

Treatment of Abuse of Dominance in Various Countries

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Abuse of dominance is a serious menace all across the world. More than 100 jurisdictions across the world had identified abuse of dominance as an anti-competitive activity. India also considers abuse of dominance a wrong under section 4 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007. The article examines abuse of dominance in selected jurisdictions and suggests that subjective criteria should be created for determination of dominance. India looks at market share as one of the factors but don't presuppose crossing what percentage of market share the undertaking will be considered dominant. Also determination of relevant product and geographic market has to be logical and scientific which paves the way forward for India.

I. Introduction

The leading jurisdictions across the world treat abuse of dominance as a serious anti-competitive activity and punish the wrong-doers in that regard. Dominance is not considered a per-se offence in any jurisdiction examined therein but these jurisdictions examine relevant market differently. The European Commission in a number of judgments stated the criteria to be examined in determining the relevant market in abuse of dominance cases. In *Hoffmann La Roche v Commission*,¹ *NV Nederlandsche Banden Industrie Michelin v*

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¹ Case 85/76, ECR 461.

*Commission*² and *Oscar Bronner GMBH*,³ it is observed that it is essential to define the relevant market both from the geographical and the product market perspectives.

In the European Union (EU), for the purposes of Article 102 the Treaty on the Functioning of the European Union (TFEU), the proper definition of the relevant market is a necessary precondition for any alleged anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined.

In the United States (US), abuse of dominance is tested seriously with the first consideration of relevant market. The courts have emphasised the importance of first defining the relevant markets by taking into account both the product and geographic aspects in the following cases, *Walker Process Equipments Inc. v. Food, Machinery and Chemical Corp.*,⁴ *E. & G. Gabriel v. Gabriel Bros., Inc.*, *Image Technical Services Inc v. Eastman Kodak Co.*,⁶ *Green Country Food Market, Inc v. Bottling Group, LLC and Bottling Group Holdings, Inc.*, *United States v. E.I. du Pont de Nemours & Co.*,⁸ *Brown Shoe Co. v. United States*.⁹

India applies its own criteria to determine abuse of dominance. Section 4 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, prohibits the abuse of dominance by any enterprise or group of enterprises.¹⁰ The Act prescribes a three-step test for the determination of abuse of dominance: defining the relevant market; assessing dominance in the relevant market; and establishing abuse of dominance. Each of the above steps is key to establishing liability under section 4 of the Competition Act, 2002, as amended by the Competition (Amendment). The references relating to US and EU had been taken

² Case C-322/81 ECR 3461 [1983].

³ Case C-7/97, ECR. I-7791 [1998].

⁴ 382 U.S. 172 (86 S.Ct. 347, 15 L.Ed.2d 247).

⁵ 382 U.S. 172 (86 S.Ct. 347, 15 L.Ed.2d 247).

⁶ 504 U.S. 451 (1992).

⁷ 371 F.3d 1275.

⁸ 351 U.S. 377 (1956).

⁹ June 25, 1962. 370 U.S. 294.

¹⁰ Section 4 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007

due to the fact the laws in those jurisdictions are in practice for long and Court decisions had created jurisprudence as opposed to India, where the provisions are new and Competition Commission of India's working also very recent.

II. Defining the Relevant Market

1. Selected Jurisdictions

In the EU, the European Commission defines the relevant market and its product and geographic components as follows:¹¹

- A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;
- A relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.

In the US, there exists a set of merger guidelines—written by the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC)—which specify methods for analysing and defining markets. Since 1980, the DOJ and the FTC have used these guidelines to convince courts to adopt a more explicitly economic approach to antitrust policy.¹² A relevant market comprises a product or group of products and the geographic area in which these products are produced and/or traded. Therefore, the relevant market has two components: the product market and the geographic market.

¹¹ The Summaries of EU legislation, <<http://eur-lex.europa.eu/browse/summaries.html?locale=en>> accessed 28 July 2015.

¹² J. Gregory Sidak and David J. Teece, Dynamic Competition in Antitrust Law <<https://www.criterioneconomics.com/dynamic-competition-in-antitrust-law.html>> accessed 28 July 2015.

2. India

The dominance of an enterprise is always determined with respect to a particular relevant market. The concept of the 'relevant market' is critical to competition law, and in the case of an abuse of dominance investigation, this sets the parameters for the determination of 'dominance'. The relevant market is determined on the basis of relevant product or service market and relevant geographic market. The relevant product market is defined as all those products or services which are regarded as interchangeable or substitutable by the consumer, on the basis of product characteristics, prices and end-use. Section 19 (4) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007 provides the factors to be examined and the definition of relevant product market is there under section 2 (t) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007. Apart from such demand-side factors, the Competition Commission of India (CCI) considers supply-side factors such as switching costs for producers, et seq. in defining the relevant product or service market. The relevant geographic market is defined as a market comprising the area in which there exist distinct homogenous competitive conditions in terms of demand and supply of goods or services, which can be distinguished from the conditions prevailing in neighbouring areas. Section 2 (s) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007 defines relevant geographic market.

As such, the breadth of the relevant market definition is an important factor in establishing whether an enterprise is dominant or not. A classic example is the case of real-estate major, DLF Limited in *Belair Owners' Association v DLF Limited* (the DLF case).¹³ The CCI defined the relevant market extremely narrowly to be the market for 'high-end residential apartments in the city of Gurgaon'. By restricting the product scope and the geography of the relevant market to a particular suburb, the CCI's decision that DLF was dominant in the relevant market was but a given. In contrast, in the *Coca-Cola* cases, (which dealt with the alleged abuse of dominance in relation to the sale of its aerated drinks and bottled water at high prices by Coca-Cola in multiplex theatres), the CCI held

¹³ Case No. 19/2010.

that Coca-Cola was not dominant, by defining the market to be all multiplex theatres in India, as opposed to any single multiplex theatre, which would no doubt have led to the obvious conclusion that Coca-Cola was dominant.¹⁴

The CCI has assessed numerous sectors in the four years since Section 4 of the Act was notified, such as real estate, public utilities, stock exchange services, publishing houses, food and beverages, etc. and appears to be moving towards a trend of more substantive analysis, including econometric data. Section 4 of Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007 reads as follows. Section 4 in the Competition Act, 2002:

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

¹⁴ *Consumers Guidance Society v Hindustan Coca-Cola Beverages Private Limited* (UTPE 99/2009) and *M/s Cine Prekshakula Viniyoga Darula Sangh v Hindustan Coca-Cola Beverages Private Limited* (RTPE 16/2009).

(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 CCI has also considered several natural monopoly sectors, such as the coal sector as well as the sports sector. As discussed in greater detail below, the CCI seems to have departed from its usual standards in its assessment of sports federations as a natural monopoly, as is demonstrated from the contradictory holdings in *Surinder Singh Barmi v Board of Control for Cricket in India* and *Dhanraj Pillai v Hockey India*.¹⁵

¹⁵ Competition Commission of India, Case No. 61 of 2010.

III. Assessment of Dominance

Dominance is defined as the ability of an enterprise to operate independently of market forces and enables it to affect competitors or consumers or the relevant market in its favour.¹⁶ Under section 19(4) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, the CCI is required to assess dominance on the basis of the following factors: market share; size and resources of the enterprise; market share of competitors; economic power of the enterprise, including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; legal monopoly or dominant position; 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 switching costs; countervailing buyer power; market structure and size of the market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the dominant enterprise; or any other factor that the CCI may consider relevant for the inquiry.¹⁷

Section 19 of Competition Act, 2002 states the following:

19. Inquiry into certain agreements and dominant position of enterprise.—

(1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) receipt of a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

¹⁶ Explanation (a) of Section 4 (2) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

¹⁷ Section 19 (4) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

(2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

- (a) creation of barriers to new entrants in the market;
- (b) driving existing competitors out of the market;
- (c) foreclosure of competition by hindering entry into the market;
- (d) accrual of benefits to consumers;
- (e) improvements in production or distribution of goods or provision of services;
- (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) 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;

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

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

(5) For determining whether a market constitutes a “relevant market” for the purposes of this Act, the Commission shall have due regard to the “relevant geographic market” and “relevant product market”.

(6) The Commission shall, while determining the “relevant geographic market”, have due regard to all or any of the following factors, namely:—

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

- (d) adequate distribution facilities;
- (e) transport costs;
- (f) language;
- (g) consumer preferences;
- (h) need for secure or regular supplies or rapid after-sales services.

(7) The Commission shall, while determining the “relevant product market”, have due regard to all or any of the following factors, namely:—

- (a) physical characteristics or end-use of goods;
- (b) price of goods or service;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialised producers;
- (f) classification of industrial products.

Thus, there is no concrete market share test, unlike as with other jurisdictions. For example in South Africa, more than 45 % market share is considered dominant, in Israel, more than 50% market share is considered dominant. For the determination of dominance under the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, even though the market share is treated as an important indicator. The CCI has considered market share in most cases of abuse of dominance it has reviewed but has also considered subjective factors such as vertical integration, countervailing buyer power, economic power of the enterprise, entry barriers, statements in the public domain, etc. This is evident from two important orders passed by the CCI relating to abuse of dominance: *the MCX Stock Exchange v National Stock Exchange of India Limited (the NSE case)*¹⁸ and *the DLF case*. These cases submit that the determination of dominance is dependent on the relevant market examination. In

¹⁸ Case No. 13 / 2009.

DLF Case relevant market included the high rise buildings in the area of Gurgaon in North India. DLF is found dominant in that relevant market and thus abuse of dominance was proved.¹⁹

IV. Determination of Dominant Position in Selected Jurisdictions

Dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. This has been stated in the case *United Brands Company v Commission*.²⁰ TFEU does not contain a specific definition of “dominant position”. However, the Court of Justice of the European Union has in some decisions defined “dominant position”.

In the United Kingdom (UK), according to the Competition Act section 18 (3), "dominant position" means a dominant position within the UK; and "the UK" means the UK or any part of it". Section 18 does not provide any explanation as to what is meant by dominant position.

In the US, under the Clayton Act of 1914 in US, the term corresponding to “dominant position” is “monopoly”. “Monopoly Power” is defined as the power of the concerned entity to control prices or to restrict or exclude competition.²¹ It is reiterated in the following judgements: *United States v E.L. du Pont de Neumours and Co* *United States v E.L. du Pont de Neumours and Co*²², *Jefferson Parish Hospital Distt No. 2 v Hyde*.²³

The Indian Competition Act 2002 contains a definition of dominant position that takes into account whether the concerned enterprise is in such a position of economic strength that it can operate independently of competitive forces or can affect the relevant market in its favour. Explanation (a) to Section 4 of the Indian

¹⁹ *Belaire Owners Association Inda v DLF Limited*, Case No. 20, 2010, CCI.

²⁰ [1978] ECR 207.

²¹ Section 2 of Sherman Act, 1890.

²² 351 US 377 (1956).

²³ 466 US 2 (1984).

Competition Act 2002 defines dominant position as “dominant position means a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to- operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. The Competition Act, 2002 displays a marked shift from the Monopolies and Restrictive Trade Practices Act (MRTP) as regards the definition of dominance/ dominant position’ goes. Under the MRTP, a dominant undertaking was defined as one which supplied, produced or controlled not less than one fourth of the total supply of that good or service in India. Among the different types of abuse of dominance prevalent in different jurisdictions, predatory pricing is one of common forms. The next section discusses the law of predatory pricing and objective standards of determining the same.

V. Case Example: Predatory Pricing

“Predatory Pricing has not been mentioned specifically in the competition laws of most of the jurisdictions studied as amounting to “an abuse of dominance”. However, under the Indian Competition Act, “directly or indirectly imposing unfair or discriminatory price in the purchase or sale (including predatory pricing) of goods or services” has been specified as amounting to an abuse of dominance if engaged in by a dominant enterprise.²⁴

In the EU, Article 102 TFEU prohibits a firm's conduct that abuses a dominant position within the Union and may affect trade between Member States as mentioned in the case *AKZO Chemie BV*.²⁵ In the US, on the other hand, section 2 of the Sherman Act condemns monopolisation or the attempt to monopolise any part of commerce among US States. Attempt of monopolization is discouraged also under Federal Trade Commission Act, 1914. The Clayton Act also prohibits predatory pricing and price discrimination.

As per Explanation (b) at the end of Section (4) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, ‘predatory price’ means

²⁴ Section 4 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

²⁵ Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-03359.

the sale of goods or provision of services at a price below cost with the subject to reduce competition or eliminate competitors.²⁶ This definition was also used in *In re Johnson And Johnson Ltd.*²⁷

VI. Abuse of Dominance in India

Under Indian Competition Act, and the competition laws of different jurisdictions like the US and the EU, relevant determination is the first step in the context of fact finding and examination of abuse of dominance and anti-competitive activity.²⁸ According to the section 2 (s) Competition Act, India, relevant geographic market includes a market comprising of the area in which the conditions of competition for supply of goods or provision of services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring area. According to the section 2 (t), the relevant product market is the “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.”

Different jurisdictions define relevant markets according to their own criteria. In determination of the relevant market it is common to use certain economic tools. One such tool is the SSNIP test (Small, but Significant, Non-transitory Increase in Price). It is also called the Hypothetical monopolist test. The question in that respect is that if the price of the product were increased by a factor of around 5 to 10 per cent, which other products the customer would switch to; all such products would be covered by the relevant product market.²⁹

²⁶ Section 4 (b) of the Competition Act, 2002, as amended by the Competition (Amendment) Act 2007

²⁷ In Re: Johnson And Johnson Ltd., (1988) 64 Comp Cas 394.

²⁸ Relevant Product Market and Relevant Geographical Market is defined under section 2 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

²⁹ It is used in *United States v. E.I. Du Pont de Nemours and Co.*, 118 F Supp 41 (D Del 1953) In US, in spite of the failure of the SSNIP test, many cases had been decided on the basis of relevant product market being determined by using SSNIP. See in Malaysia, relevant market is defined as a smallest group of products (in a geographical area) that hypothetical monopolist controlling that product group (in that area) could profitably sustain a price above the competitive price.

1. Relevant Product and Geographical Market in India.

Relevant product market and geographical market is defined in the following way in India. In addition to the definition u/s 19 (7) India had specified criteria like physical characteristics or end uses, consumer preferences, price of goods or services for the relevant product market. India had specified criteria u/s 19 (6) like regulatory trade barriers, transport costs, language, consumer preferences for the relevant geographic market. Physical characteristics or end –uses have huge relevance in India, EU and other jurisdictions. In *Aerospatiale-Alenia/de Havilland case*,³⁰ the European Commission decided that commuter turboprop aircraft with more than 20 seats occupied three distinct markets: aircraft with 20-39 seats; with 40-59 seats and with 60 or more seats.³¹ The differences in the seating capacities were fundamental to definition of separate markets because this determined the type of routes on which these aircrafts could be used. The reference relating to EU is important due to the fact that they had been successful in creating objective standards on physical characteristics and end uses.

2. Importance of DLF Case in India in the context of Abuse of Dominance

DLF Case is the most landmark case in India in the context of success of Competition Commission in addressing abuse of dominance.³² The conditions that CCI found abusive in DLF's Belaire Project agreement. Unilateral changes can be made by the builder without the buyers' consent. DLF unilaterally decided to increase the size of the building from 19 floors to 29. The builder enjoys unilateral right to increase/decrease super area at his sole discretion without consulting allottees, who nevertheless are bound to pay additional amounts or accept a reduction in the area.

Allottees have no exit option except when builder fails to deliver possession within the agreed time, but even in this case they get refunds without interest, and that too only after the apartment is sold. Punitive penalties can be imposed if you default, but not if the builder defaults. DLF took crores of rupees from the

³⁰ Decision 91/619 [1992] 1 CEC 2,034.

³¹ *Ibid.*

³² *Belaire Owner's Association versus DLF Limited*, Case No. 19 of 2010.

allottees, even before the first brick was laid. CCI found the 16 conditions all, being unfair and abusive.

In this connection it is necessary to examine the concept of 'after-market abuse' as explained by the US Supreme Court in the case of *Eastman Kodak Co. Vs. Image Tech.*³³ In this case, Kodak was the seller of photocopying machines. In the market of photocopying machines Kodak was not a dominant player. As far as the services and the repair market for the photocopiers was concerned, Kodak was initially selling the spares to various dealers who used to service the photocopiers and use the spares supplied by Kodak. Kodak found that some of these service dealers started developing their own spares to service the photocopiers and some of them used to give better service than Kodak itself. Kodak therefore changed its business model and asked the equipment manufacturers to supply the equipment to it only.

Kodak then used to sell the spares to those buyers of Kodak photocopiers who could service them themselves or used to service the photocopiers with spares in Kodak's premises. In this manner, Kodak had control over 100% of the spares and around 85% of the service itself. Thus, many of the earlier Kodak dealers who used to service the Kodak photocopiers were driven out of business. These dealers filed an antitrust case against Kodak. The District Court ruled in favour of Kodak. The dealers took the case in appeal to the court of Appeals for the Ninth Circuit. The Court of Appeals held that Kodak's approach was anticompetitive, exclusionary and involved a specific intent to monopolise. Aggrieved against the judgement of the Court of appeals Kodak went to the Supreme Court.

The Supreme Court considered the facts of the case. In the opinion of the Supreme Court there were two markets: the market of photocopiers where Kodak was not a second market and was described by the Supreme Court as an aftermarket and consisted of service after sales. In this after market, there was a tie I in scenario as spares would be given with the service. The Supreme Court then relied on its own decisions on market power. In the case of *Jefferson*

³³ SVCS504 U.S. 451(1992).

Parish,³⁴ Supreme Court had held that market power is power “to force a purchaser to do something he would not do in a competitive market.”

In another case *US v E.I. du Point de Nemours & Co.*³⁵ the Supreme Court had defined market power as “the ability of a single seller to raise price and restrict output.” The existence of such power is ordinarily inferred from the seller's possession of a predominant share in the market *Jefferson Parish*.³⁶ The Supreme Court then held that in the aftermarket Kodak enjoyed monopoly power. The Supreme Court also held that a customer is “locked in” after the purchase of the equipment as the switching costs are high. The customer can then be subjected to abuse. The Supreme Court also held that it is a question of fact as to whether information costs and switching costs foil the assumption that the equipment and service market act as a pure complement to each other. On these facts, the Supreme Court held that the behaviour of Kodak was anticompetitive.

In this particular case also there are two markets. The first market is where a consumer enters into an agreement with builder and the second market is the aftermarket after he has entered into an agreement with the builder and then the consumer is governed by the agreement which he has entered into with the builder. By the virtue of the agreement the builder acquires a dominant position over the consumer. This issue is covered in Section 19(4)(g) of the Competition Act. The word "otherwise" mentioned in Section W19(4)(g) is very pertinent. In this particular case, dominance is established in the agreement. The Section is inclusive and therefore has to be given a wide interpretation.

In fact, Section 19(4)(m) of Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, talks of any other factor which the CCI may consider relevant for the inquiry. Therefore while determining abuse of dominance the CCI is entitled to consider any other factor which shows that the enterprise is in a dominant position to affects its competitors or consumers or the relevant market in its favour. In this particular case the informant became a captured consumer and he could be discriminated and abused. Therefore in this

³⁴ See *supra* note 23.

³⁵ 351 US 377, 391 (1956).

³⁶ See *supra* note 23.

case in the aftermarket as there existed high switching costs and information asymmetry the abuse of dominance is established. In fact the decision of the US Supreme Court in the case of Eastman Kodak has been incorporated in the explanation to Section 4 read with Section 19(4) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

Acting on a complaint filed by the Owners' Association of one of the DLF building "Belaire" in Gurgaon, in the case of *Belaire Owners Association ('Informant') vs. DLF Limited & Ors. ('Opposite Parties')*, the CCI pronounced DLF Limited ("DLF") guilty for grossly abusing its dominant market position in the concerned relevant market and imposing unfair conditions in the sale of flats/apartments to home buyers/consumers. The CCI imposed a penalty of INR 6,300 million (USD 140 million), at the rate of 7% of the average turnover of DLF for the last three financial years and issued a 'cease and desist' order against DLF from imposing such unfair conditions in its agreements with buyers for residential buildings to be constructed in Gurgaon.

Relevant product market included services by developer / builder in respect of 'high-end' residential building in Gurgaon and CCI held that although there can be no hard and fast rule to determine what constitutes 'high-end', the same needs to be determined on the basis of facts and circumstances of each case. 'High-end' is not a function of size alone but includes a complex mix of factors such as size, reputation of location, characteristics of neighbours, quality of construction and actual customers and their capacity to pay.

Relevant geographic market included the market for services of developer/builder in respect of high-end residential accommodation in Gurgaon. A decision to purchase a high-end apartment in Gurgaon is not easily substitutable by a decision to purchase a similar apartment in any other geographical location.

The CCI's scope was limited to the extent of purchasing power of average citizens and small increase in prices was immaterial in such cases. The CCI relied on the CMIE data which said DLF had the highest market share (45%), vis-a-vis the

market share of the nearest competitor (19%) which was more than twice of its competitor, leading to hardly any competitive constraints.³⁷

3. Case Study: Ajay Devgan Case

The question of relevant market again was examined by CCI in Ajay Devgan Case. *Ajay Devgan versus Yash Raj Productions*.³⁸ It was alleged that Yash Raj Films had put a condition to single screen owners that if they wanted to exhibit movie A (bound to be blockbuster) at the time of Eid, they would have to simultaneously agree to exhibit movie B at the time of Diwali.

Any single screen theatre who did not agree to booking of his theatre for both the films would not get the right to exhibit the single film. Out of 1407 single screens, 821 agreed to show A (Ek Tha Tiger), and B (Jab Tak Hai Jaan). The informant however failed to substantiate how 'film industry in India' was the relevant market and how YRF was dominant in this relevant market. As per the information available in public domain, in Bollywood itself, 107 and 95 films were released in 2011 and 2012 respectively. Out of this, YRF produced only 2-4 films each year. This cannot be said to amount to dominance even in the Bollywood industry.

In the scheme of the Competition Act, tie-in arrangements per se violate Section 3(4)(a) of this act. Whether such an agreement is prohibited under the Act depends upon its actual or likely appreciable adverse effect on the competition in India. The CCI took the view that the agreement has neither created entry barriers for new entrants nor drove existing competitors out of the market, nor is there any appreciable effect on the benefits accruing to the ultimate consumer viz. the viewers. Single screens contributed to 35% of revenue while multi-screen theatres contributed to 65% of revenue. Ajay Devgan appealed in Comp. Appellate Tribunal, for stay of JTHJ, but COMPAT rejected the stay petition.

To sum up, after analysing the DLF Case in India, the following recommendations can be made. In the determination of relevant market, just like in case of abuse of dominance, CCI should also look into sub-markets in the cases

³⁷ CMIE includes Center for Monitoring Indian Economy.

³⁸ Case No. 66 of 2012.

of the anti-competitive agreements. In the determination of relevant geographic market in cases of anti-competitive agreements India should consider the relevant geographic area rather than entire India. India should give importance to “intent” in the determination of abuse of dominance and if the intent is to exclude competitors in the relevant market the alleged party should be prevented from alleged abuse of dominance.

VII. Conclusion

It can be concluded that the determination of dominance is the most complicated task of the competition agency in any jurisdiction. India has the relevant provisions in place. According to Section 19 (1) of the Indian Competition Act 2002, the Competition Commission of India may inquire into any alleged contravention of Section 4 (1) i.e. abuse of dominant position by an enterprise on its own motion or by receipt of a complaint, or a reference made to it by the Central Government, State Government or a statutory Authority. Section 27 of the Act lays down the orders that can be passed by the Commission upon finding that the action of an enterprise in a dominant position is in contravention of Section 4.

The determination of dominance has boiled down to interpretation of relevant product and geographical market. In India the standards are not objective. Thus, India should create objective criteria to determine dominance, otherwise wrongdoers will get away by the channel of lack of appreciable adverse effect on competition.

Section 34 further states that the Commission has been empowered to pass an order for compensation to be recovered from an enterprise due to whose conduct loss or damage has been suffered. The successful implementation of these provisions by DG and CCI will ensure India’s success in abuse of dominance cases. India can look into the best practices in USA, UK, European Union, Australia and other jurisdictions. CCI is very new. A lot of co-operation is required also from the Sectoral regulators and stakeholders for successful implementation of the provisions of the Competition Act in India.