part of it". Section 18 does not provide what is meant by dominant position. Section 60 (1)of the UK Competition Act provides that the purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community. Accordingly, the Competition Authorities of the United Kingdom have placed reliance on the definition of dominant position laid down by the European Court of Justice.

AUSTRALIA

Under Section 46(3) of the Australian Trade Practices Act, in determining the degree of power which a firm enjoys in the given market, it should be judged whether the conduct of such a firm is constrained by the conduct of competitors or potential competitors or suppliers or consumers. This is similar to the independence test of the European Union.

INTERNATIONAL COMPETITION NETWORK

Report of the International Competition Network (ICN) While analyzing materials received from competition authorities of the various members of the ICN, there were revealed two types of definition of the dominant position: behavioural and structural. The most important elements

[7] [1983] ECR 3451

of the behavioural definition are ability of a company to pursue its market policy in conditions of independence of disciplining its influence from the part of competitors. Structural definition proceeds from the companies market share. It doesn't mean that share indices are not applied by competition authorities using behavioural definition of dominance. However, they consider market share as one of criteria of market power (even though the most important), but not as an element of the definition of dominance. The majority of jurisdictions reviewed were holding the behavioural definition, and the structural. Some jurisdictions examine the possibility to introduce appropriate alterations to their competition legislation, turning from the structural definition to the behavioural one The behavioural definition of market power seems to be more preferable compare to the structural one, because it permits to conduct more multilateral analysis of factors defining the dominant position, first of all, barriers of entrance.

DOMINANT POSITION IN RELEVANT MARKET

Coming back to the Indian position, it can be seen that dominant position is talked about always in reference to a relevant market. So understanding the market in question will be helpful for a better understanding of dominant position in that market. The concept of relevant market has two dimensions namely, the relevant product market and the relevant geographical market. The Competition Act, 2002 states that for determining the relevant market, the relevant product market or the relevant geographic market, or both are to be taken into account.

The Act defines "**relevant market**" under Section 2(r)]as: "the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;

Section 2(s) defines the "**relevant product market**" as: "a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use"; and

Section 2(t) defines" **relevant geographical market**" as: "a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas"

The definition of the relevant market in both its product and geographic dimensions often has a decisive influence on the assessment of a competition case. The purpose of ascertaining market is to be able to examine whether an enterprise is dominant in a specific market, made up of the product or service, the competing suppliers and the buyers of the product or service, all operating in a geographical area. The Competition Act requires that the relevant geographic and product market are determined on consideration of certain factors which are given in Section 19(5) to (7).

CHAPTER III

PART 1

ABUSE OF DOMINANCE

The idea of the concept of “abuse” is very objective as it relates to the behaviour of the undertaking placing itself into the dominant position so as to influence the structure of a market. This results in the presence of the dominant entity in the market and the degree of competition is weakened by the recourse of methods undertaken by the entity which is different from those conditions which are generally normal in competition of products or services transactions of commercial operators. This has an effect which hinders the maintenance of a healthy degree of competition which is still existing in the market and the growth of that competition. The whole idea behind keeping a regulation or Act for the fare competition in the market is that a situation of monopoly on the face of it is not against public welfare policy but to use the same status in which it operates to the advantage of its full potential and in front of the actual competitors. The Act does not prohibit the undertakings to become the “dominant” player or having a “dominant” position. There is no physical control preventing the undertaking from becoming dominant or superior. The moral and goal of the Act is to prohibit the “Abuse” of the dominant position. The Act on the face of it prohibits “abuse of dominance” not “dominant position”. This is the moral behind the Act which is fair and is a step towards an economy which is truly global and liberal.

Therefore, just because an undertaking withholds a position which is dominant does not mean it is breaking or not abiding by the law. The “hugeness” of few undertakings is very natural and even essential, as because of this hugeness there is a need or requirement for industrial efficiency and innovation in marketing and production. The provisions of the Competition Act will interfere in market situations where the size of the undertaking effects the fair competition. An oligopolistic market needs these provisions under Section 4 to prevent these big undertakings from swiping out the independent and comparatively small businesses from the market and from dictating prices.

An undertaking is said to have “abused its dominant position” when it directly or indirectly carries out unfair, bias and discriminatory market conditions, hence eliminating its competitors. It strengthens its position by abiding to unfair means which is outside the circle of a healthy competition driven market and equality. For example: X is a businessman and enjoys a

dominant position in the food market as he keeps huge stocks of vegetables and most of the retailers get supplies from him, which is the reason for which he enjoys a dominant position. And one day X purchases about 80 percent of the total produce of onions and then refuses to supply the same to the retailers, as a result the supply of tomatoes in the market has diminished and demand for tomatoes has increased, as tomatoes form the base of Indian cooking. As the demand for tomatoes has increased the price of tomatoes has gone up as well, so when the price of tomatoes increased X sold all of the tomatoes at a premium rate and made a huge profit. This act done by X is called as abusing of one's dominant position. The consumers in need of tomatoes will buy them at whatever price X will dictate.

CONCEPT OF ABUSE COVER BOTH EXPLOITATIVE AND EXCLUSIONARY PRACTICES

Although not expressly stated as such, section 4 is drafted widely enough to cover both exploitative and exclusionary practices. The CCI, in HT Media Ltd v Super Cassettes Ltd (2014) (HT Media case), observed that pricing abuses may be 'exclusionary' (i.e., pricing strategies adopted by dominant firms to foreclose competitors) or 'exploitative' (i.e., which cover instances where a dominant firm is accused of exploiting its customers by setting excessive prices). In this case, the CCI held the minimum commitment charges (MCC) imposed by Super Cassettes Industries Limited (SCIL) to be both exploitative and exclusionary.

Exploitative abuses, such as excessive pricing and unfair terms of contract, have been considered in various cases by the CCI. In Shri Shamsher Kataria v Honda Siel Cars India Ltd & Ors (2014) (Auto Parts case), the CCI considered the passenger vehicle market and the after markets comprising spare parts, diagnostic tools and provision of after-sales repair and maintenance services. It found that 14 car companies had abused their dominant positions in their respective after markets by requiring customers to purchase spare parts and diagnostic tools solely from the respective car manufacturer or its authorised dealers. The CCI held that this amounted to a denial of market access to competitors, applying the essential facilities doctrine. The CCI also found that the car manufacturers had engaged in excessive pricing of their spare parts. This finding has been confirmed by the COMPAT (2016). On appeal by three of the car manufacturers, the Supreme Court has stayed operation of the COMPAT's judgment.

In the Coal India case (2014), the CCI found that Coal India, which had a state-sanctioned monopoly on coal supplies, had imposed unfair terms and conditions in its contracts relating to

supply of coal to customers. On appeal, this was upheld by the COMPAT (2016) and is currently under appeal in the Supreme Court. Separately, following the setting aside and remand of another finding of abuse of dominant position against Coal India, the CCI re-examined the agreements entered into by Coal India and again found a contravention. However, largely on the basis of remedial measures taken by Coal India, the CCI reduced its earlier penalty from US$273 million to US$91 million. This case is also under appeal in the Supreme Court.

In Google (2018), the CCI held that the pre-determined and prominent display of Google's own products in the search results was an unfair/discriminatory condition in the provision of services. The case is currently under appeal in the NCLAT.

According with the traditional taxonomy of abusive behaviour, abusive practices are distinguished as exploitative abuses, including discriminatory abuses, and exclusionary abuses. The difference between these categories of abusive behaviour is concerned with the way in which these harm social welfare[8]. Accordingly, exploitative and discriminatory abuses are directed towards the customers of a dominant undertaking, while exclusionary abuses are directed towards the competitors of a dominant undertaking. Thus, in practice, dominant undertakings can abuse their market position in three ways. First, dominant undertakings may use their dominant position to harm consumers, for instance, by raising prices (exploitative abuse). Second, within the same category, dominant undertakings use their market position to harm consumers by charging different prices to different customers (discriminatory abuse). And third, dominant undertakings may use their market power to create or maintain a dominant position to suppress competition, by -

a) **Exploitative Abuse**

I. Excessive pricing

Excessive pricing is a type of exploitative abuse that occurs when prices are set significantly above competitive levels as a result of monopoly or market power. Excessive pricing constitutes abusive behaviour when the price charged is excessive because it does not have a reasonable relation to the economic value of the product supplied. From the enforcement perspective, normally, competition authorities are

[8] NAZZINI, Renato (2011), 'The Foundations of European Union Competition Law: The Objective and Principles of Article 102'. Oxford; New York: Oxford University Press, p. 51.

often extremely reluctant to take enforcement action in case of exploitative abuses in general and excessive pricing in particular[9] .

b) **Discriminatory abuse**

II. Discriminatory Pricing

Under certain conditions, discriminatory pricing is also considered as an abusive practice in most jurisdictions. Discriminatory pricing occurs when an undertaking sells a product or service at different prices, regardless of identical costs of supplying the goods, however, this kind of practice will be anticompetitive only when it is intended to unfairly exclude competitors from the market, provided that charging lower prices to consumers may be a sign of competition. Accordingly, discriminatory pricing will be anticompetitive:

- if there is no objective commercial justification for it;
- when the act places an undertaking at a competitive disadvantage;
- if it is likely to have the effect of substantially preventing or lessening competition;
- if it creates inequality in competition; or
- if it creates diversified conditions of competition.

c) **Exclusionary abuse.**

III. Predatory Pricing

One of the most common abusive practices by dominant undertakings is predatory pricing. Predatory pricing is an exclusionary practice where a dominant undertaking sells a product or service at a very low price with the purpose of driving competitors out of the market, or creating barriers to entry for potential new competitors. The main issue related to this exclusionary practice is the determination of when this practice occurs. Normally, predatory pricing involves pricing below some acceptable measure of costs and certain evidence of exclusionary or monopolistic intent. For instance, in

[9] OECD, Excessive Prices, 2011

some jurisdictions, predatory pricing will occur when a dominant undertaking sells its goods at a price that is below cost[10].

Nonetheless, despite the preceding, the provisions against undesirably low pricing have to be carefully considered, provided that the indiscriminate use of these may deter vigorous, aggressive pricing, which is ultimately the type of behaviour that competition law is aimed to protect and foster[11].

IV. Exclusive Dealing

Another anticompetitive practice that is related to the abuse of dominance is exclusive dealing. Exclusive dealing is a practice whereby a supplier of a product makes the supply of the product dependent upon the acceptance of restrictions on the distribution or manufacture of competing goods. In these cases, the undertaking will have the exclusive right to buy or sell the dominant undertaking's products. However, in exchange of this exclusive right, the supplier requires the buyer to deal only or primarily in products supplied by the supplier. In some competition regimes, exclusive dealing is related to restrictions to buyers to sell the supplied goods in determined territories only[12].

V. Resale price maintenance

Resale price maintenance prevents resellers from setting their prices independently, and ultimately, lead to increased prices for consumers. In practice, unlike other abuse of dominance practices, resale price maintenance has been declared as illegal per se in some jurisdictions. Resale price maintenance is considered as an anticompetitive vertical agreement, and consequently, governed by those provisions.

VI. Refusal to Deal

Most competition systems have provisions that prohibit dominant undertakings to refuse to deal with other undertakings with the purpose of excluding competitors or

[10] In China, Section 17 of the Anti-monopoly Law prohibits selling products at prices below cost without any justifiable cause. In Vietnam, Article 13 prohibits dominant undertakings to sell goods at prices lower than the aggregate costs in order to eliminate competitors.
[11] FOX, Eleanor M. (1997), 'US and EU Competition Law: A Comparison'. In: Graham E.M. & Richardson J.D. (eds) Global Competition Policy. Washington: Institute for International Economics, p. 351
[12] In Canada, Section 77 of the Competition Act.

granting a competitive advantage to another undertaking. Provided that in most jurisdictions, undertakings should be allowed to contract with whosoever they wish, unless it is not justified, the decision of an undertaking to refuse to deal with another undertaking will not always raise competition issues. Refusal to deal is also concerned with the refusal to allow another undertaking to access a network, infrastructure or facility of a dominant undertaking, provided that there is an adequate remuneration by the other undertaking and that without such access the other undertaking is unable to operate as a competitor of the dominant undertaking. Similarly, refusal to deal is related to refusing to supply scarce goods to a competitor when supplying those goods is economically feasible. Moreover, in India, the refusal to deal provisions is not related to the abusive behaviour of a dominant undertaking, but is regulated as a vertical anticompetitive agreement[13] .

VII. Tying or Bundling

A further abusive conduct by dominant undertakings is the practice of tying or bundling. Tying is the practice of a suppliers of one product (the tying product) requiring a buyer also to buy a second product (the tied product). Bundling is a practice where two products are sold as a single package at a single price. Accordingly, in practice, most competition regimes have provisions that prohibit dominant undertaking to carry out these anticompetitive practices[14] .

VIII. Other Abusive Practices

Finally, there are other practices that amount to an abuse by dominant undertakings that are prohibited by the competition provisions of certain competition regimes. These include:

- margin squeezing; buying a scarce supply of goods or resources required by a competitor;

[13] In India, refusal to deal is a prohibit agreement between enterprises at different stages of the production chain (Section 3(4)(d) of the Competition Act

[14] Armenia, Article 7 of the Law on Protection of Economic Competition; Bosnia and Herzegovina, Article 10 of the Competition Act; Canada, Section 77 of the Competition Act; Egypt, Article 8 of the Law on the Protection of Competition and the Prohibition of Monopolistic Practices; Jamaica, Section 20 of the Fair Competition Act; Seychelles, Section 7 of the Fair Competition Act.

- undertaking an act that leads to the nonmanufacturing, or non-production, or the non-distribution of a product for a certain period of time;
- reducing or increasing the quantity of the assets or the scope of the services offered by a dominant undertaking;
- abusing an intellectual property right; or
- unreasonably impeding the participation of new competitors.

PREDATORY PRICING

Predatory Pricing refers to the state of affairs where a dominant firm reduces its price to below cost level for a certain period of time with an intention to eliminate existing competitive players in the market. Hence the basic objective of predatory pricing is to drive out competitive forces i.e.to curb competition. Ensuing that, and once the predatory firm deems itself secured enough; it will raise its price to a level above the competitive price level in order to recoup the losses made during the reduction period. It is the influential company in such a market which is likely to have both the inclination and the resources to finance such strategy and such pricing can be equally 'unfair' to competitors.

After analyzing the concept at length it would be appropriate to say that the bare provision is silent about "what exactly is below cost price". The CCI has proposed certain regulations with respect to determining cost in cases of multi-product enterprises[15], Joint products and By-products[16], transfer pricing[17], and captive consumption.[18] Commission while adjudicating matters before it prescribed and adopted various methods such as average cost method, test of predatory intention etc. Yet a clear proof method of estimating costs is not prescribed and varies from case to case. Next, it does not draw a distinction between illegal price reduction and legitimate price reduction. In order to prove illegality of price reduction, consideration must be laid upon:

a) Malicious intent to drive competitors- Why was the dominant player motivated to reduce the price is an incredible mystery. One is not capable of deriving the intent of another. But still

[15] Regulation 5.
[16] Regulation 6.
[17] Regulation 7.
[18] Regulation 8.

intention plays a very important role in proving any alleged predatory conduct. Section 2 of the Sherman Act makes it illegal to "attempt to monopolize any part of the trade or commerce among the several States, or with foreign nations". To demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. In Brooke Group Ltd v. Brown and Williamson Tobacco Corp[19] it has been said that "the requirement for a claimant seeking to establish competitive injury resulting from a rival's low prices was to prove that the prices complained of were below an appropriate measure of its rival's costs". In addition, to establish predatory pricing, it should be necessary to look for an element of mala fide, i.e., of eliminating competition by creating transitory phase of low pricing which a competition may not be able to withstand. "In order to recognize that undertaking is engaged in predatory pricing it is necessary to prove illegal intent of the undertaking."[20]

b) Economic evidences which would enable us to draw distinction between illegal and legitimate price reduction- Economic evidences are able to show the rationality of predatory pricing like the possibility of recoupment which is an essential element in determining the rationality of predatory strategy of a firm. In a US case of Flat Glass Antitrust Litigation[21], The Department of Justice relied on several structural economic evidence (on concentration, high fixed costs, excess capacity) and several conduct economic evidence (the fact that the price increases were not justified by costs or demand variations)

Rationality:

Distinguishing predatory behaviour from legitimate competition is difficult. Since Competition jurisprudence strives to create conditions where consumers benefit from effective competition, the distinction must be drawn between low prices, which result from predatory behaviour and that which result from legitimate competitive behaviour. The law on predatory pricing has to tread a fine line between not condemning competitive responses on the part of dominant firms on the one hand and prohibiting unreasonable exclusionary conduct on the other. Many are of the opinion that it is not a real concept, that is, nothing like it can ever exist.[22] The first and the most obvious reason as to why this entire concept is often criticized is that, the competitors

[19] Brooke Group Ltd v. Brown and Williamson Tobacco Corporation, 509 US 209 (1993)
[20] Case T—340/03 France Telecom SA v. Commission [2007] para. 197
[21] 385 F 3d 350, 359-60 (3d Cir. 2004)
[22] Refer Rationality Analysis in Antitrust, University of Pennsylvania Law Review, Vol. 158, No. 2, 2010

who had left the market during the predation phase may pop-up again in the recoupment phase. Secondly it is unreasonable to say that all the other players would leave the market and not adopt any counter strategy such as merger. In Matsushita Electric Industrial Co v. Zenith Radio Corp[23], the majority further reasoned that because below-cost pricing forces the predator to forego profits, or that investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. Relying on the arguments of Chicago School theorists, the Court argued that there could be no such reasonable expectation of recoupment because, even if predation succeeded in driving competitors from the market, subsequent price increases would invite into the market new (or former) rivals that would drive the price down to competitive levels. Given these hurdles, the Court asserted that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful". In short, traditional theory of predatory pricing was perceived as irrational in theory and thus not attempted in practice. Bork, McGee and Easterbrook contend that predatory pricing is so intermittent that it should not be a matter of concern for competition policy agencies. Recent theories having been cropped up surpassed the conventional theory and have found rationality in the concept of predatory pricing[24] which needs to be examined further in the study with the help of illustrated cases of various States.

Non-Price Predation:

Another emerging concern is the concept of non-price predation which generally refers to the conduct of increasing the costs of the rival competitors in contrast with that of predatory pricing which aims at foregoing profits in the present to gain advantage in the future. Hence, predatory pricing is a future oriented approach as compared to that of non-price predation wherein profits are immediate. By increasing the cost of the rivals, the margins of the predator will increase disproportionately with the increase in prices. Conversely, if prices remain constant the market share of the predator will increase because of the restricted output by the rival firms. Hence it involves various modes through which rival firms cost can be proliferated.

- Sham litigation or other misuse of government authority which does not necessarily involves a dominant firm.

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[23]Matsushita Electric Industrial Co v Zenith Radio Corp 475 U.S. 574(1986)

[24] John S. McGee, Predatory Pricing Revisited, 23 Journal of Law and Economics 289(1980) Refer http://www.oecd.org/competition/abuse/2375661.pdf Accessed on 24-01-2019

- Undertaking of capital investment, research and development, advertising or vertical integration etc which are likely to enhance efficiency though it may raise the costs of rival firms.

The Commission observed in M/S Bull Machines Pvt India Ltd V M/S JCB India & Ors[25] that "the predation through abuse of judicial processes presents an increasingly threat to competition, particularly due to its relatively low anti-trust visibility."

COMPARATIVE ANALYSIS OF THE CONCEPT OF PREDATORY PRICING

EU Practice- Article 86 of the European Commission treaty governs the business entities with regard to abuse of dominant position. According to the aforementioned provision, any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular embrace within itself, directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. Hence, it can readily be inferred that, any undertaking or group which occupies a dominant position in the market and imposes unfair prices is prohibited only if it affects the Member States.

In a landmark case of **AKZO Chemie BV v. Commission of the European Communities**[26], Engineering and chemical supplies (ECS) filed a complaint against AKZO whereby it alleged that AKZO had acted contrary to the articles of EC and abused its dominant position in the European organic peroxides market. ECS further complained that it implemented its effectuated its pricing policy in response to ECS' expansion into the plastic sector of the organic peroxide market in the UK and Germany. Further, it intended that low prices annihilate ECS as a competitor in the market. After a deliberate investigation, ECJ after emphasizing upon the subjective intent of the company to selectively reduce the costs below average total cost, held it responsible for indulging into predatory pricing. This subjective evidence consisted of unambiguous AKZO internal memoranda that documented a high level AKZO strategy to discipline, if not destroy, ECS.[27] Hence while a price below AVC must always be regarded as

[25] M/S Bull Machines Pvt India Ltd V M/S JCB India & Ors Case 105 of 2013
[26] ECJ 3 Jul 1991
[27] Ibid.

abusive, even pricing above AVC may be abusive if the defendant had ‘a plan to eliminate a competitor’

US Practice- Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. The US Courts concentrates on the relationship between the pricing and costs incurred by the firm in order to establish a clear demarcating line between competitive and predatory pricing. Further Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, states price discrimination that may to a great extent lessen competition, or tend to create a monopoly, or “injure, destroy or prevent competition” with persons (or their customers) who grant or receive discriminatory prices. In particular, price discrimination that a firm employs to injure its rivals, may sometimes be considered a form of predation28. The test developed by Philip Areeda and Donald F Turner of Harvard University, known as Areeda- Turner test classifies the various costs incurred by a firm and depicts that pricing below marginal cost which was later substituted by average variable cost, should be conclusively regarded as unlawful, because a firm charging below-marginal cost prices "is not only incurring private losses but wasting social resources.” Janich Bros Inc Vs American Distilling Co[29] accepted the Areeda Turner Test and adjudged that prices below AVC are considered to be predatory. In its leading predatory pricing decision, William Inglis & Sons Baking Co. v. ITT Continental Baking Co[30], the Ninth Circuit devised a test which combines cost-based and intent based evidence into a balanced, comprehensive formula for detecting predation. Though major regard was laid upon the cost based evidence and did not make proof of subjective intent mandatory as compared to the ECJs’ decision in AKZO case. The courts reiterated that determination of price and cost is a pathway to establish predatory pricing. Further, it devised a test featuring the shift of burden of proof from the plaintiff to the defendant.[31]

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[28] Section 2(a) of Clayton Antitrust Act, 1914

[29] Janich Bros Inc Vs American Distilling Co 570 F.2d 848 (9th Cir. 1978)

[30] 668 F.2d 1014 (9th Circuit 1982)

[31] Ibid. The Inglis court stated: We hold that to establish predatory pricing a plaintiff must prove that the anticipated benefits of a defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Indian Practice- As already explained in Section 4, the prerequisites for qualifying predatory pricing policy are as follows:

- It must be an enterprise or a group.
- Must be a dominant firm.
- Dominance must be in the relevant market(product and geographical market)
- There must be abuse of dominance by way of reducing prices below costs which is unfair and discriminatory, as determined by the regulations.
- Certain level of entry barrier to prevent competition
- Evince of predatory intent to be considered.

Landmark cases reveal the test of cost based evidence accompanied with subjective intent and possibility of recoupment in deducing the occurrence of predatory tactics by the dominant firm.[32]

LINK BETWEEN ABUSE AND DOMINANCE

The CCI is not required to demonstrate the link between abusive conduct and dominant position. It appears that any conduct, as set under Section 4(2), could amount to an abuse if committed by a dominant enterprise.

It is also not necessary for the dominance to exist in the same market where the effects of the anticompetitive conduct are felt. Section 4(2)(e) of the Act provides that there shall be an abuse of a dominant position if the dominant enterprise uses its dominant position in one relevant market to enter or protect another relevant market.

[32] MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd 2011 SCC Online CCI 52

PART 2

ABUSE OF DOMINANT POSITION UNDER INDIAN COMPETITION ACT

The Competition Act provides in section 4 for the prohibition of abuse of dominant position:

Section 4: Abuse of Dominant Position:

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or services; or

(ii) price in purchase or sale (including predatory price) of goods or service; or

Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation —For the purposes of this section, the expression—

(a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour;

(b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

The provision of the Competition Act in relation to abuse of dominant position clearly explains above that no undertaking or group shall abuse its dominant position. The dominant position is explained in the explanation to section 4 as a position of strength in the relevant market in India. The illustrations are inclusive and exhaustive. Section 4 explanation, raises many possible ways by which such a strength could be used. These possibilities can be clearly examined separately or in a combined manner, depending upon the each of the facts of the case.

The Explanation to section 4(2) (a) makes them immune from unfair or discriminatory trading situations or unfair or discriminatory prices rate or predatory pricing as referred in section 4(2) (a) (i) and (ii), preparing out those practices which are dominant in nature, from being referred as an “abuse of a dominant position” to meet competition. On the basis for this argument made by the undertakings who are involved in the competition and reformulating their trade practice strategies or plans to adhere to demand offer of competitors in a market as it grows, there is no „abuse" by any of the undertaking. They are only reciprocating to the changing market situations. for example, if rate of a product falls in the market, for reasons not none to the action of an undertaking, a decrease in the rate of the product by that undertaking to match its rate to the new rate cannot be tagged as unfair rating or predatory pricing. This explanation could be used as defense that may be used by one blamed for having abused a dominant position under section 4(2) (a). It should be noted that it is not available in the case of allegations of practices set out in section 4(2) (b) to (e)12

In existing competition laws there are two kinds of provisions of abuse of dominant position:
1 - The first relates to actions taken by an incumbent form to exploit its position of dominance by charging higher prices restricting quantities or more generally using its position to extract rents.

2 - Second relates to actions by an incumbent in a dominant position to protect it position of dominance by making it difficult for potential entrance and competitors to enter the market.

In case of the latter it is important to distinguish between growth due to product security and / or efficiency leading to a larger market share and I will full destruction of acquisition and maintenance of the market power. Generaly firms that are in legally acquired position of dominance are allowed to exploit the position by charging higher prices and making extra – normal profit so long as there are no barriers to entry the market will generally be contestable. Thus although the dominance is a necessary condition for establishing violation of this provision it is by no means a sufficient condition for an act to be in contravention of this provision it is imperative that abuse of dominant position be established.

" Dominance" and " Dominant undertaking" may be appropriately defined in the competition law in the terms of" the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and Consumers by its actions". The definition should be in terms of " substantial impact on the market including creating barriers to new entrants". This definition may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then, this ambiguity has a justification having regard that even a firm with the low market share of just 20% with the remaining 80% diffusedly held by a large number of competitors maybe in a position to abuse is dominance ,while of firm with say 60% market share with the remaining 40% held by a competitor main not be in a position to abuse of dominance because of the key rivalry in the market. Specifying a threshold or arithmetical figure for defining dominance may either allow real offenders to escape (like it the first example above) or result in unnecessary litigation (like second example above) hence in a dynamic changing economic environment a static arithmetical figure to define dominance will be and aberration. With this suggested broad definition, the authorities or Tribunal concerned would have the freedom to fix errant undertaking and encourage competitive market practices even if there is a last player around. Abuse of dominance is key for the competition policy or law.

In the absence of dominance, there can be no abuse; therefore, as a first step, dominance of an enterprise in a relevant market needs to be established.

INDIA's POSITION AND CASES

There are many cases that have come up for consideration before the CCI regarding abuse of dominant position.13 Recently, a decision with far – reaching consequences was handed down by the CCI, involving all the major car manufacturers and suppliers in India. The issue was regarding restriction on completion by the car manufacturers on sale of spare parts in the downstream market.

Transportation sector Case: In Shri Shamsher Kataria[33] two levels of market were identified. One is the primary market for „sale of cars in India", and two aftermarkets, at secondary level, are market for „sale of spare parts" and market for „repair and maintenance services". Original Equipment Manufacturers (OEM"s) argued that there is no such division as primary and secondary markets and there is only one „system market".

It was by the CCI observation the two aspects were determined so as to see the capability to affect competitors and consumers, market share and entry conditions. Regarding market share, it was noted by the CCI that OEM"s have 100 percent share in the aftermarket for their own brand of cars. This is because of the inter- and intra brand non substitutability of spare parts of one brand with other, due to high degree of technical specificity. In the absence of substitutability, OEM"s were shielded from any competitive constraints in the aftermarkets from their competitors in the primary market. Moreover, through a network of contracts, OEM"s became the sole supplier of their own brand of spare parts and diagnostic tools in the aftermarket and shielded themselves from any competition. This means that OEM"s have 100% share in their own brand of cars.

Hospital Case: In Ramakant Kini[34], the DG suggested „provision of maternity services by super specialist hospitals" to be the relevant product market and „area within a distance of 0-12km from OP hospital" as the relevant geographical market. This was suggested by the DG on the basis of the inflow of patients from different wards to the hospital. The DG found that 63.70% of the maternity patients in the hospital were coming from certain areas. The opposite party, on the other hand, contended that relevant geographical market should not be bound to

[33] Shri Shamsher Kaaria v. Honda Siel, MANU/CO/0066/2014:2014 Comp LR 1 (CCI).
[34] RamakantKini v. Dr. L.H. Hiranandani Hospital, Powai, Mumbai, MANU/CO/0081/2014:2014

12 km distance travelled, but should also include a catchment area where the patient ahs to travel 16-20km or roughly 12 crow flight(straight line), The CCI finally held relevant market to be of "provision of maternity services by super specialty /high end hospitals within a distance of 0-12km from the Hiranandani Hospital covering S, L, n, K/E, T and P/S wards of the Municipal Corporation of Greater Mumbai". Thus CCI in this case concluded that the opposite party hospital is not dominant in the relevant market of „provision of maternity services by superspecialty/high end hospitals within a distance of 0-12 km from the Hiranandani Hospital covering S, L, n, K/E, T and P/S wards of the Municipal Corporation of Greater Mumbai.

Media Case: In Ajay Degn Films[35], the informant alleged that the opposite party is tying up two of its films and is forcing single-screen theatres to buy either two or none. It was averred that the opposite party released its mega – starrer film Ek Tha Tiger on 15 August 2012 was contemplating to release another untitled film, later name as Jab Tak Ha Jaan (JTHJ), at the time of Diwali. The opposite parties before the release of Ek Tha Tiger had put a condition on single screen theatres that if they wanted to exhibit the other film, JTHJ, at the time of Diwali. The informant contended that since Ek Tha Tiger was a big ticket film, it was bound to be block buster, and its exhibition was profitable for the single screen theatres; thus, a majority of the single- screen theaters entered into the agreement for exhibition of both the films of the big name and dominance of the opposite party. The grievance of the informant arose because the informant feared that he would not get enough theaters for his own film Son of Sardar because of the agreement of single- screen theaters with the opposite parties at the time of the release of Ek Tha Tiger. The CCI noted that as per the information available in public domain, in Bollywood itself, 107 and 95 films were released in 2011 and 2012 (till now), respectively . Out of this, the opposite party produced only two to four films each year. This cannot be said to amount to dominance even in the Bollywood industry, leave aside film industry in India. The case was closed under Section 26(2) of the Act.

Power Sector: In In Re, Maharastra State Power Generation Company Ltd[36],A number of complaints were filed against Coal India Ltd.(CIL) for abuse of dominant position. CIL

[35] Ajay Devgn Films v. Yash Raj Films, MNAU/CO/009/2012:2012 Comp LR 1099 (CCI): [2012] 16 SCL 593 (CCI).
[36] In Re Maharashtra State Power Generation Company Ltd v. Mahananadi Coalfields Ltd. And Coal India Ltd ., 2013 Comp LR 910 (CCI) : MANU/CO/0068/2013

along with its subsidiaries is clearly in a monopolistic position due to its statutory monopoly created under law. Complaints alleged that fuel supply agreements (FSA‟s) entered into by CIL with power- producing and other companies were one sided, without negotiations and were in favor of it. In this case CCI analyzed the market structure and legal and regulatory framework regarding the coal industry in India. The CCI noted that after the nationalization of coal mines in 1973, the coal industry was reorganized into two major public sector companies, viz. CIL and National Coal Development Corp.(NCDC), which have the main responsibility of supplying coal to all end users. CIL has eight subsidiaries. It concluded that CIL and its subsidiary companies have been vested with monopolistic power for production and distribution of coal in India. So coal companies have acquired dominant position and have no competitive pressure or horizontal challenge in the market. The same was held in Ashoka Smokeless[37] case too. Referring to various factors mentioned in section 19(4), the CCI found that the argument of CIL not being able to act independently regarding the supply and customers is misconceived. The CCI opined that CIL through its subsidiaries operates independently of market forces and enjoys undisputed dominance in the relevant market. This was reiterated in Madhya Pradesh Power Generating Co. Ltd.[38]

Real- Estate Case: In Belaire Owners Association[39], the CCI determined the relevant market in the context of services of development or construction offered by the opposite party. While delineating relevant product market for service of construction, the underlying assets were analyzed from the point of view of the 'residential' and high-end. Residential property, different from the non-residential, may be of many kinds, such as standalone houses, builder-floors, apartments, row-houses, condominiums or studio apartments, etc. Despite some element of consumer preferences, these categories are interchangeable or substitutable to some extent, with reference to price range, geography, facilities and amenities. On the basis of these factors CCI held that DLF is fully capable of operating independently of competitive forces in the residential market and thus, the requirement of conditions laid down in explanation (a) (i) to section 4 is satisfied. DLF has the ability to influence the market itself in its favor. An announcement was made of several large projects by DLF Ltd. At one go can make its competitors react by holding some of their own projects to avoid market saturation. Similarly,

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[37] Ashoka Smokeless Coal(P) Ltd. V. Union of India (2007) 2 SCC 640

[38] Madhya Pradesh Power Generating Company Ltd. And South Eastern Coalfields Ltd. & Coal India Ltd., 2014 Comp LR 68 (CCI): MANU.CO/0054/2014.

[39] Belaire Owner's Association v. DLF Ltd., Case no. 19 of 2010. Decided on 12 August 2011.

prospective consumers may defer their demand in expectation of availability of projects to be offered by the market leader. Thus, DLF would be able to influence both supply and demand of projects in the relevant market. These possibilities indicate that DLF has a position of strength as envisaged in explanation section 4 (a) (ii) of the Act.

Sports case: In Surinder Singh Barmi[40] there was a issue regarding the abuse of position by the BCCI, in the field cricket arose, wherein the informant, who claims to be a cricket fan, filed information under section 19(1)(a) alleging irregularities in the grant of franchise rights for team ownership, media rights for coverage of league and the award of sponsorship rights and other local contracts related to the organization of the Indian Premier League (IPL). To delineate the relevant market, the CCI looked at the characteristic features their relevance and substitutability of cricket. The CCI observed that their most significant source of dominance of the BCCI is its regulatory powers. Its monopoly in organization of cricket is axiomatic as it is the de facto regulator of the game. The CCI assessed the dominance of the BCCI in the market for organization of private professional leagues. BCCI"s dominance also stems from its role as an organizer of first class/international cricket events. Thus, owing to regulatory role, monopoly status, control over infrastructure, control over players, ability to control entry of other leagues(failure of ICL), the BCCI is concluded to be in a dominant position in the relevant market for organizing private professional league cricket events in India.

[40] Surinder Singh Barmi v. Board of Control of Cricket in India (BCCI), MANU/CO/0006/2013: [2013] 113 CL A579 (CCI): 2013 Comp. LR 297 (CCI):[2013] 118 SC L226 (CCI).

Assessing of dominance according to Competition Act –

Section 19(4) of the Act sets out various factors that the Competition Commission of India (the CCI) must consider in assessing whether an enterprise enjoys a dominant position, the Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(I) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.

To ascertain whether or not an enterprise holds a dominant position, the relevant market should be specified since dominance does not occur in an abstract market. A dominant position is always in reference to a relevant product and relevant geographical markets.

A geographical market is that part of the territory where the conditions of competition for supply of goods or services are distinctively homogeneous and can be distinguished from the conditions prevailing in neighbouring areas. Only that part of the geographic territory where uniformity of composition is present should be considered the geographic market. Relevant products or services are all those products that are interchangeable in the minds of the consumer. All substitutes of one product or service therefore compete with each other and form one relevant product market.

- **Market Share**- An enterprise holding high market shares does not necessarily enjoy dominant position. Different parameters are employed to measure market share depending upon the nature of sector and the issue under investigation. As the Raghavan Committee reported, "a firm with a low market share of just 20 per cent with the remaining 80 per cent diffusedly held by a large number of competitors, may be in a position to abuse its dominance, while a firm with say 60 per cent market share with the remaining 40 per cent held by a competitor may not be in a position to abuse its dominance because of the key rivalry in the market. Specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape or result in unnecessary litigation. Hence, in a dynamic changing economic environment, a static arithmetical figure to define "dominance" will be an "aberration." The Competition Act, 2002, therefore does not state a percentage of market share as the measure of dominance. However, a high market share usually indicates limited ability of the customer to shift to other undertakings.

- **Size and Importance of Competitors**- Not only the size and value of the enterprise but also the size and importance of its competitors are crucial when determining dominance. The largest firm's market share should be evaluated relative to its competitors; the smaller the shares of the competitors, the largest firm is more likely to have dominance.

- **Dependence of Consumers on the Enterprise**- Customers have a bargaining power and influence the pricing and conditions of the market. If in the relevant market, the dependence of consumers on the enterprise is high for example a specific medicine that is non-substitutable; the enterprise providing that medicine will be determined as dominant. Likewise, a consumer of electricity in India, at present, does not have a choice of supplier.

- **Entry Barriers** – Barriers to entry, exit or expansion and durability to market power have been identified as very important factors in the assessment of dominance. If entry barriers faced by the rivals are low, the undertaking which have high market share may not be able to continue with significant market power for long.[xi] The barriers could be structural, regulatory or strategic one. Common barriers to entry a specific markets includes legal patents as well as first mover strategic advantages.

- **Countervailing Buying Power** – In a market, the buyer also has bargaining power which affects the price of a product. A strong buyer affects the dominance of an enterprise just as much as a strong competitor.

- **Market Structure and Size**- Market structure can be characterised by a sole supplier of goods/services either on stand-alone basis or by virtue of common ownership.

These factors individually or collectively may result in an enterprise being determined as having "dominance" over the relevant market.

Abuse of Dominance: Effect over Form?

Given the multifaceted economic and legal considerations, fair and effective enforcement of competition law is a complex task. It is rendered all the more daunting with the added requirement for the optimal level of competition law enforcement.

Optimal enforcement is arguably more important in competition law proceedings than in other areas of law enforcement because inadvertent under- and over-enforcement may actually end up harming competition itself. For example, if a competition authority attempts to over-enforce, it can actually make conduct illegal that was otherwise legal and, thus, prevent an enterprise from competing on merits. The result would be counter-productive to the objectives of competition law (by harming level of competition in the markets).

Given this debate, the story of competition law has been the story of competition between tests and concepts that are either presumption or form based (thus, simpler and providing legal certainty) and tests that are effects based – i.e. using economic/ quantitative techniques and are, thus, more accurate (and more conducive to the idea of optimal enforcement).

Recently, although the debate in this regard has surrounded the applicability of the effects-based test to prohibit abuse of dominance, companies need to be able to formulate policies that re-assure them of their legal certainty – stakeholders, therefore, await fast-track consensus.

Effect v. Form – Abuse of Dominance

The debate between 'effect' over 'form' is even more relevant today. It can be said that there is no clear consensus on this subject in India. The recent judgment of the Supreme Court in the multi-system operators case has also not dealt with the issue of 'objective justification'. Most recently, though not directly endorsing an effects-based analysis in abuse of dominance cases, the Competition Commission of India (**CCI**) in a Google[41] minority (dissenting) order has emphasised the need for greater economic evidence and its implications for competition and consumers to consider an alleged conduct as abusive.

[41] Matrimony.com Limited v. Google LLC & Others (Case No.07/2012) & Consumer Unity & Trust Society (CUTS) v. Google LLC & Others (Case No.30/2012) [Order dated 31 January 2018]

The competition authorities in the EU have developed the concept of abuse from jurisprudence laid-down by the European Court of Justice (**ECJ**) in the Hoffmann-La-Roche case[42]. **Hoffman-La Roche** is also heavily relied upon in India and is frequently cited by the CCI.

The competition authorities in the EU have also been distinguishing anti-competitive behaviour based on dominance from "normal competition". The competition authorities recognise that the direct result of the presence of a dominant entity taking recourse to methods different from those governing "normal competition" can have an anti-competitive effect on the market. Interestingly, in more recent cases[43], the ECJ placed a much greater emphasis on whether the impugned conduct has anti-competitive effects.

The nuanced position adopted lately is most evident in the ECJ's decision in Intel Corporation Inc. vs. European Commission,[44]wherein it expressly endorsed the effect-based approach to abuse of dominance. In terms of the ECJ's order – where the dominant firm submits evidence that its conduct was not capable of excluding competitors, the competition authorities must analyse the effects of the conduct. It further stated that in the cases relating to abuse of dominance the following factors must be analysed:

- The extent of dominant position of an enterprise/ entity in the relevant market.
- The share of the market covered by the challenged practice as well as the conditions and arrangements for granting rebates in question, their duration and amount.
- The possible existence of a strategy aiming to exclude competitors that are at least as efficient as dominant enterprise/ entity from the market. The above approach seems to accord with the European Commission's enforcement priorities[45], which suggest moving away from the formalistic approach and stresses effect on consumers.

The evolution of jurisprudence in Europe may have an effect on interpretation of provisions in India, as well. The Competition Act, 2002 does not expressly state that abuse of dominance

[42] [1979] ECR 461
[43] Deutsche Telekom [2010] ECR I-9555 and Telesonera [2011] ECR I-527

[44] Case C-413/ 14 P
[45] C 45/7 dated 24 February 2009

requires an evaluation of the appreciable adverse effect on competition (which is specifically required in the case of anti-competitive agreements). During the early years of enforcing the provisions of the Competition Act, the CCI interpreted the above provision to mean that if an enterprise found to be dominant indulges in specified conduct that is considered abusive, it would resultantly, be "bound to cause"[46] an appreciable adverse effect on competition. Though the CCI recognises that the objective of the Competition Act is to protect the process of competition and not the individual competitors (owing to the inherent economic nature of competition law); it becomes all the more important for the CCI to consider the application of economic quantitative techniques by applying effect-based principles (as also considered in the minority order of Google).However, with various substantive cases on abuse of dominance currently pending before the Supreme Court of India, it is likely that the above issue will come up for debate and decision by the Supreme Court soon.

The Competition (Amendment) Bill, 2020, is to be discussed in Parliament during the current budget session. It is based on the report of the Competition Law Review Committee (CLRC) of July 2019. CLRC, set up by GOI in October 2018, has made detailed recommendations on various gaps in the enforcement of the Competition Act, 2002, in a short span of time. However, one emerging area of attempts to monopolise has not been adequately addressed.

Internationally, there is a dichotomy of approach to regulate unilateral conduct by large firms. In some jurisdictions like the EU, a form-based approach is used based on clearly defined market shares and on an 'effect vs object' test that's well codified. In contrast, unilateral conduct of firms not yet dominant is also evaluated in the context of its likely effect on competition in jurisdictions such as the US, Germany and Japan.

India has adopted a mixed approach that's nearer to the form-based approach — declaring five prohibited conducts as per se illegal only when they are employed by dominant firms, but, unlike in the EU, without specifying market share-based criteria for assessing a dominant position. However, evaluation of 'effect' on competition is missing for analysing cases of abuse of dominance, except in cases of 'exclusionary' abuse resulting in denial of market access.

A form-based approach in respect of competition law is one that strictly follows the letter of law without analysing the effects resulting from the conduct on competition and consumers.An

[46] MCX Stock Exchange Ltd. & Ors. v. National Stock Exchange of India Ltd. & Ors. (Case No.13/2009) [order under section 27, dated 23 June 2011].

effect-based approach, on the other hand, calls for a case-by-case analysis that aims at weighing the anti-competitive effects against pro-competitive effects of the conduct to arrive at a conclusion on its legality.

The main concern with the form-based approach to Section 4 of the Act, however, is that it promotes the presence of dominance of an enterprise as a prerequisite to the application of the provision. The effects-based approach would, instead, imply that due importance be given to the consequences of the conduct of the enterprise. So, if such conduct amounts to anti-competitive practice, despite the enterprise being non-dominant, the effect-based approach would suggest that legal liability be attached to the firm.

In the US, Section 2 of the Sherman Anti-Trust Act, 1890, proscribes even an attempt to monopolise. Of late, even the EU has witnessed a positive shift towards an effects-based approach, particularly in cases related to loyalty rebates given to select customers and exclusive deals. Innovative legal tests such an 'as efficient competitor' tests came to be adopted, shifting its approach towards an effect-based assessment of market power.

The current scheme of Section 4 of the Competition Act seems to present a contradictory view to the preamble of the Act. The preamble imposes a statutory mandate on CCI to prevent practices having an adverse effect on competition. This means that it seeks to include cases of any attempt to monopolise, and correspondingly imposes a duty on CCI to do so while enforcing Section 4 of the Act. However, despite this, CCI has chosen to interpret Section 4 to exclude attempted monopolisation of the market.

Time and again, it has maintained that dominance of enterprise is essential to the application of the provision. Accordingly, to restore a level playing field in the markets and to empower CCI, the Competition (Amendment) Bill should amend Section 4 to include 'attempt to monopolise' as a violation under the Act.

Furthermore, the gradual shift to an effect-based approach ought to be expedited. This would assist in assessing cases of attempted monopolisation.
As to the requirement to show anticompetitive effects, in some older cases, the CCI has considered and applied an object-based approach while finding abuse (for example, National Stock Exchange case).In more recent cases, however, the CCI and COMPAT [Competition

Appellate Tribunal] have deployed an effects-based approach while evaluating abusive conduct. The following cases are illustrative.

In the Schott Glass case the COMPAT found that unlawful price discrimination required a showing of both '(i) dissimilar treatment to equivalent transactions; and (ii) harm to competition or likely harm to competition in the sense that the buyers suffer a competitive disadvantage against each other leading to competitive injury in the downstream market'. The COMPAT found the CCI had wrongly ignored the second limb and that the evidence showed there was 'no effect on the downstream market and ultimate consumer did not suffer' as a result of the alleged conduct. The matter is under appeal before the Supreme Court.

Recently, in Tata Power Delhi Distribution Limited v Competition Commission of India (2018), the CCI observed that the seminal issue in an abuse of dominance case is harm to consumers; however, given that the electricity tariffs were fixed by a regulator (Central Electricity Regulatory Commission), the issue of harm to consumer did not arise. As the COMPAT has been merged with the National Company Law Appellate Tribunal (the NCLAT) with effect from 26 May 2017, subsequently, the case was appealed before the NCLAT. Notably, the parties negotiated a settlement during the pendency of the appeal, and the NCLAT accordingly disposed of the case.

In XYZ v REC Power Distribution Company Ltd (2016), the CCI noted that establishing a denial of access meant proving 'anticompetitive effect/distortion in the market in which denial has taken place'.

In Dhanraj Pillay & Ors v Hockey India (2013), the CCI balanced anticompetitive effects against the defendant's justifications. The CCI held that the Act was not violated where allegedly abusive contractual restrictions were not disproportionate to a sporting organisation's legitimate regulatory goals.

Finally, in ESYS Information Technologies Pvt Ltd v Intel Corporation & Ors (2014) (Intel case), the CCI dismissed section 4 claims based on Intel's distribution agreements in part because 'the distributors of intel products are not precluded from dealing in the products of its competitors and in fact they were found dealing in the competing products' and therefore 'there is no question of foreclosure of market for the competitors of Intel'.

In summary, the more recent CCI and COMPAT jurisprudence reflects a move away from rigid form-based analysis. Instead, the CCI is increasingly requiring proof of anticompetitive effects in its enforcement action.

ECONOMICS OF AN EFFECTS-BASED APPROACH TO COMPETITION LAW ENFORCEMENT

A form-based approach to enforcement is very conservative as it considers market power bad and hence aims at an unrealistic benchmark of perfect competition. In fact, the underlying theoretical framework and case law of an effects-based approach shows that standardised rules are ineffective in enforcing a modern competition law where markets are highly complex, often contestable and rapidly evolving. In such a world, where survival of the fittest is key, apparent abusive actions of a firm may actually be driven by a plethora of legitimate factors and objective justifications to meet competition.

Form-Based Approach Vis-À-Vis an Effects-Based Approach

Traditional competition law focused on protecting competitors and was primarily enforced through a form-based approach. This is derived from the traditional view, where perfect competition was assumed to be an ideal scenario and firms were price takers with limited or no market power.

However, adopting a form-based approach in undertaking abuse of dominance assessment is fraught with problems. A key reason for this is that the abuse of dominance provisions in competition law are formulated with a 'pre-requisite' of establishing dominance. This raises several concerns. First, determining dominance requires definition of relevant markets, and what the relevant market is can be contentious. While there are various tools and methods available to define relevant markets, they are all subject to their own criticisms and may not fit well in all market situations. For instance, using the Small but Significant and Non-transitory Increase in Price (SSNIP) Test (without any modifications) in non-traditional markets such as platform markets may cause a very narrow market definition, thereby leading to erroneous conclusions in anticompetitive assessments Second, there is also the issue of defining 'dominance'. The most commonly used metric, market-shares, is an inadequate measure to establish dominance, and using only this can lead to significant inconsistencies as there is no accepted benchmark on the market share cut-off beyond which a firm will be considered to be

dominant. Also, market shares may be an erroneous criterion in platform markets which are highly contestable. Moreover, platform markets by nature require economies of scale, and thereby tend to be characterised by few large players with relatively high market shares. Third, the dominance pre-requisite may also provide an escape route to a firm pursuing the same anticompetitive practice as a dominant firm (to strengthen its market position), but may not yet be construed to be dominant by the law. Such a firm will typically have no legal liability. Further, a form-based approach ignores or undermines the possibility of alternate business or efficiency justifications for the dominant firm's actions.

The effects-based approach rests on the more evolved view of competition, which recognizes that firms continuously look for new opportunities to maximize profits through innovation[47]. Such innovation may range from raw materials and production processes to sales tactics, exploring new markets and fulfilling continuously evolving needs of consumers. In order to achieve this, a firm may adopt strategies that enhance its market power or eliminate a competitor, however, its actions may actually result in more efficient processes and enhanced consumer welfare. For instance, a newly opened supermarket in a small town may eliminate several small vendors but it may offer welfare enhancing benefits to consumers, for instance discounts and a one-stop solution for household needs. Therefore, this new view on competition - based on today's evolving market structures and dynamics of competition – is urging the law to adopt an effects-based approach to antitrust enforcement. This approach, aims at weighing the pro vis-à-vis anticompetitive effects of a firm's action, rather than simply protecting competition.

The effects-based approach enhances the effectiveness and accuracy of competition law enforcement, and minimizes the probability of penalizing pro-competitive actions undertaken by firms[48]. It takes into consideration the nature of the industry and the market structure in which the firm operates. It also attempts to understand the economic rationale for such actions and their relevance in the context of the firm's current competitive strategy. For instance, in industries such as aviation where scale and large investments are of prime importance, there tend to be limited number of firms in the market, each enjoying a certain degree of market power and sometimes even dominance on certain routes. The hub and spoke model of airline competition creates productive efficiencies for the airline by establishing near monopolies on

[47]Alberto Pera, Changing Views of Competition, Economic Analysis and EC Antitrust Law. (Paper originally prepared for the 2008 Macerata Lecture on European Economic Policies at the University of Macerata, Italy)
[48] Nicolas Petit, From Formalism to Effects? The Commission's Guidance on Article 82 (Working Paper, Institut D'etudes. Juridiques Eurepeennes (IEJE), Nº3, 2009)

routes with the hub as the origin or destination. Similarly, large price discounts by airlines may not necessarily be an abuse of dominance. They could simply be the firm's strategy to improve aircraft utilization (to recover maximum portion of variable costs) or a part of its marketing/sales strategy where the firm could have set aside a budget to sell tickets at a lower price for a certain period of time. This in turn will enhance consumer welfare through lower prices. However, if one were to adopt a form-based approach in this case, such alternative justifications are likely to be ignored or left unexplored and the firm would be held accountable for restricting market entry or driving out incumbents.

Further, an effects-based approach ensures that practices undertaken by firms, which have the same outcomes, are subject to similar legal treatments. Many a times, companies try to exploit loop holes in the law and adopt practices that enjoy a relatively lenient legal treatment but have the same effects as those which may be more strictly prohibited.8 For instance, instead of heavily discounting all its rooms – to a level below costs - and risking enforcement on grounds of predatory pricing, a large hotel could significantly reduce the price of its lowest category rooms (selective price cutting) in order to eliminate competition from the only small budget hotel in the vicinity. Thereafter, if the large hotel is able to increase prices and recoup its losses, it may harm budget consumers in the long run. Such harm will be equivalent to a full scale predatory pricing case but may be lightly penalised as a selective rebate practice. Therefore, by adopting an effects-based approach, antitrust authorities will rule based on the impact of the action undertaken by a firm rather than using the action itself as a standard for establishing an anticompetitive abuse of dominance practice.

SPECIFIC FORMS OF ABUSE IN INDIA

Rebate schemes

The Act does not specifically cover discounts and rebate schemes. However, rebate schemes may be looked at from the perspective of unfair or discriminatory prices and conditions, or other exclusionary practices (eg, that limit or control production of goods and supply of services or are practices that result in the denial of market access), and, therefore, may be covered under the Act.

In the Intel case (2014), the CCI found that Intel's incentive and target schemes did not foreclose competitors, and that this was reflected in the distribution of competing microprocessors by Intel's distributors and OEMs. The complainant's allegation that distributors were restricted from dealing in competing products was found to be unsubstantiated. Further, the CCI observed that Intel's incentive schemes were targeted at increasing sales of low-demand products and offered non-predatory discounts to meet competition, all of which were found to constitute reasonable business practices.

Tying and bundling

Unilateral tying and leveraging are considered abusive under section 4(2)(d) and section 4(2)(e) of the Act.

In Sonam Sharma v Apple (2013), the CCI set out the conditions for an abusive tie under section 3(4) of the Act (which deals with anticompetitive vertical agreements):

- the presence of two separate products or services capable of being tied. The purchase of a commodity must be conditioned upon the purchase of another commodity;
- the seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; and
- the tying arrangement must affect a 'not insubstantial' amount of commerce: a tie-in arrangement is only considered to be abusive if a 'substantial' portion of the market is affected.

The COMPAT in Schott Glass (2014) held that, for an abusive tie-in arrangement under section 4(2)(d) of the Act to be made out, the tied product and tying product must be entirely different and have no connection to each other in their application. The CCI in Khemsons Agencies v Mondelez India Foods Private Limited (2018) held that given that the coolers to store chocolates were provided free of cost on a voluntary basis, there was no tying of coolers with the sale of chocolates.

Exclusive dealing

Exclusive dealing, non-compete provisions and single branding restrictions could constitute abuses of dominant position, as they would all be characterised as practices that result in the denial of market access as covered by section 4(2)(c) or limiting production or technical development as covered by section 4(2)(b). The CCI is increasingly analysing the foreclosure effect of such conduct as a requirement under section 4 of the Act (see response to question 10).

Predatory pricing

Explanation (b) to section 4 of the Act sets out a two-step test for assessing whether a dominant enterprise's conduct is predatory. First, the price must be below cost (as determined by CCI regulations) and second, the dominant enterprise must have the intention to reduce competition or eliminate competitors.

The CCI has published regulations on determining the cost of production, which state that the default cost benchmark is average variable cost (as a proxy for marginal cost). However, the CCI and the Director General (DG) may consider other cost measures such as avoidable cost, long-run average incremental cost and market value, depending on the nature of the industry, market and technology used, with reasons provided in writing.

In National Stock Exchange of India Ltd (2011), the CCI found zero pricing by the National Stock Exchange (NSE) in the currency derivatives segment of stock exchange services to be unfairly low pricing. In appeal, the COMPAT clarified that the zero pricing by NSE was predatory. However, neither the CCI nor the COMPAT provided any guidance on the relevant cost benchmark to be applied in predatory pricing cases. The NSE has filed an appeal against the COMPAT's decision before the Supreme Court.

In two subsequent cases involving predatory bidding, M/s Transparent Energy Systems Pvt Ltd v TECPRO Systems Ltd (2013) and HLS Asia Limited, New Delhi v Schlumberger Asia Services Ltd, Gurgaon & Ors (2013), the CCI held that predatory pricing had to be assessed on the basis of an appropriate cost benchmark (ie, average variable cost), as reduction of prices in itself was actually the essence of competition. The CCI also observed that the abuse of predatory pricing had to be assessed on the basis of actual prices and not projected prices.

The CCI had opened an investigation into Ola Cab's activities, on the strength of a complaint by Meru Cabs, accusing it of predatory pricing under the scheme of section 4 of the Act, giving discounts to passengers and incentives to drivers on a scale such that it was operating at a loss in Bengaluru. In July 2017, the CCI dismissed these allegations against Ola, holding that Ola did not hold a dominant position in the relevant market as Ola and Uber posed competitive constraints on each other. The CCI also decided not to interfere with a new and evolving market, noting that any interference at this nascent stage would disturb market dynamics and risk prescribing a sub-optimal solution. The appeal is being heard by the NCLAT.

Price or margin squeezes

Price squeezes, although not specifically referred to in the Act, would be covered where they amount to unfair or discriminatory pricing terms under section 4(2)(a)(ii) of the Act and denial of market access under section 4(2)(c) of the Act.

In 2016, the CCI opened an investigation into the activities of Grasim Industries for allegedly abusing its dominant position in the market for man-made fibres in India. The informant alleged that Grasim was abusing its dominant position by engaging in discriminatory pricing, offering lower prices to manufacturers that were exporting their products, and higher prices to those selling goods intended for the domestic market, and which would, therefore, be competing with Grasim's own downstream garment business.

Refusals to deal and denied access to essential facilities

A refusal to deal has been defined in the context of a vertical arrangement under section 3(4)(d) of the Act as 'any agreement which restricts, or is likely to restrict, by any method, the persons or classes of persons to whom goods are sold or from whom goods are bought'. In the Auto Parts case (2014), a fine of 25.44 billion rupees was imposed on 14 car manufacturers for

restricting the sale of car spare parts in the open market. This conduct was held to be both an abuse of dominance, as being a denial of market access under section 4(2)(c) of the Act, and a refusal to deal, on account of imposing restrictions through agreements, under section 3(4)(d) of the Act. On appeal, however, the COMPAT mandated the companies to pay a 2 per cent penalty on average annual turnover of spare parts in the aftermarket. The CCI is yet to determine this amount. The COMPAT's judgment was stayed by the Supreme Court on appeal.

Access to essential facilities would be covered under practices resulting in a denial of market access under section 4(2)(c) and possibly section 4(2)(b), which prohibits limitations or restrictions on the production of goods or provision of services or technical or scientific development relating to goods or services to the prejudice of consumers.

In Arshiya Rail Infrastructure Ltd v Ministry of Railways (2013), the complainants had alleged that railway infrastructure was an essential facility and that the Ministry of Railways' refusal to provide access to this rail infrastructure amounted to an abuse of dominance. The CCI found that the essential facility doctrine could be invoked upon an appraisal of the technical feasibility to provide access, the possibility of replicating the facility in a reasonable period of time, the distinct possibility of lack of effective competition if such access was denied and the possibility of providing access on reasonable terms. Only if these legal conditions are satisfied can a refusal to deal constitute an abuse under section 4. In this case, in relation to access to railway infrastructure, the CCI found that there were no technical, legal or even economic reasons why container train operators could not create their own terminals or similar facilities. The CCI, therefore, dismissed the complainants' allegations of abuse.

Further, in the BCCI case (2013) the CCI provided interesting insight into the interpretation of the essential facilities doctrine in India. The CCI found that BCCI had misused its role as the regulator of cricket in India to restrict economic competition in sporting events. The CCI appears to suggest that a restriction of access by a dominant enterprise to necessary infrastructure (which may be considered as an essential facility) to the detriment of competitors can amount to refusal to deal. This case was remanded by the COMPAT to the CCI for reconsideration on certain procedural grounds. Resultantly, the CCI passed its order (2017) in the matter after re-examining the issues before it and found a contravention by the BCCI.

In Fastway (2018), the Supreme Court held that an illegal termination of an agreement amounted to a denial of market access. However, on the facts of the case, it decided not to levy any penalty.

Predatory product design or a failure to disclose new technology

Although reasonable conditions for the protection of intellectual property rights (IPRs) are not restricted by the Act with respect to anticompetitive agreements, there is no such explicit mention of IPRs in the abuse of dominant position provisions of the Act. An unreasonable unilateral refusal to license an IPR or discriminatory price between two enterprises can constitute an abuse of dominant position if these actions result in the imposition of an unfair condition or price, denial of market access, limiting production, technical or scientific development or price discrimination, or a combination of any of these.

In the Auto Parts case (2014), the CCI held that an unreasonable denial of market access by a dominant company cannot be defended on the basis of holding IP rights and would be considered abusive under section 4.

In the HT Media case (2014), the minimum commitment charges imposed by SCIL were considered exploitative and an abuse of SCIL's intellectual property rights by the CCI because private FM radio stations had to pay the MCC irrespective of their actual play-out, which could be lower than the MCC. The matter is before the NCLAT on appeal.

The CCI is currently investigating the potential abuse of a dominant position by Ericsson, on the basis that as the holder of a standard essential patent, it was bound by the commitments to license on fair, reasonable and non-discriminatory terms it had entered into while participating in the standard-setting process. Failure to abide by those commitments could amount to an abuse of dominance, as has been found in other jurisdictions.

Price discrimination

Section 4(2)(a)(i) of the Act prohibits non-price discrimination and section 4(2)(a)(ii) prohibits price discrimination.

The COMPAT, in the Schott Glass case (2014), has found that the abuse of price discrimination involves the satisfaction of two ingredients: dissimilar treatment of equivalent transactions and harm to competition or likely harm to competition by which buyers suffer disadvantage against each other. The COMPAT provided further guidance on conduct that may be considered as discriminatory by noting that '[t]he price and conditions could be said to be discriminatory, if and only if, they were different for the same quantities of the same product'. The COMPAT's

approach to discriminatory conduct has been followed by the CCI in the Intel case, where the CCI observed that:

[i]t appears to be a common business practice to give better discount to the bulk purchase and unless it impedes the ability of the reseller to compete any competition may not probably arise the alleged pricing policy of Intel does not amount to secondary line price discrimination and has not resulted in foreclosure of any of its downstream customers.

Further, in Singhania & Partners LLP v Microsoft Corporation (I) Pvt Ltd & others (2011), the CCI (and, on appeal, the COMPAT in 2012) found that the prices imposed by Microsoft for different types of licences (OEM licences, volume licences and retail licences) granted to different categories of customers did not amount to price discrimination as the different licences giving customers different rights of use were, in fact, different products. Similarly, in Travel Agents Federation of India v Lufthansa Airlines (2010), where the prices of Lufthansa tickets on its official website were different from the fares made available to appointed travel agents, the CCI found that the sale of airline tickets through travel agents and through Lufthansa's official website constituted two distinct markets and mediums and, consequently, the different fares did not amount to price discrimination.

In opening its investigation against Ericsson (2015), the CCI found that the licences charged by Ericsson, besides, on the face, being a breach of its commitments to licence on fair, reasonable and non-discriminatory terms, were also discriminatory. The royalty rate being charged by Ericsson had no link to the functionality of the patented product; rather it was based on the final price of the manufactured product in which the patent was being used. Accordingly, charging of two different licence fees per phone for use of the same technology was held to be discriminatory by the CCI and an investigation has been ordered into Ericsson's conduct.

Exploitative prices or terms of supply

Exploitative abuses, such as excessive pricing and unfair terms of contract, have been considered in various cases by the CCI. In the Auto Parts case (2014), the CCI found that 14 car companies had abused their dominant positions by requiring customers to purchase spare parts and diagnostic tools solely from the respective car manufacturer or their authorised dealers. The COMPAT, while deciding the appeal, agreed with the CCI's analysis that the margins from spares business substantially exceed the margins from the business of selling cars

substantially and held that the car companies were charging an unfair price in the spare-parts market. On appeal, the Supreme Court has stayed the COMPAT's judgment.

On the contrary, the COMPAT's decision in the Orissa Steel Federation case (2016) follows the approach of the EU courts to excessive pricing: it is not enough for the CCI to argue that a price is excessive, but it must also show unfairness. Besides the costs, the CCI should also consider the difference between what the dominant firm and other firms can charge, what different customers pay, whether customers can still be profitable, and whether there is a shortage of supply (in which case high prices may be an efficient method of allocating the product).

As mentioned above, in the HT Media case which is now under appeal before the NCLAT, the CCI considered the minimum commitment charges imposed by SCIL as exploitative.

Abuse of administrative or government process

Section 4 of the Act may cover abuses in the nature of sham litigation that result in denial of market access and limiting production, technical or scientific development.

In the case of Bulls Machines v JCB India Ltd (JCB) (2014), Bulls Machines filed a complaint before the CCI alleging abuse of judicial process by JCB to exclude competitors. The complaint was filed owing to proceedings initiated by JCB before the High Court of Delhi alleging infringement of the design registrations and copyright of JCB by Bulls Machines in developing the backhoe loader 'Bull Smart'; JCB obtained an ex parte injunction against Bulls Machines on the basis of alleged design infringements. The injunction proceedings were later withdrawn by JCB as they appeared to have misrepresented the facts of the infringement of their design before the High Court of Delhi. The CCI found there was a prima facie case that JCB had abused its dominant position in the manufacture and sale of backhoe loaders in India by initiating these proceedings and directed the DG to proceed with the investigation.

Mergers and acquisitions as exclusionary practices

Although structural abuses are not specifically dealt with under the abuse of dominance provisions in the Act, the merger control provisions of the Act require mandatory pre-notification of combinations that cross certain financial thresholds contained in section 5 of the

Act. Combinations that cause or are likely to cause an appreciable adverse effect on competition in India are void.

Mergers and acquisitions that do not meet these financial thresholds may be assessed under section 3 of the Act for entering into anticompetitive agreements or under section 4 of the Act for an abuse of dominance; however, no transaction has been reviewed under these provisions to date. Section 4(2)(c) of the Act may be wide enough to capture any form of denial of market access, including through mergers and acquisitions, if they are exclusionary.

Other abuses

Section 4(2) appears to set out an exhaustive list. However, the provisions dealing with abuse of dominance under the Act are fairly broad and the abuses listed under section 4(2) of the Act could, in fact, cover almost all types of abuse.

SOLVING THE PROBLEM OF ABUSE BY CCI

To an enterprise who is held to be abusing its dominant position, the Commission can do several things-

- Firstly, it can direct the undertaking or enterprise to discontinue or stop such actions that may amount to abuse. (S.27(a)) of the Competition Act. For example the use of this power by the CCI can be found in cases like In Re Shamsher Kataria and Atos in which the dominant parties were ordered to end and discourage the enterprises form involving in activities which had been found to be against section.4.

- Secondly to Impose penalties of up to 10% of the average of the turnover for the last three preceding financial years. (S.27(b)) of the Competition Act.

There has been a lot of concern about the provision as it provides no calculation but just the upper limit for the penalty, CCI is yet to formulate any guidelines on this issue. Presently the CCI has overall discretion in calculation and assessment of penalties which needs to be imposed upon such persons or undertaking who are parties to such kind of abuse. The COMPAT (The Competition Appellate Tribunal) has put some prohibitions on the CCI in relation to awarding penalties which are related to it. COMPAT in the one instance has also admonished CCI for its action of awarding large penalty without explaining any reason for the same and recommended that it needs to be calculated on the basis of the 'relevant turnover'[49]. So even in a case of where the abuse is done against a multi-product company, the turnover used to calculate the penalty against it would be the turnover from the kind of product or services which is in the contention, and not the overall turnover.

However, this irregularity is very rampant in this condition, when we talk about of the functioning of the CCI and the Appellate Authority, as for COMPAT has itself failed to adhere its own precedent of 'relevant turnover' in M/s DLF Limited v Competition Commission of India &Ors[50] . COMPAT did not restrain itself from assessing the penalty on the basis of DLF Limited's turnover which arose from the residential segment, regardless of the relevant market in the present case for 'high-end residential accommodation'. COMPAT with held the penalty

[49] M/s Excel Crop Care Limited v Competition Commission of India, Appeal 79 of 2012.
[50] M/s DLF Limited v Competition Commission of India &Ors, Appeal No. 20 of 2011, Appeal No. 22 of 2011, Appeal No. 19 of 2012, Appeal No. 23 of 2011, Appeal No. 12 of 2012, Appeal No. 20 of 2012, Appeal No. 29 of 2013, Appeal No. 8 of 2013, Appeal No. 9 of 2013, Appeal No. 11 of 2013

which the CCI collected on the basis of DLF's turnover pertaining to its entire business (i.e., the development of residential, office and commercial properties).[51]

- Lastly, the Commission can pass any relevent order that it deems to cause the division of the dominant enterprise such that does not abuse its dominant position. (S.28)[52]

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[51] Cyril Shroff & Nisha Oberoi, India: Abuse of Dominance, Global Competition Review. Available at http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2749/india-abuse-dominance/ (last visited on 18/11/2015).

[52] http Abuse of Dominant Position in Indian Competition Law: A Brief Guide, The Centre for Internet and Society (2017), http://cis-india.org/a2k/blogs/abuse-of-dominant-position-in-indian-competition-law-a-brief-guide (last visited Feb 15, 2017).

JUDICIAL VIEW

The Competition Commission of India has identified as to what constitutes abuse of dominant position to fall under the purview of anti-competitive practices.

- **Zero pricing by a dominant player** amounts to annihilating or destructive pricing being **beyond** the parameters of **promotional or penetrative pricing**.[53]
- By providing **free services cannot by itself raise competition concerns** unless the same is offered by a dominant enterprise and shown to be tainted with an anti-competitive objective of excluding competition/ competitors[54].
- In a competitive market scenario, where big players are already operating in the market, it would **not** be **anticompetitive for an entrant to incentivise customers by giving attractive offers and schemes**.[55]
- Providing **services below the average variable cost** unless **it coupled with abuse of dominant position** does not amount to predatory pricing in contravention to the Competition Act (Section 4)[56].
- **Market share is one of the indicators for assessing dominance**, **but** the same **cannot be seen in isolation** to give a conclusive finding[57].
- **No restriction affecting the entry or expansion of other** entrants into the market in indicative of **lack of abuse of dominant position**[58].
- The narrow interpretation of the concept of dominance would mean that an **entrant** armed **with a new idea, a superior product or technological solution** that challenges the status quo in a market and shifts a large consumer base in its favour would have to be **erroneously held dominant**.[59]
- The interpretation of the Competition Act, 2002, does **not** allow **more than one dominant player**.[60]

[53] MCX Stock Exchange Ltd. vs. National Stock Exchange of India Ltd. & DotEx International Ltd. (Case No. 13/2009) CCI
[54] Bharti Airtel Limited Vs. Reliance Industries Limited & Reliance Jio Infocomm Limited (Case No. 03 of 2017) CCI
[55] Bharti Airtel Limited Vs. Reliance Industries Limited & Reliance Jio Infocomm Limited (Case No. 03 of 2017) CCI
[56] Bharti Airtel Limited Vs. Reliance Industries Limited & Reliance Jio Infocomm Limited (Case No. 03 of 2017) CCI
[57] Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd Vs. ANI Technologies Pvt. Ltd. (Case No. 6 & 74 of 2015) CCI
[58] Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd Vs. ANI Technologies Pvt. Ltd. (Case No. 6 & 74 of 2015) CCI
[59] Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd Vs. ANI Technologies Pvt. Ltd. (Case No. 6 & 74 of 2015) CCI
[60] Fast Track Call Cab Pvt. Ltd. & Meru Travel Solutions Pvt. Ltd Vs. ANI Technologies Pvt. Ltd. (Case No. 6 & 74 of 2015) CCI

PART 3

Abuse of Dominant Position by the E-Commerce Retailers in India

In the last few decades there has been an unprecedented growth in the electronic commerce industry or e-commerce industry on a global scale and India is not an exception to it. This unprecedented growth is on account of mushrooming of internet, growth of start-ups and changing customer behaviour. The market and distribution system has tremendously changed owing to the advent of the e-commerce retail market, as it brings along a vast numbers of buyers and sellers through the medium of World Wide Web, and provide goods at a very low price as compared to the traditional cement and brick stores. There is a twofold reason for doing so, firstly the e-commerce market is still in its nascent stage in India and in the atmosphere of intense competition they are doing whatever it takes in order to capture the market share. Hence, the tool used by them to achieve this purpose is price. Secondly, the Indian e-commerce start-ups have private equity funds and investors hence, the companies can afford giving heavy discounts because of the excessive funds. Owing to such heavy discounts the traditional stores are making an effort to catch up by the provision of such services and experiences which have never been offered to the consumers. Despite, such offers these stores witness customers who visit the stores only to see the product physically before making a final purchase online. This factor shows that the balance is tilting towards the e-commerce sector which naturally is a source of tension between the two competing networks, leading to legal complexities which are to be addressed through the antitrust regimes. It is evident that e-commerce has been inciting various set of anti-competitive issues which may be economic or otherwise, consequently calling for the vigilance of the Competition Commission of India. Thus a need arises to analyse the e-commerce sector in the light of the provisions of the Competition Act, 2002.

Online shopping portals offer a large number of discounts such as Black Friday deals in the US, Big billion day and Diwali offer in India to lure consumers and expand their consumer base. Simultaneously such acts of the online players have also invited the fury of the traditional offline sellers who are lamented by decreasing sales as the customers visit the market just to have a physical look of the products reducing the shops to mere showrooms for customer

display and inquiry whereas, the actual purchase is usually made through online platforms since they offer anti-competitive cheaper prices.

In this age of ecommerce, the traditional concepts of competition law may not be of much use. The dynamics of the digital market are such that the concept of 'abuse of dominance' is resulting in several enforcement gaps in preventing the attempt of enterprises to monopolise markets. For example, the growing discontent among brick-and-mortar businesses against ecommerce platforms has led to a series of cases being filed before the Competition Commission of India (CCI).

Until recently, most of these cases were dismissed since, individually, none of these digital entities can be held to be 'dominant' as per the definition of the term due to intense competition in their markets.

Even the archaic form-based interpretation of Section 4 of the Competition Act — prohibiting the abuse of a 'dominant position' in the market without penalising 'dominance' per se — is also raising concerns in markets such as telecom, where cases of alleged predatory behaviour against Reliance Jio were closed by CCI. To be fair, the CLRC report has noticed this enforcement gap. It has stressed on the need to address this issue, but only in the context of ecommerce platforms.

Against such anti-competitive practices numerous instances have been recorded before the CCI against several online players such as Flipkart, Snapdeal, Amazon, Jabong and Myntra alleging predatory pricing. But in the Flipkart Case the CCI at the prima facie level rejected the claim since none of the players enjoyed dominance in the retail market and in order to prove predatory pricing it is fundamental to show that the enterprise has a dominant position in the market. The determination of dominance is connected to the refusal made by the CCI to designate e-market as a different space of goods/services.

In the case of M/s Fast Track Call Cab Private Limited v. ANI Technologies,[61] it was alleged that Ola was providing incentives, loyalties, rebates, predatory discounts. Here, the Commission noted that the act of Ola of providing heavy discounts to its purchasers and bonus

[61] Case No. 06 of 2015

to its employees at the cost of bearing loss seems to be a well devised plan of the enterprise formulated to exclude other market players out of the relevant market. This case shows that there has been a transit in the attitude of CCI with regards to the protection of the traditional taxi service providers.

E-commerce enterprises basically operate in online spheres, hence their visibility, brand name and promotion is necessary for their growth hence, the Competition law provides the necessary tool to showcase their visibility in the market place. In this context it is noteworthy to state that several e-commerce enterprises such as Microsoft, Yahoo, Facebook, Yatra, Nokia's Here Maps etc had been requested by the Director General (DG) to provide their comments with regards to the investigation of abuse of dominance against Google. Google being one of the most popular search engines has been alleged to abuse its dominance by offering its own maps, places, Google+ social network which was aiming to compete with Facebook. The DG in this regard has laid down various grounds on the basis of which Google is said to abuse its dominance. These points are as follows:

1. The unfair imposition of conditions on the sellers to whom Google is selling its services;
2. Reducing and confining technical and scientific development with regards to goods and services to the prejudice of the consumers;
3. Constraining dominant companies from involving into practices leading in the denial of the market access in any manner;
4. Constraining a dominant company from utilising its position of dominance in one relevant market with a view to enter into, or guard, other relevant markets.[62]

[62] Editorial, "Why did CCI write Google a bad report card?" Live Mint, September 2, 2015.

PART 4

CONCEPT OF ABUSE OF DOMINANT POSITION IN US

The concept of abuse of dominant position in US and EU has some basic differences and it is interesting to note that the competition law in India has seen a shift from more reliance on EU than US in dealing with abuse of dominance cases. This is quite evident from the fact that the concept of 'monopolistic trade practices' under the MRTP Act[63] was more near to US law of 'monopolisation' while the concept of 'abuse of dominance' under the Competition Act is more nearer to the EU text in Article 102 which prohibits abuse of a dominant position.

While there is a basic distinction in enforcement approach in EU and US, i.e. in US, there is a criminal enforcement of anti-trust laws while in EU it is administrative. India has followed the administrative model in EU.

Abuse of Dominant Position in US

Under Section 2 of the Sherman Act in US it is unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations…" Thus, there are three offences established by this section which are commonly termed as, i.e. "monopolization, "attempted monopolization," and "conspiracy to monopolize"[64]. It is pertinent to note that section 2 of the Sherman Act targets single-firm

[63] iSection 2 (i) of the MRTP Act, 1969: "monopolistic trade practice" means a trade practice which has, or is likely to have, the effect of- (i) [maintaining the prices of goods or charges for the services] at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner; (ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services; (iii) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any service rendered, in India to deteriorate; [(iv) increasing unreasonably- (a) the cost of production of any goods; or (b) charges for the provision, or maintenance, of any services; (v) increasing unreasonably- (a) the prices at which goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or (b) the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase) of any goods or by the provision of any services; (vi) preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices;]

[64] iiU.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act (2008), <http://www.justice.gov/atr/public/reports/236681.pdf> accessed July 1, 2014

conduct or unilateral conduct of firms with monopoly power or with a dangerous probability of attaining such power which can be distinguished from the violation of section 1 of the Sherman Act or Section 7 of the Clayton Act which deals with conduct of two or more firms coming together in restraint of trade. Firms with monopoly power can reduce output, charge higher prices and thus, can be detrimental to the consumers.

Here it is important to note that the jurisprudential development of US antitrust law has seen a significant shift over time from Harvard School to Chicago School, i.e. from more interventionist approach (protection of small and medium enterprises) to less interventionist and more economic approach (opening up of markets and economic efficiency). This shift is a universal phenomenon across antirust jurisdictions and roots into the fact that sometimes single firm conduct may create efficiencies and benefit consumers.

Microsoft case

This certainly one of the most published cases in the history of anti-trust policy s. In May 1998, the US Department of Justice and a group of states filed separate complaints asserting anti-trust violations by Microsoft. The company s alleged anti-competitive practices dealt with business practices related to its internet browser, Internet Explorer which competed with Netscape Navigator, initially the leading browser. A highly publicized trial found that Microsoft had strong-armed many companies in an attempt to prevent competition from the Netscape browser. In April 2000, the District Court issued its conclusions of law. Microsoft was found liable for three separate violations of anti-trust laws: (I) maintence of monopolization in the market of Intel –compatible operating systems for personal computers , (an infringement of section 2 of the Sherman Act); (II) attempted monopolization of the internet browser market (again violation of sec 2 of Sherman Act); (III) tying its window s OS with IE (in violation of section 1). The trial court ordered Microsoft split in two to punish it, and prevent it from future misbehaviour; however the Court of Appeals reversed the decision, removed the judge from the case for improperly discussing the case while it was still pending with the media. With the case in front of a new judge, Microsoft and the government settled, with the government dropping the case in return for Microsoft agreeing to cease many of the practices the government challenged. In his defense, CEO Bill Gates argued that Microsoft always worked on behalf of the consumer and that splitting the company would diminish

efficiency and slows the pace of software development. Micro soft filed an appeal and the Court of Appeals (CA) issued its decision in June 2001. It ruled that (I) Microsoft was guilty of maintenance of monopolization for some of the business practices it had adopted (II) it was not guilty of attempted monopolization, and (III) found that the tying allegations should be analyzed under rule of reason, rather than under a per se rule as done under District court and remanded the case to the District Court for an assessment on tying. Thus according to the judgment, Microsoft cannot regulate the market by imposing its product and services on people. It can no longer prevent the market from functioning properly and that computer user and therefore entitled to benefit from choice, more innovative products and more competitive prices.

'Monopoly Power' under US Law

Monopoly power in US is generally referred to as the power to control prices and exclude competition. The aforesaid two factors are intertwined and have been treated as one by the US Supreme Court. Unlike the EU Law on abuse of dominance, which has elaborate guidelines on the assessment of relevant market and the enforcement priorities in applying Article 102 of the Treaty on the Functioning of European Union (TFEU) to abusive exclusionary conduct by dominant undertakings[65], the US Law does not have such elaborate guidelines as such. The US Law on monopolisation has to be interpreted from the catena of decisions of the US Supreme Court and the circuit courts. However, an analysis of these decisions would reveal that more or less the approach in dealing with monopolisation cases in US is quite similar to the EU Law on prohibiting abuse of dominant position, except some philosophical differences which has been discussed below.

In US, monopoly power of an enterprise can be proved by way of direct evidence of actual exercise of control over prices and/or the actual exclusion of competition from the relevant market. It may be noted that it is difficult to find direct evidence and thus monopoly power is inferred by way of indirect/circumstantial evidence of the defendant's ability to control prices or exclude competition which can be gauged from the defendant's share in the relevant market and the existence of barriers to entry.

[65] Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (2009/C 45/02). http://ec.europa.eu/competition/antitrust/art82/

Market Definition

In Walker Process[66], US Supreme Court found it essential to define relevant market because "without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition." In evaluating a claim for monopolization or attempted monopolisation, it is necessary to find out whether the defendant possesses monopoly power or is in a position to obtain monopoly power. American Bar Association recognizes that "defining the relevant market for purposes of Sherman Act Section 2 presents the same issues as defining the relevant market for other antitrust purposes, including Sherman Act Section 1 and Clayton Act Section 7".

Relevant market assessment thus becomes a key to Section 2 analysis in US and changes the scene of the case altogether, for example in Alcoa's Case[67] the District Court had computed Alcoa's market share to be about 33%; however after re-defining the relevant market, the Circuit Court computed the share to be over 90%. In Dentsply Case[68], the Third Circuit held that the relevant market for artificial teeth included dental dealers as well as dental labs (district court only included dental labs in the definition).

Though there are no specific guidelines on assessment of abuse of dominant cases or the relevant market as such, Department of Justice (DOJ) and Federal Trade Commission (FTC) recognize that "the market-definition requirement brings discipline and structure to the monopoly power inquiry, thereby reducing the risks and costs of error." The Horizontal Merger Guidelines[69] provide for a specific section on market definition and the same is based upon the Hypothetical Monopolist test and SSNIP[70] test, however, in cases of monopolisation due care needs to be taken and the tests laid down in the merger guidelines may not be applied as it is, as the analysis in merger cases is ex ante opposed to ex post analysis in monopolisation cases. Still, the Merger Guidelines serves an important document to find out the approach in US. Let us take an example from the Guidelines to understand the relevant market concept.

The market definition has both the product and geographic dimensions. The focus in determining the relevant product market is to find out the reasonable interchangeable

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[66] Walker Process Equipment Inc. v. Food Machinery & Chemical Corp. 382 US 172 (1965)

[67] United States v. Aluminum Co. of America (Alcoa) 148 F. 2d. 416 (2d Cir. 1945)

[68] United States v. Dentsply International, 399 F.3d 181 (3d Cir. 2005)

[69] Horizontal Merger Guidelines 2010: US DoJ and FTC, <http://www.justice.gov/atr/public/guidelines/hmg-2010.html> accessed July 24, 2014

[70] [Small but Significant and Non-transitory Increase in Price] it seeks to identify the smallest relevant market within a hypothetical monopolist or cartel could impose a profitable significant increase in price.

products[71] which consumers would shift to on the basis of price, use and quality, commonly referred to as 'demand substitution'. The supply-side substitutability occurs when the producers are easily able to shift their production from one market to the other. In geographic market definition, the consideration is all the physical territories to which the consumers would easily move to for their source of supply in case of price rise or any other constraint in the market, like short supply, etc. Thus, it can be noted that the approach of determination of relevant market in US is very similar to the EU.

Market Share as a Relevant Factor

In US many lower courts continue to regard market share as the starting point in assessing monopoly power, while others consider market share and entry barrier simultaneously. While market share is an important factor in determination of monopoly power of a firm, market share only is not sufficient in absence of any barriers to entry or other evidence of the defendant's ability to control prices or competitors. An analysis of cases in US would show that generally a market share in excess of 70% has been prima facie considered to be sufficient evidence to establish monopoly power, and in cases where the market share is less than about 50% there would not be a case of monopoly. The cases of market share between 50% to 70% has seen a lot of intellectual mess in US and leads to necessity of other evidences. While market share has been required to be coupled with other circumstances to establish monopoly power of a firm, market share itself needs to be of a durable nature. The durability of the market share shows the market power of the firm to maintain this share in the market vis-à-vis its competitors.

Other factors

Sometimes rather than going on for relevant market determination, etc. the market power is established by way of direct evidence like proof of high profits, however, this approach poses several difficulties in determination of monopoly power especially the price-cost margin analysis. Some important factors in determining the monopoly power in US are:

(a) Barriers to Entry – which means a cost or condition which would deter a new entrant

[71] United States v. E. I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 404 (1956); see also Microsoft, 253 F.3d at 51–52 ("'Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level,' the relevant market must include all products 'reasonably interchangeable by consumers for the same purposes.'")

in the market even on an increase in price by the monopolist. Such barriers may be the legal license requirements, intellectual property rights, control by way of natural monopoly, etc.

(b) Market Structure and Performance – Courts also consider other market structure characteristics in determining whether or not a firm has monopoly power, including the relative size and strength of competitors, economies of scale and scope, probable development of the industry, the elasticity of consumer demand, the homogeneity of products, dwindling market demand and potential competition.

Monopolization

The legal test for satisfying the requirements of 'monopolisation'[72] claim are

(i) monopoly power and

(ii) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

While the first element has been discussed above, the second element has been recently explained by US Supreme Court in Verizon's Case[73] as follows:

"The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct".

The conduct referred to above is the exclusionary conduct and has been interpreted by US courts as the conduct harming the competitive process and thereby the consumers rather than only competitors. The US approach has been very cautious on this aspect as not to condemn the aggressive business conduct of enterprises which has a very thin line difference from the anticompetitive conduct. The requirement of intent of the enterprise has been relevant in determining such conduct like in cases of predatory pricing.

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[72]United States v. Grinnell Corp., 384 U.S. 563 (1966)

[73]Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)

Attempted Monopolization

'Attempted Monopolisation' offence under section 2 of the Sherman Act is a stage before the monopolisation case and has to satisfy the following requirements[74]

(i) anticompetitive conduct,

(ii) a specific intent to monopolize, and

(iii) a dangerous probability of achieving monopoly power.

The requirement of 'intent' is more specific in cases of attempted monopolisation and a mere desire to increase market share or win customers from a competitor is not sufficient, there has to be a specific intent established to destroy competition or build monopoly. The evidence may be direct or an inference drawn from circumstantial evidence. Coupled with the requirement of 'specific intent' is the requirement of dangerous probability of success keeping in view the circumstances of the case. A relative high market share and significant entry barriers raises this probability and in such cases, the US courts have upheld the attempted monopolisation claim.

Conspiracy to Monopolize

Elements of this offence are –

(i) existence of a combination or conspiracy

(ii) an overt act in furtherance of the conspiracy and

(iii) specific intent to monopolize.

Analysis of the conspiracy or combination in this offence is done on the same principles that govern conspiracies in restraint of trade cases under Section 1 of the Sherman Act. However, this has to be distinguished from the concept of 'Shared Monopoly' or 'joint monopolisation' under which a group of firms that collectively possess monopoly power can be found liable for joint monopolisation, has been rejected by the US Courts[75]

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[74]Spectrum Sports, Inc. v. McQuillan 113 S.Ct. 884, 890-91 (1993). In order to determine whether there is a dangerous probability of monopolisation, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.

[75]United States v. Yellow Cab Co., 332 U.S. 218 (1947), Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145 (9th Cir. 2003)

Anticompetitive Conduct

Exclusionary or anticompetitive conduct is an essential requirement in establishing both monopolisation and attempted monopolisation cases. The cases of anticompetitive conduct may involve refusal to deal, vertical agreements, sham litigation, bundled and royalty rebates, predatory pricing, tying arrangements, market allocation, and other cases like unfair and malicious business tactics. Unlike EU, US does not have a readymade list of anticompetitive conduct and has to be read from the decisions of the Courts. Some of these cases can be discussed as follows:

Vertical Restraints: While vertical restraints conduct are generally examined under Section 1 of the Sherman Act (anti-competitive agreements or agreements in restraint of trade), vertical restrictions have also been examined under Section 2 violation in cases of refusal to deal with "disloyal" customers or suppliers, exclusive dealing, tying, bundled pricing, and most favoured customer clause.

In United Shoe Machinery Case, the court held that the defendant violated Section 2 by offering certain shoe manufacturing equipment only pursuant to a 10-year leases that discouraged customers from switching to the defendant's competitors. It was found in this case that the long-term leases impeded competitor access to customers more than outright sales because a customer who purchased the machinery could sell it in the secondary market and then turn to another supplier, whereas a customer subject to a long-term lease had no practical way of switching to a competitor during the term of the lease. In fact, the term of the lease provided for penalties for customers terminating the lease early.

While the monopolisation cases in US are dealt with under section 2 of the Sherman Act, Section 5 of the FTC Act, which is administrative in nature, has also been enforced in cases of abuse of dominance cases on the grounds of "unfair methods of competition" which has been compared by authors to the concept of 'unfairness' present in Article 102 of EU[76].

[76] WilliamKovacic, 'Article 102 TFEU: The case for a remedial enforcement model along the lines of Section 5 of the Federal Trade Commission Act', Concurrences: Competition Law Journal, 1-2013 pp. 54-61

CHAPTER IV

ENFORCEMENT OF COMPETITION LAW IN INDIA

India has some unique features including a mixed economy, where private sector participation has been allowed in some public sector undertakings. In addition, some of its markets have recently opened up resulting in foreign direct investment in various permitted sectors. Eventually, it is envisaged that the old practise of state-protection to companies will vanish, giving way to a more open, independent way of working for each enterprise.

On the other hand, the US had a free economy from the start. In fact, their problems were reining in the anti-competitive conduct of big business. The EU is also largely a group of developed countries and their objective has been to bring about a single common market. The point is that those countries did not have to experience the kind of transition that is taking place in India, and readjust to the changed business environment and the introduction of regulatory mechanism to protect competition in the market. It is this changing situation that the Competition Act is to commence its operation. This requires that reorientation in outlook is necessary not only for the government but for business also.

The Act, patterned largely on the EU model has to be worked to assess its appropriateness to the country's present scene. A further opening up of markets in new sectors would invite more entrepreneurs who would demand an effective law relating to competition and one under which they are not discriminated against. More than the set of sections prescribing the substantive law, what is necessary to make the Act serve the intended purpose would be effective and consistent enforcement.

Enforcement mechanism in India

The main objective of competition policy is to promote efficiency and maximise welfare. The ultimate goal of competition is the interest of the consumer. The consumer's right to free and fair competition

cannot be denied by any other consideration. Hence for ensuring this right of the consumer there is a need of supportive institutions to strengthen a competitive society notably, adequate spread of information throughout the market, free and easy communication and ready accessibility of goods[77] and this are the institutions responsible for enforcement of Competition law in India. In India basically there are three enforcement institutions namely:

(1) Competition Commission,

(2) Director General and

(3) Competition Appellate Tribunal.

Competition Commission of India

CCI is an expert body which functions as a regulator for preventing anti-competitive practices in the country and also have advisory and advocacy functions. CCI is a quasi-judicial and corporate body. The commission consists of a chairperson and not less than two and not more than six other members appointed by central government.[78]Competition Commission of India and its operations:

Acts taking place outside India but having an effect on Competition in India –

Section 32 of Act authorises CCI to "inquire" for acts taking place outside India but having an effect on competition in India. The Commission shall have power to inquire into agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on Competition into the relevant market in India and pass such order as it deems fit.[79]

Synergised relationship between the sectoral regulators and Competition Commission of India –

The jurisdiction of Competition Act extends to all the sectors of the economy and sector regulated by sector specific laws. Hence within the purview of the Act the CCI can make

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[77] Paul A. Samuelson & William A. Nordhaus: Economic, 16th Ed. 1998, p 54, (Tata McGraw – Hill Publication Co. Ltd., New Delhi).

[78] Section 8(1) of the Competition Act.

[79] Sections 19, 20, 26, 29 and 30 of the Competition Act

reference to a statutory authority or receive reference from statutory authority. Further wherein course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or propose to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority can make a reference in respect of such issue to the commission[80]. The statutory authority can also make the reference suo motu to Commission.[81]

Commission has power despite other laws –

The provisions of the Act are having an overriding effect over any other law[82]. Further the jurisdiction of civil courts is barred in respect of those cases where CCI and CAT are having jurisdiction.[83]

Inquiry into certain agreements and dominant position of enterprise –

The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on receipt of any information, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or a reference made to it by the Central Government or a State Government or a statutory authority. The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3 and section 4 shall have due regard to factors mentioned in Section 19.

Inquiry into Combination by Commission –

The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India. However the Commission shall not initiate any inquiry under this sub-section after the

[80] Section 21(1)of the Competition Act
[81] Section 21(2) Proviso of the Competition Act
[82] Section 60 of the Competition Act
[83] Section 61 of the Competition Act

expiry of one year from the date on which such combination has taken effect. For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall take into consideration all or any of the factors mentioned in Section 20.

Commission has powers of civil court –

The commission shall have, for the purpose of discharging its functions under this Act, the same power as are vested in a civil court under CPC, 1908, while trying suits in respect of following matters[84] namely summoning and enforcing summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of documents; receiving evidence on affidavit; issuing commissions for the examination of witnesses or documents; subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such of record or document from any office.

Penalties

The Competition Commission has vast powers in relation to anti-competitive agreements and abuse of dominant positions. If the commission concludes that there is an anti-competitive agreement which has caused or is likely to cause an appreciable adverse effect on competition within India, or that any enterprise has abused its dominant position in the market, it may pass all or any of the following orders:

- a cease and desist order, which directs the parties involved in such agreement or abuse of a dominant position to discontinue acting upon such agreement and not to re-enter such agreement, or to discontinue such abuse of a dominant position, as the case may be;
- an order which imposes a monetary penalty, as deemed fit but that does not exceed 10% of the average turnover for the last three preceding financial years, on each party to the agreement or abuse. Provided that in case any agreement referred to in Section 3 has been entered into by a cartel, the commission may impose on each producer, seller,

[84] Section 36(2) of the Competition Act

distributor, trader or service provider included in that cartel a penalty of up to three times its profit for each year of the continuance of such agreement or 10% of its turnover for each year that it continues such agreement, whichever is higher;

- an order that directs that the agreement must stand modified to the extent and in the manner that may be specified in the order;
- an order that directs compliance with its orders and directions, including payment of costs;[85]
- an order that directs the division of an enterprise that is abusing its dominant position to ensure that it can no longer abuse its dominance; and
- any other order or direction as the commission deems fit.[86]

Execution of orders of commission imposing monetary penalty –

In the event that a party fails to pay monetary penalty imposed by Competition Commission, the same can be recovered as specified under regulations to be made by Commission. The penalty can also be recovered in accordance with provisions of Income-Tax Act by making reference to concerned income tax authority.

Compensation in case of contravention of orders of Commission –

In the event that any person suffers any loss or damage if an enterprise violates directions given by Commission or contravenes decision or order of Commission, the aggrieved person can make application to CAT for compensation. Thus compensation can be awarded only by CAT and not by CCI.

Penalty for not giving notice under Section 6(2) –

In the event that any person or enterprise, who or which proposes to enter into a combination fails to give notice to the Commission under Section 6(2) of the Act, the Commission shall

[85] Section 27 of the Competition Act.
[86] Section 28 of the Competition Act.

impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of the combination.[87]

Penalty for failure to comply with directions of Commission and Director General –

In the event that any person fails to comply with a direction given by Commission under Sections 36(2) and 36(4) or by the Director General while exercising powers of investigation referred to in Section 41(2), CCI shall impose on such person a penalty of rupees one lakh for each day during such failure continues.

Penalty for making false statement or omission to furnish material information –

If any person, being party to a combination, makes a statement which is false in any material particular or knowing it to be false or omits to state any material particular, knowing it to be material, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to rupees one crore, as may be determined by Commission.

Lesser penalty if full disclosure made, in case of cartel –

The Commission may, if satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to violated section 3, has made a hill and true disclosure in respect of the alleged violations and such disclosure is vital, impose a lesser penalty as it may deem fit than leviable under this Act or the rules or regulations.[88]

Apart from this Commission may call upon experts from the field of economics, commerce, accountancy, international trade or any other discipline to assist commission in the conduct of inquiry before it.[89] CCI can pass final order as well as interim order.[90]However it cannot review its own order it can only rectify it.[91]

[87] Section 43A of the Competition Act
[88] Section 46 of the Competition Act
[89] Section 17(3) of the Competition Act
[90] Section 33 of the Competition Act
[91] Section 38 of the Competition Act

Director General

Appointment and Function of Director General:

The Central Government shall appoint a Director General for assisting CCI in conducting inquiry into contravention of any provisions of the Act or to perform other functions as provided by or under the Act.[92] The director shall, when so directed by the commission, assist the Commission investigating into any contravention of the provisions of this Act or any rules or regulations made there under. The Additional, joint, Deputy and Assistant Director General or such officers or other employees so appointed shall exercise his powers and discharge his functions, subject to the supervision and direction of the Director General. The Director-General shall have all powers as are conferred upon the commission under section 36(2).[93]

Competition Appellate Tribunal

Formation and Functioning of CAT:

Earlier when Competition Act 2002 was enacted there was no mention of Competition Appellate Tribunal. It was only after the filing of case Brahm Dutt v. Union of India[94] the Competition (Amendment) Act 2007 provided for the establishment of CAT. It is a quasi judicial body and consists of Chairperson and not more than two other members appointed by Central Government. The Chairperson shall be person who is or has been judge of S.C or C.J of H.C. Member of CAT shall be a person of ability, integrity and standing and who has special knowledge of and professional experience of not less than 25 years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public, affairs, administration or in any other matter which, in the opinion of the C.G, may be useful to the appellate tribunal.

The proceedings before CAT are deemed to be judicial proceedings. Appeal against the order of the CCI can be filed before CAT and provisions with respect to the same are provided in Sections 53A to 53U. The CAT will hear and dispose of appeals against order of CCI and adjudicate claims for compensation and pass orders for recovery of compensation. The compensation can be claimed under Section 42A or 52Q(2) of the Competition Act. The

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[92] Section 16(1) of the Competition Act

[93] Section 41(3) of the Competition Act

[94] AIR 2005 SC 730

appeal can be filed by C.G, S.G or enterprise or any person who is aggrieved by decision, direction or order of CCI. Appeal should be filed within 60 days. The tribunal will give opportunity of hearing to other party and then will pass the order. Copy of order will be sent to the parties to appeal and CCI. CAT can review its own decisions. In case of contraventions of CATS order without reasonable grounds, punishment of imprisonment up to 3 yrs and penalty up to Rs. 1 crore can be imposed by CMM, Delhi. Appeal against CATS order can be made to S.C within 60 days.

ENFORCEMENT MECHANISM OF COMPETITION LAW IN US

USA has a very old history of competition law enforcement. In USA the law and the procedure relating to competition law is called anti-trust law. In United States of America, The Sherman Act, 1890, The Clayton Act, 1914 and The Federal Trade Commission Act, 1914 are the major Acts which are enacted to address formation of cartels, collusion, restraint of trade and other practices which are anticompetitive in nature. The US Department of Justice (USDOJ) and the Federal Trade Commission (FTC) are the main bodies which are given the task of enforcement of anti-trust laws and adjudicate disputes relating to competition law in USA. The former is part of the executive branch of the government and the latter is an independent administrative agency, similar to the CCI. The Sherman Act, 1890, The Clayton Act, 1914 and The Federal Trade Commission Act, 1914 are the main statutes which grant the power to FTC and USDOJ to enforce the laws. Sherman Act is the oldest federal antitrust statute, enacted in 1890 and deals primarily with anti-competitive agreements and monopoly exercised by firms. The Clayton Act, 1914 deals with specific business practices including mergers, price discrimination and tying, exclusive supply etc. The DoJ and FTC independently enforce the Sherman Act and the Clayton Act. However, if the violation entails criminal prosecution, then the DoJ has the exclusive authority to prosecute.

In USA, the following statutes prohibit anti-competitive agreements:-

1. **Sherman Act**: Section 1 prohibits agreements that constitute restraints of trade[95] if they are on balance anti-competitive. The agreement can also be challenged under section 2 if the party allegedly indulging in anti-competitive practice has monopoly power and if the agreement anti competitively helps obtain or maintain such monopoly power.

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[95] Standard oil company case One of the more well known trusts was the Standard Oil Company; John D. Rockefeller in the 1870s and 1880s had used economic threats against competitors and secret rebate deals with railroads to build what was called a monopoly in the oil business, though some minor competitors remained in business. In 1911 the Supreme Court agreed that in recent years (1900–1904) Standard had violated the Sherman Act (see Standard Oil Co. of New Jersey v. United States). It broke the monopoly into three dozen separate companies that competed with one another, including Standard Oil of New Jersey (later known as Exxon and now ExxonMobil), Standard Oil of Indiana (Amoco), Standard Oil Company of New York (Mobil, again, later merged with Exxon to form ExxonMobil), of California (Chevron), and so on. In approving the breakup the Supreme Court added the "rule of reason": not all big companies, and not all monopolies, are evil; and the courts (not the executive branch) are to make that decision. To be harmful, a trust had to somehow damage the economic environment of its competitors.

Section 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. **Federal Trade Commission Act**: Section 5 of the Federal Trade Commission Act prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce. The Federal Trade Commission can challenge a vertical anticompetitive agreement under this provision.

Section 5(a) of the FTC Act provides that "**unfair or deceptive acts or practices** in or affecting commerce are declared unlawful." 15 U.S.C. Sec. 45(a)(1). Safe Web clarified that "unfair or deceptive acts or practices" in Section 5(a) include such acts or practices involving foreign commerce that cause or are likely to cause reasonably foreseeable injury within the United States or involve material conduct occurring within the United States.[96]

"Deceptive" practices are defined in the Commission's Policy Statement on Deception as involving a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances. An act or practice is "unfair" if it "causes or is likely to cause **substantial injury** to consumers which is **not reasonably avoidable** by consumers themselves and **not outweighed by countervailing benefits** to consumers or to competition."[97]

[96] 15 U.S.C. Sec. 45(a)(4)(A)

[97] 15 U.S.C. Sec. 45(n).

Section 5(a) of the FTC Act, 15 U.S.C. Sec. 45(a), prohibits, *inter alia*, "unfair methods of competition." **Unfair methods of competition** include any conduct that would violate the Sherman Antitrust Act or the Clayton Act. Among other things, the Clayton Act prohibits corporate **acquisitions that may substantially lessen competition[98]** and also bars certain forms of price discrimination[99] .

3. **Clayton Act**: Under Section 3 of this Act it is unlawful for any person to lease or make a sale of goods is made so as to substantially lessen competition or tend to create a monopoly in any line of commerce. The Act basically stipulates two requirements:-

a) Sales or discounts of goods that are conditional on the purchaser not dealing with rivals and

b) Proof that their effect may be to substantially lessen competition.

4. **Robinson-Patman Act**: This is a US Federal Law that prohibits what were considered, at the time of passage, to be anticompetitive practices by producers, specifically price discrimination. It grew out of practices in which chain stores were allowed to purchase goods at lower prices than other retailers. The Act provided for criminal penalties, but contained a specific exemption for co-operatives. In general, the Act prohibits sales that discriminate in price on the sale of goods to equally-situated distributors when the effect of such sales is to reduce competition. The seller may not throw in additional goods or services. Injured parties or the US government may bring an action under the Act. The Anti-trust laws prohibit agreements in restraint of trade, monopolization and attempted monopolization, anticompetitive mergers and tie-in schemes, and, in some circumstances, price discrimination in the sale of commodities. In Technip S.A vs SMS Holding Pvt Ltd[100] court observed that the term covers an understanding as well as an agreement, and an informal as well as a formal arrangement which leads to the purchase of shares to acquire control of a company. 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[101]. It has been a contentious issue as to what constitutes an agreement to come within

[98] (Section 7, 15 U.S.C. Sec. 18)

[99] (Section 2 of the Robinson Patman Act, 15 U.S.C. Secs. 13-13b).

[100] (2005) 5 SCC465

[101]United states vs General Motors 384 US 127

the ambit of competition enquiry. Further, 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 is sufficient that the parties to the agreement have expressed their joint intention to conduct themselves in the market in a specific manner. Anti-competitive agreements among competitors, such as price fixing and customer and market allocation agreements are typical types of restraints of trade prescribed by the antitrust laws. These type of conspiracies are considered pernicious to competition and are generally prescribed outright by the antitrust laws. Resale price maintenance by manufacturers is another form of agreement in restraint of people working together. Other agreements that may have an impact on competition are generally evaluated using a balancing test, under which legality depends on the overall effect of the agreement

Federal Trade Commission

The Federal Trade Commission was created in 1914. Initially the job of FTC was to take care of anti-competitive activities within the country. Every commercial activity in the country was in the form of trust and the activities which ended in restraint of trade were designated to be anti-trust. Over the years, Congress passed additional laws giving the agency greater authority to police anticompetitive practices. In 1938, Congress passed a broad prohibition against "unfair and deceptive acts or practices." A number of other legislations were passed in USA over a period of time and the effects doctrine given more emphasis so that the FTC could address anti-trust issues occurring in other parts of the world but having effect in the USA.

US Department of Justice

The US Department of Justice was created on 1st July, 1840. It has been established for enforcement of the law and administration of justice. The head of the Antitrust Division is an Assistant Attorney General for Antitrust (AAG-AT) appointed by the President of the United States.

Enforcement of United States Antitrust Law

In the United States, there are both state and federal antitrust laws. Enforcement of these laws takes three forms:

1. First, the federal government, via both the Antitrust Division of the United States Department of Justice and the Federal Trade Commission, can bring civil lawsuits enforcing the laws. The United States Department of Justice alone may bring criminal antitrust suits under federal antitrust laws. Perhaps the most famous antitrust enforcement actions brought by the federal government were the break-up of AT & T's local telephone service monopoly in the early 1980s and its actions against Microsoft in the late 1990s.
2. Second, state attorneys general may file suits to enforce both state and federal antitrust laws.
3. Third, private civil suits may be brought, in both state and federal court, against violators of state and federal antitrust law.

Abuses of dominance are conducts by dominant undertakings intended to maintain or increase their dominant position in an anti-competitive way. Like vertical agreements, the unlawfulness of abusive behaviour cannot be easily identified, thus, enforcement actions by public or private parties require the expenditure of considerable amounts of resources in the detection of these anti-competitive practices. As with vertical agreements, private parties normally have some expertise about the industry, in addition, in cases where the private plaintiffs are directly connected with the infringement –business partners- these may have an information advantage in comparison with public authorities. However, since this type of anti-competitive behaviour require high degree of expertise to delineate the market and determine the dominance of the defendant, public authorities may be better suited to investigate cases related with the abuse of a dominant position.

TREBLE DAMAGES

Federal antitrust laws, as well as most state laws, provide for **treble damages** (triple the amount of actual damages) against antitrust violators in order to encourage private lawsuit enforcement of antitrust law. Thus, if a company is sued for monopolizing a market and the jury concludes the conduct resulted in consumers' being overcharged $200,000, that amount

will automatically be tripled, so the injured consumers will receive $600,000. The United States Supreme Court summarized why Congress authorized private antitrust lawsuits in the case Hawaii v Standard Oil Co. of Cal, where in it was held that; "Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigour, and strong competition depends, in turn, on compliance with antitrust legislation.

In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as "private attorneys general." Additionally, the federal government also reviews potential mergers to attempt to prevent market concentration. As outlined by the Hart –Scott-Radino Antitrust Improvement Act, larger companies attempting to merge must first notify the Federal Trade Commission and the Department of Justice's Antitrust Division prior to consummating a merger. These agencies then review the proposed merger first by defining what the market is and then determining the market concentration using the Herfindahal –Hrischman Index (HHI)[102] and each company's market share. The government looks to avoid allowing a company to develop market power, which if left unchecked could lead to monopoly power.

INTERNATIONAL AGENCIES

Competition law has already been substantially internationalized along the lines of the US model by nation states themselves; however the involvement of international organizations has been growing. Increasingly active at all international conferences are the United Nations Conference on Trade and Development (UNCTAD)[103] and the Organization for Economic

[102] The Herfindahl index is a measure of the size of the firm in relation to the industry and an indicator of the amount of competition among them.

[103] The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a permanent intergovernmental body. It is the principal organ of the United Nations General Assembly dealing with trade, investment, and development issues. The organization's goals are to "maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis." (from official website). The creation of the conference was based on concerns of developing countries over the international market, multi-national corporations, and great disparity between developed nations and developing nations.

Cooperation and Development (OECD)[104], which is prone to making neo-liberal recommendations about the total application of competition law for public and private industries. Office of Fair Trading Director and Professor Richard Whish wrote skeptically that it "seems unlikely at the current stage of its development that the WTO will metamorphose into a global competition authority." International competition agencies are also likely to become more efficient and competent with greater co-operation. “At the investigation stage, beneficial co-operation could include assistance in (or joint) evidence gathering, exchanging information, discussing common issues, one agency deferring to another, and so on. If a case goes forward, co-operation might involve parallel proceedings or one agency deferring to another, joint settlement discussions with a multinational enterprise, co-ordination with respect to remedies sought, and so on.”

Extra territorial application and enforcement of US Competition Law

World problem needs world solution. The main U.S. antitrust statute, the Sherman Act, is a criminal statute in that violations of it are criminal offences. However, it can also be enforced through private action. Because the Sherman Act dates from 1890 its extraterritoriality reach inevitably became an issue before the EEC[European Economic Community] even existed. The ‘Effects Doctrine’ propounded on the US courts has provided the central concept around which the discussion of extraterritoriality in competition law is usually conducted.
Two points about US law should be noted at the outset. First, there is a multiplicity of actors in US antitrust law. The federal agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are not decision makers as is the European Commission as antitrust law is enforced in the ordinary courts. The Sherman, Clayton and FTC Acts all apply to commerce with the foreign nations . The origin of modern competition policy can be traced back to the end of the 19th century, mainly as a reaction to the formation of trusts in the United

[104] The Organization for Economic Co-operation and Development (OECD) is a Paris-based international economic organization of 30 countries. Most OECD members are high-income economies with a high Human Development Index (HDI) and are regarded as developed countries. It originated in 1948 as the Organization for European Economic Co-operation (OEEC), led by Robert Marjolin of France, to help administer the Marshall Plan for the reconstruction of Europe after World War II. Later, its membership was extended to non-European states. In 1961, it was reformed into the Organization for Economic Co-operation and Development by the Convention on the Organization for Economic Co-operation and Development

States[105]. The Sherman Act debates began in 1888. The United States has two agencies enforcing competition law on the national level[106]. The interrelation of trade and competition is increasingly becoming a subject for the international trading community. The Kodak-Fuji dispute[107] between the United States and Japan exemplifies the problem of conflict in competition law. In this case, the United States attempted to use Section 301 of the Trade Act of 1974 to address the Japanese distribution structure. The United States lost the dispute settlement procedure in the WTO. However, the United States apparently did not attenuate its pressure upon Japan to gain more market access for American film products in the Japanese film market. The case exemplifies the thorny issues pertaining to perceived private restraints and shows how unilateral action may lead targeted countries to feel that their sovereignty is at stake, which may give rise to unpleasant trade disputes. The issues pertaining to trade and competition and a number of pertinent antitrust cases are set out as a starting point. Harmonization, Co-operation and the principle of "Positive Comity" are assessed with a view to identifying possible solutions. While it is not intended that international competition regulation could or should replace trade rules, consideration is given to whether trade and competition policy share the same objectives. But while the former concentrate on tariff and non-tariff barriers to prima facie access, the latter focus on de facto equality of chances of success.

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[105] The 'trust' was originally a device by which several corporations engaged in the same general line of business might combine for their mutual advantage, in the direction of eliminating destructive competition, controlling the output of their commodity and regulating and maintaining its price, but at the same tome preserving their separate individual existence, and without any consolidation of any manufacturing industry. See; Massimo Motta, "COMPETITION POLICY: THEORY AND PRACTICE", Cambridge University Press, 2004, p.

[106] COMPETITION LAW TODAY, CONCEPTS, ISSUES AND THE LAW IN PRACTICE: THE EFFICIENT AND EFFECTIVE COMPETITION AUTHORITY", Oxford University Press, 2008, p. 215. Vinod Dhall (ed).Page 26 of 86

[107] WTO, Kodak-Fuji case, Panel Report of 5 Dec ember 1997, WTO-Doc.WT/DS44/R of 31 March 1998,www.wto.org/wto/dispute/distab.htm>; Garry n. Horlick and k. Kim Yong, Private Remedies for AntiCompetitive Barriers to Trade: The Kodak-Fuji Example, Int'l Bus. Law., (1996), p. 474.

Origin of Effects Doctrine:

The Effects Doctrine is applicable only when the action taken outside the Country has 'direct, substantial, and reasonably foreseeable' effects within the Country. Whether this Doctrine is against the spirit of International Law? In International Law there is no standard to determine the '**direct, substantial, and reasonably foreseeable' effects** within the Country'. Therefore, this Doctrine is not against the spirit of International Law. In the first half century following the enactment of the Sherman Act the US courts were diffident about applying the rules of extraterritoriality. Sherman Act and FTC Act jurisdiction may be asserted over export trade and purely extraterritorial foreign trade activity only if the defendant's conduct has a direct, substantial and reasonably foreseeable effect on trade of a person engaged in U.S. export trade. Not surprisingly, the extraterritorial application of US antitrust laws met with hostility from other States.

In Timberlane[108] the Ninth Circuit Court of Appeals considered the notion of 'international comity' in this context. 'Comity' means living peacefully with other nations in mutual respect and accommodating their interests or, as one authority puts it, the 'rules of politeness, convenience and goodwill observed by States in their mutual intercourse without being legally bound by them[109]. The so-called effects doctrine has gained more and more support internationally throughout the last 20 or 30 years. Following the initial Alcoa decision of the US Court for the 2nd Circuit[110], it has specifically been approved by the US Supreme Court[111]and, in the 1950s, by the German legislature in what is now Section 130 (2) of the German Act against Restraints on Competition[112].

After a long period of hesitation, Commonwealth countries such as the United Kingdom, Australia and New Zealand have adopted statutory rules to the same effect and this is also true for many European states including France, Italy, Denmark, and Poland. Sweden and Switzerland. In South-America there is evidence in Argentina, Brazil and Chile of the recognition of the effects doctrine.

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108 Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).
109 Oppenheim's International Law (ed. R.Y. Jennings and A. Watts) (9th edn),I, 34 n.1. Page 27 of 86
110 U. S. v. Aluminium Co. of America, 148 F. 2d 416 (2nd Cir. 1945)
111 Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 = 125 L. Ed. 2d. 612, 638 (1993).
112 Section 130 (2) of the German Act against Restraints on Competition (GWB) reads as follows: "This Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act.".

In practice, the enforcement of the respective competition statutes may differ in the various countries mentioned above. But there is general agreement that the national competition statute applies to anti-competitive conduct if it has direct, substantial and foreseeable domestic effects. Until about 20 years ago there were many countries which held the effects doctrine to be in conflict with public international law and in particular with the principles of territoriality and non-intervention. This objection has faded away.

THE ENFORCERS UNDER US COMPETITION LAW

Antitrust Enforcement – Multiple Enforcers

- Department of Justice Antitrust Division (DOJ) – criminal and civil
- Federal Trade Commission (FTC) – civil (refers criminal cases to DOJ)
- State Attorney Generals (under federal law and analogous state laws)
- Private Plaintiffs – individual plaintiffs and class actions, under federal and state laws
- Foreign Enforcers – 100+ foreign jurisdictions now have similar laws

The Federal Government

Both the FTC and the U.S. Department of Justice (DOJ) Antitrust Division enforce the federal antitrust laws. In some respects their authorities overlap, but in practice the two agencies complement each other. Over the years, the agencies have developed expertise in particular industries or markets. For example, the FTC devotes most of its resources to certain segments of the economy, including those where consumer spending is high: health care, pharmaceuticals, professional services, food, energy, and certain high-tech industries like computer technology and Internet services. Before opening an investigation, the agencies consult with one another to avoid duplicating efforts. In this guide, "the agency" means either the FTC or DOJ, whichever is conducting the antitrust investigation.

Premerger notification filings, correspondence from consumers or businesses, Congressional inquiries, or articles on consumer or economic subjects may trigger an FTC investigation. Generally, FTC investigations are non-public to protect both the investigation and the individuals and companies involved. If the FTC believes that a person or company has violated the law or that a proposed merger may violate the law, the agency may attempt to obtain

voluntary compliance by entering into a consent order with the company. A company that signs a consent order need not admit that it violated the law, but it must agree to stop the disputed practices outlined in an accompanying complaint or take certain steps to resolve the anticompetitive aspects of its proposed merger.

If a consent agreement cannot be reached, the FTC may issue an administrative complaint and/or seek injunctive relief in the federal courts. The FTC's administrative complaints initiate a formal proceeding that is much like a federal court trial but before an administrative law judge: evidence is submitted, testimony is heard, and witnesses are examined and cross-examined. If a law violation is found, a cease and desist order may be issued. An initial decision by an administrative law judge may be appealed to the Commission.

Final decisions issued by the Commission may be appealed to a U.S. Court of Appeals and, ultimately, to the U.S. Supreme Court. If the Commission's position is upheld, the FTC, in certain circumstances, may then seek consumer redress in court. If the company violates an FTC order, the Commission also may seek civil penalties or an injunction.

In some circumstances, the FTC can go directly to federal court to obtain an injunction, civil penalties, or consumer redress. For effective merger enforcement, the FTC may seek a preliminary injunction to block a proposed merger pending a full examination of the proposed transaction in an administrative proceeding. The injunction preserves the market's competitive status quo.

The FTC also may refer evidence of criminal antitrust violations to the DOJ. Only the DOJ can obtain criminal sanctions. The DOJ also has sole antitrust jurisdiction in certain industries, such as telecommunications, banks, railroads, and airlines. Some mergers also require approval of other regulatory agencies using a "public interest" standard. The FTC or DOJ often work with these regulatory agencies to provide support for their competitive analysis.

ENFORCEMENT UNDER FTC

A. Administrative Enforcement of Consumer Protection and Competition Laws

In the administrative process, the Commission determines in an adjudicative proceeding whether a practice violates the law. Under Section 5(b) of the FTC Act, the Commission may challenge "unfair or deceptive acts or practices," "unfair methods of competition," or violations of other laws enforced through the FTC Act, by instituting an administrative adjudication. When the Commission has "**reason to believe**" that a law violation has occurred, the Commission may issue a complaint setting forth its charges. If the respondent elects to settle the charges, it may sign a consent agreement (without admitting liability), consent to entry of a final order, and waive all right to judicial review. If the Commission accepts the proposed consent agreement, it places the order on the record for thirty days of public comment (or for such other period as the Commission may specify) before determining whether to make the order final.

For violations of the Clayton Act, Section 11 of the Clayton Act, 15 U.S.C. Sec. 21, parallels Section 5(b) of the FTC Act in authorizing administrative adjudication.

1. **Administrative Adjudication**

If the respondent elects to contest the charges, the complaint is adjudicated before an administrative law judge in a trial-type proceeding conducted under the Commission's Rules of Practice. The prosecution of a matter is conducted by FTC "complaint counsel," who are staff from the relevant bureau or a regional office. Upon conclusion of the hearing, the Administrative law judge issues an "initial decision" setting forth his or her findings of fact and conclusions of law, and recommending either entry of an order to cease and desist or dismissal of the complaint. Either complaint counsel or respondent, or both, may appeal the initial decision to the full Commission. In limited cases, including certain merger cases, the Commission's rules provide that the appeal is automatic.

Upon appeal of an initial decision, the Commission receives briefs, holds oral argument, and thereafter issues its own final decision and order. The Commission's final decision is appealable by any respondent against which an order is issued. The respondent may file a petition for review with any United States court of appeals within whose jurisdiction the respondent resides or carries on business or where the challenged practice was used. FTC Act Section 5(c), 15 U.S.C. Sec. 45(c). If the court of appeals affirms the Commission's order, the court enters its own order of enforcement. The party losing in the court of appeals may seek review by the Supreme Court. Commission decisions and orders are available on this site.

2. **Enforcing Final Commission Orders**

A Commission order (except an order to divest assets) generally becomes final (i.e., binding on the respondent) 60 days after it is served, unless the order is stayed by the Commission or by a reviewing court. Divestiture orders become final after all judicial review is complete (or if no review is sought, after the time for seeking review has expired). If a respondent violates a final order, it is liable for a civil penalty for each violation. FTC Act Section 5(l), 15 U.S.C. Sec. 45(l). The penalty is assessed by a federal district court in a suit brought to enforce the

Commission's order. The court may also issue "mandatory injunctions" and "such other and further equitable relief" as is deemed appropriate.

3. **Redress After an Administrative Order is Entered**

In addition (after all judicial review of its order is complete), the Commission may seek consumer redress from the respondent in federal district court for consumer injury caused by the conduct that was at issue in the administrative proceeding. In such a suit, which lies under Section 19 of the FTC Act, 15 U.S.C. Sec. 57b, the Commission must demonstrate that "a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent."

4. **Civil Penalty Enforcement Against Non-Respondents in Consumer Protection Matters**

Where the Commission has determined in a litigated administrative adjudicatory proceeding that a practice is unfair or deceptive and has issued a final cease and desist order, the Commission may obtain civil penalties from non-respondents who thereafter violate the standards articulated by the Commission. To accomplish this, the Commission must show that the violator had "actual knowledge that such act or practice is unfair or deceptive and is unlawful" under Section 5(a)(1) of the FTC Act. FTC Act Section 5(m)(1)(B), 15 U.S.C. Sec. 45(m)(1)(B). To prove "actual knowledge," the Commission typically shows that it provided the violator with a copy of the Commission determination about the act or practice in question, or a "synopsis" of that determination.

B. Judicial Enforcement

Even where the Commission determines through adjudication that a practice violates consumer protection or competition law, the Commission must still seek the aid of a court to obtain civil penalties or consumer redress for violations of its orders to cease and desist or trade regulation rules (discussed below). In this section, we discuss the Commission's ability to challenge a practice directly in court, without first making a final agency determination that the challenged conduct is unlawful.

Section 13(b) of the FTC Act[113], authorizes the Commission to seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission." Whenever the Commission has "reason to believe" that any party "is violating, or is about to violate" a provision of law enforced by the Commission, the Commission may ask the district court to enjoin the allegedly unlawful conduct, pending completion of an FTC administrative proceeding to determine whether the conduct is unlawful. Further, "in proper cases," the Commission may seek, and the court may grant, a permanent injunction.

The Commission makes widespread use of the permanent injunction proviso of Section 13(b) in its consumer protection program. In doing so, the Commission may seek not only permanent injunctions that bar unfair or deceptive practices, but also imposition of various kinds of monetary equitable relief (i.e., restitution and rescission of contracts) to remedy past violations. In some cases, the Commission may also seek to preserve the possibility of ultimate monetary

[113] 15 U.S.C. Sec. 53(b)

equitable relief, by obtaining temporary restraining orders and preliminary injunctions that freeze assets and impose temporary receivers.[114]

In the competition context, the Commission has used Section 13(b) primarily to obtain preliminary injunctive relief against corporate mergers or acquisitions pending completion of an FTC administrative proceeding. In addition, in some circumstances, the Commission may obtain permanent injunctive relief, as well as disgorgement of unjust enrichment, restitution for injury suffered by consumers[115]

DOJ

Antitrust – Civil and Criminal

Enforces Sherman and Clayton Acts against

- agreements in restraint of trade
- monopolization
- mergers and acquisitions the effect of which may be to substantially lessen competition

FTC

Antitrust – Civil only

- Enforces FTC Section 5 (which prohibits "unfair methods of competition") against conduct which violates the Sherman Act, and the Clayton Act
- Debate over scope of Section 5 beyond other antitrust laws

Consumer Protection

[114] See, e.g., FTC v. U.S. Oil & Gas Corp., 748 F.2d 1431, 1432-35 (11th Cir. 1984) (per curiam); FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1110-13 (9th Cir. 1982).

[115] (e.g., the refund of overcharges attributable to price-fixing) or other appropriate equitable remedies. See, e.g., FTC v. Cephalon, Inc., 100 F. Supp. 3d 433, 437-41 (E.D. Pa. 2015); FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 35-37 (D.D.C. 1999).

- Enforces FTC Act Section 5 (which prohibits “unfair or deceptive acts or practices”) and numerous specific statutes
- Advertising, marketing, privacy

States

State attorneys general can play an important role in antitrust enforcement on matters of particular concern to local businesses or consumers. They may bring federal antitrust suits on behalf of individuals residing within their states ("parens patriae" suits), or on behalf of the state as a purchaser. The state attorney general also may bring an action to enforce the state's own antitrust laws. In merger investigations, a state attorney general may cooperate with federal authorities. For more information on joint federal-state investigations, consult the Protocol for Coordination in Merger Investigations.

Private Parties

Private parties can also bring suits to enforce the antitrust laws. In fact, most antitrust suits are brought by businesses and individuals seeking damages for violations of the Sherman or Clayton Act. Private parties can also seek court orders preventing anticompetitive conduct (injunctive relief) or bring suits under state antitrust laws. Individuals and businesses cannot sue under the FTC Act.

Issues of International Jurisdiction

U.S. and foreign competition authorities may cooperate in investigating cross-border conduct that has an impact on U.S. consumers. For more information on the application of U.S. antitrust laws to businesses with international operations, consult the Antitrust Guidelines For International Enforcement and Cooperation. In addition, as more U.S. companies and consumers do business overseas, federal antitrust work often involves cooperating with international authorities around the world to promote sound competition policy approaches. There are now more than 130 foreign competition agencies. For more information on the agency's work with these authorities, visit the Office of International Affairs web pages.

SUGGESTIONS

With the change in the International economic environment the competition standards of the country also changes. Society is not static and hence for a dynamic society the law must also be dynamic. Our Competition Act of 2002 though has tried its level best to curb the anti competitive arrangements in our country but as of now it has not succeeded in it. Hence our competition Act requires few amendments in it to satisfy the present scenario of competition in market some of them are as follows:

- The inclusion of concept of Commitments in the Competition Act would amounts to saving of time of the Commission.
- Though Commission itself consist of Experts but Setting up of an independent Advisory Committee would help in proper functioning of the Commission.
- it is suggestive that the CCI should take into account the unique features of the e-commerce sector such as rapid technological advancement, increasing returns, network effects, data collected from the users while analysing the position of dominance and abuse.
- The concept of privileged communication as provided under Section 30 of the U.K Competition Act is also not included in the Indian Competition Act. This non inclusion can affect the right of the undertakings or legal or natural persons who are undergoing investigation.
- In India there is no framework for coordination between the sectoral regulations and the Competition Commission of India. In such situations businesses are afraid that in such instances there may be conflicting directions from different regulators.
- The CCI should also employ the essential facilities doctrine for mandating compatibility between a dominant player and the other market operators. It can also be said that time has come for reviewing and amending the Competition regime to keep pace with the rapidly changing new economy.
- Further the Indian Competition Act does not talk about the concept of Professional Secrecy; this might also affect the rights of the individuals as well as undertakings.

Hence above were few of the amendments that if we make to our Competition Act it would become a comprehensive legislation which will function in the interest of the country as well as the concerned parties.

CONCLUSION

The role of competition law is to ensure that the process of competition in the market works efficiently. Given that competition benefits consumers, competition law in effect promotes consumer welfare. In principle therefore, competition authorities who enforce the law have to consider whether a business practice, conduct, or transaction, alters the dynamics of competition in the market, and as a result negatively affects consumer welfare.

APPROACH - India has followed a form-based approach in abuse of dominance cases. While there are instances when what can in effect be categorized as an effects-based approach has been used in both majority and minority opinions, the general acknowledgement is that the Competition Act 2002 has to be interpreted as suggesting a form-based approach when it comes to abuse of dominance. Given that India is a fast growing economy with an increasing role for the private sector, clear understanding of what constitutes a contravention of the competition law is very important. Innovation and the growth of the private sector will be stifled with regulatory uncertainty and this will in turn have a detrimental effect on economic growth and consumer welfare. Moreover, contrary to the traditionally held view, an effects-based approach will lead to a consistent and predictable regime - being grounded in economics, and it will allow for like practices being treated alike. Last on the issue of the ease of administration of a form-based approach, we believe that it is a flawed argument. It is not obvious that a case by case approach to determine the likely impact of a practice is difficult or impossible to administer as 24 economic science brings with it a set of rules and principles that bring in coherence to the administration of the law. Moreover, given that an effects-based analysis is readily undertaken in merger and acquisition assessment, it is safe to assume that a similar approach can easily be adopted by the CCI in undertaking abuse of dominance assessment as well.

DOMINANCE –The abuse of dominance is some way or the other is intruding with the competition in the changing demands of market place. In easy and clear terms it refers to the behavior of the undertaking which enjoys the dominant position, as per the Act. In actual sense dominant position means the authority or position of strength and superiority which is enjoyed by an undertaking enables it to perform independently of its competing forces which prevail in the relevant market. Such an undertaking or enterprise will be in a stature to ignore the market forces and unilaterally impose trading conditions, fix prices, etc. which is abusive and may result in the preventing any kind of competition, or the elimination of effective competition.

Some of the various kinds of abuse are: price fixing, imposing discriminatory pricing, predatory pricing, limiting supply of goods or services, denial of market access, etc Abuse of dominant position is an important part of the constitution of modern competition authorities. For developing country like India, competition authorities who are regulating through the Competition Law rules, it is recommendable to deal with “abuse of dominance” on a priority basis. This question is very relevant in case of India as

the Competition Commission of India has not yet started enforceable action yet on such a issue. Abuse of Dominant position cases should be taken up by authorities only if it has strong enforcement in. anti competitive agreement and mergers. The new kind of competition issues faced by the authorities which invariably are faced by developing countries where infrastructure development is a ultimate priority. Abuse of dominance remains a main thrust area in view as there is a close link between essential facilities and infrastructure facilities. Infrastructure facilities tend to qualify as very essential facilities for the application of competition Law in view of the lumpy investment involved and the long gestation lag in creating infrastructure. Besides, Dominance is to be determined by the Commission based on a number of factors which are either structural or behavioural in nature. The Act provides an exclusive list of abuses. It also takes cognizance of abuse by a "group "having dominant position in the relevant market. However, the relevant provision in the India law is distinct from the concept of "collective dominance "in EU law. The Indian law provides for effective and enforceable remedies against use of "abuse of dominant position" .

E-SECTOR DOMINANCE - it can be said that despite of the universality of problems of competition policy the Indian competition law can be said to have created enough space so as to allow the novel and creative organizations to enter the market and offer more options to the customers and organizations. Simultaneously, the interest of the traditional bricks and mortar companies is also being safeguarded by the competition regime as it seeks to provide protection from the harmful effects caused by the e-commerce firms. A check-and balance mechanism has also been brought into play in the e-commerce sector which prevents them from practising unfair pricing.

US COMPARISON - In conclusion it can be said that the history relating to working of the FTC and USDOJ suggest that the US Enforcement system had been very efficient to tackle cartels, abuse of dominance and anti-competitive mergers over the years. US had provided criminal sanctions and the enforcement mechanism had been adequate to create deterrent effect on the big corporations. The effects doctrine in USA also had allowed the enforcement branch to implement the provisions of the anti-trust laws in cross-border jurisdictions. The corporate leniency policy or the amnesty program had also been successful. Other jurisdictions should learn from US the art of enforcement of anti-trust law in the country

In a developing economy like ours though the legislators have tried twice to frame laws which would provide suitable conditions for a fair and perfect competition but still the present act

requires some alterations. It is still incomplete and is silent on various aspects. Some changes in the present act and some new things are very much important and need to be inculcated as it would help in eliminating some serious economic problems like price fixing. Lastly much can be borrowed from the Sherman act and Clayton act and other acts of European nations as they have very perfect piece of legislations on the competition laws. Further the contribution of the International Organizations to International Competition Regulation is quite appreciable and could be advisable for the developing and transitory countries to take valuable advice of the International Organizations while drafting or amending their existing Competition legislation.

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