RESEARCH TITLE

ABUSE OF DOMINANT POSITION IN COMPETITION LAW: A COMPARATIVE STUDY OF INDIA AND EUROPEAN UNION

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CHAPTER 1.

INTRODUCTION

Competition is crucial to the functioning of markets. It makes the economy more vibrant and active and encourages innovation. It requires a company or a firm to operate efficiently and provide a wider range of high-quality products to customers in order to avoid competitors. However, competition fuels competitors, and in order to sweep more profits and outdo each other, competing firms frequently engage in unfair trade practices. The governments of many nations have imposed legal barriers on competition in order to maintain a healthy competitive environment. Competition law generally refers to the rules and regulations designed to protect consumer interests, guarantee that all players have an equal opportunity to operate in the markets, and penalize those who abuse their power. Competition law is known by various names, including antitrust law in the United States, anti-monopoly law in China, competition law in the European Union and India, and so on. These laws are framed to meet the domestic requirements of each country, so the provisions differ from one to the other. Abuse of dominance harms the market by eliminating competition even before other players have a fair chance. Abuse occurs when a dominant enterprise behaves in such a way that it reduces its competitors' ability to compete or prevents new enterprises from entering the market, resulting in significantly reduced competition.

1.1 REVIEW OF LITERATURE

Competition law and practices are a topic of current interest with a sufficient body of literature and data available. The researcher has provided a brief summary of the studies that have been found and are relevant to the subject in the section below.

1) **Kajal Dhiman's article, "Abuse of dominant position under the Competition Act, 2002,"**[1]discusses the concept of dominant position and its abuse in the context of the Competition Act of 2002. The ability of an organization to function independently of competitive forces in a given market and influence customers, rivals, or the relevant market in their favour is referred to as having a dominant position. As stated by the article, the Act prohibits the abuse of dominant positions rather than the dominant position itself. Abuse of a dominant position includes actions like predatory pricing, setting unfair terms or conditions, restricting market or production, applying different terms to identical transactions, and blocking market access. This is particularly relevant to my dissertation, which explores the balance between market competition and regulatory frameworks. Understanding how the Act addresses predatory practices, unfair terms, and market restrictions will help me analyze the effectiveness of competition laws in promoting fair business practices and preventing monopolistic behaviours. This context underscores the necessity of maintaining competitive markets to encourage innovation and consumer welfare.

2) **Dr (Prof.) Naresh Patel and Divyesh Patel, FCS, the article "Demystifying the Competition Implications of 'Abuse of Dominance' (Concept and Compliance's)"**[2]delve into the Competition Act of 2002 in India and its impact on the concept of “abuse of dominance.” They cover various topics including groups and enterprises, relevant markets, abuse of dominant position, remedies and penalties, and conceptual clarification. The aim of their article is to provide a comprehensive analysis of the Competition Act of 2002 and its implications on abuse of dominance in India. This literature review is highly relevant to my dissertation as it examines the legal framework surrounding competition law in India, which is a focal point of my research.

[1] Kajal Dhiman's, "Abuse of dominant position under the Competition Act, Manupatra, 2002,"

[2] Dr (Prof.) Naresh Patel and Divyesh Patel, FCS, "Demystifying the Competition Implications of 'Abuse of Dominance' (Concept and Compliance's)", ICSI,2023.

3) **Ankesh Jain (2012) in his Journal “Extra-Territorial Jurisdiction of Competition Commission of India”**[3]he explores the jurisdictional powers of the Competition Commission of India (CCI) in addressing international combinations affecting India. According to Jain, the CCI's jurisdiction is supported by legal doctrines such as the Effect Doctrine and the Doctrine of Minimum Contact, which allow it to regulate international combinations through various case laws. Jain emphasizes the importance of protecting India's interests in the face of increasing trends in acquisitions and mergers that promote international trade. This review is relevant to my dissertation as it discusses the challenges and implications of enforcing competition law in the context of global economic integration, which is a key aspect of my research.

4)**Aditya Bhattacharjee (2006) examined in his Journal “India's New Competition Law: Mergers in India”**[4] examines how the Competition Act of India, modified from its predecessor, the MRTP Act of 1969, has been implemented. According to him, earlier studies have highlighted gaps in representing competition issues in cases focusing on consumer contractual and complaint disputes. Bhattacharjee notes that while the new Act has positive aspects, such as prosecuting cartels, it also maintains previous practices of penalizing unfair behavior, which may overlook serious predatory behavior and anti-competitive cross-border mergers. This analysis is significant for my dissertation as it sheds light on the evolution of competition law in India and the challenges in its enforcement, which is a key focus of my research.

5)**Shalaka Patil, Patel Chatterjee et al. (2013) founded in their Report on Competition law in India**[5] Jurisprudential trends, and a path forward that Competition law analysis involves composite economic and legal considerations.

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[3] Ankesh Jain, “Extra-Territorial Jurisdiction of Competition Commission of India”, ResearchGate,2011.

[4] Aditya Bhattacharjee, “India's New Competition Law: Mergers in India”, ResearchGATE,2006.

[5] Shalaka Patil, Patel Chatterjee et al., Competition law in India: Jurisprudential trends and way forward, Nishith Desai Associates,”2013.

According to the Commission's orders, it appears that it has been asked to decide on composite antitrust issues arising from the actions of businesses operating in extremely diverse markets from the very beginning of its establishment. The COMPAT or Supreme Court has never issued a final order relating to Sections 3 or 4. Therefore, at this early phase in the evolution of competition law in India, it is very challenging to identify and analyse jurisprudential trends. Still, a few significant patterns in the Competition Commission of India's orders have been identified by the study. Additionally, there has been a steady rise in the quantity of complaints that the CCI receives from various informants, indicating that public knowledge of the new law is expanding. Since the Competition Act is modeled after TFEU, the CCI tends to rely more on EU authorities when it comes to relying on foreign authorities.

This is relevant to my dissertation, as I am examining the development of competition law in India. The report points out inconsistencies in CCI orders, such as inconsistent use of economic principles, arbitrary fines, and over-reliance on circumstantial evidence. These insights are important for my research on the challenges of creating a fair and consistent competition law framework.

6) **Feba Sara Vinu and Varnika Vinu, Abuse of Dominance : A comparative study of India, US and UK 2022,**[6] they discusses in their paper about the evolution of abuse of dominance (AOD) and competition law has been crucial in addressing the imbalance of power in markets, where dominant players often exploit their substantial resources to engage in anti-competitive practices, disadvantaging smaller players and new entrants. This is particularly relevant to my dissertation, as it highlights the need for specific legal frameworks to curb monopolistic behavior and ensure fair competition. In India, the Competition Commission of India (CCI) plays a key role in enforcing these laws, with legislators and courts actively addressing abuse of dominance cases. Comparing India with the EU and the UK, the paper notes that India prioritizes consumer welfare and efficiency, while the UK and EU focus on preserving market structures and ensuring a level playing field. This comparative analysis is important for my research, as it underscores the global efforts to maintain competition and advance economic efficiency.

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[6] Feba Sara Vinu and Varnika Vinu, Abuse of Dominance: A comparative study of India, US and UK, ResearchGate, 2022,

7) **Manisha Singh Inquiry and Investigation under Competition Act 2002, 2019,**[7] is particularly relevant to my dissertation as it explores the critical role of the Competition Commission of India (CCI) in addressing anti-competitive practices. According to me, understanding the CCI's function is essential because it serves as the primary investigative body, established under the Competition Act of 2002. The Central Government appoints a Director General (DG) to conduct detailed inquiries into potential violations, which can be initiated based on references or the CCI's own information, following Sections 19 and 20 of the Act.

For my research, it is important to note that Singh emphasizes the CCI's structured inquiry process. She explains that inquiries into anti-competitive agreements and abuse of dominance are handled under Section 19, while those related to combinations fall under Section 20. The process starts when the CCI forms a prima facie opinion that a case exists, leading to a directive for the DG to conduct a comprehensive investigation. This systematic approach by the CCI is crucial for ensuring fair market practices, a key focus of my dissertation on the enforcement of competition law in India.

8) **Gabriel Peric (EU Competition Law and Abuse of Dominance) 2022**[8]**,** is highly relevant to my dissertation as it delves into the main goal of EU competition law: maintaining undisturbed competition within the domestic market. Peric explains that the Treaty on the Functioning of the European Union (TFEU) plays a crucial role in this, especially through Article 102, which prohibits the abuse of dominance.

For my research, understanding the conditions outlined in Article 102 TFEU is essential. Peric clarifies these conditions and examines the actions that could be considered abuse of dominance. He highlights the importance of case law in interpreting and evolving the application of Article 102, providing insights into how courts have applied these provisions in various situations. Additionally, Peric

[7]Manisha Singh, Inquiry and Investigation under Competition Act 2002, (2009) https://mnluacclrblog.home.blog/2019/05/17/inquiry-and-investigation-under-the-competition-act-2002/ (last visited on 26 May,2024)

[8] Gabriel Peric, EU Competition Law and Abuse of Dominance, DiVA Portal, 2022.

discusses rare exemptions where dominant undertakings might not fall under Article 102, analyzed on a case-by-case basis. He also addresses contentious views and challenges in applying Article 102, shedding light on its complexities. This comprehensive analysis is invaluable for my dissertation, as it enhances my understanding of the regulatory framework governing competition in the EU and its implications for maintaining fair market practices.

9) **"Dr. S. Chakravarthy, (Relevant Market in Competition Case Analysis),"**[9] he delves into the crucial role of defining the "relevant market" in enforcing competition laws effectively. According to him, this process is fundamental as it lays the groundwork for competition authorities, providing them with clarity on how to analyze conduct among market players. Chakravarthy emphasizes that defining the relevant market is my initial step in assessing potentially harmful behavior in the marketplace, as it sets the context for analysis. He underscores the importance of this definition, stating that it outlines the space where anti-competitive conduct could occur. Chakravarthy outlines a methodology for defining the relevant market, involving a series of questions aimed at identifying the smallest market where anti-competitive conduct could be sustained. For me, understanding this methodology is crucial as it helps in evaluating behavior to determine its anti-competitive impact. Additionally, Chakravarthy covers aspects such as the relevant product market and geographic market in detail, providing insights into the analytical methodology used by competition authorities. This review offers valuable insights into the significance of defining the relevant market, which is pertinent to my dissertation on competition law enforcement and its implications for fair competition and consumer welfare.

10) **H.S. Gezici and Y. Taspinar (EU and Competition Policies) 2016**,[10]they delve into how the European Union (EU) has shaped competition policies to drive economic integration and enhance social welfare among member states. For my dissertation, understanding the EU's impact on competition policies is crucial. Gezici and Taspinar

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[9] Dr. S. Chakravarthy, (Relevant Market in Competition Case Analysis), cuts-ccir.org.

[10] H.S. Gezici and Y. Taspinar, EU and Competition Policies, ResearchGate, Vol. 1, 2016

highlight the EU's core objectives, such as the pursuit of free movement of goods, labor, and capital, supported by an internal market and a free-market economy. They emphasize the role of competition policy in preventing anti-competitive practices, restraining dominant firms, and limiting state intervention in markets. Their insights into competition policy implementations within the EU are valuable for my research on competition law enforcement, as they demonstrate the importance of regulatory frameworks in promoting fair competition and safeguarding consumer welfare. Overall, their review provides valuable insights into how competition policies contribute to economic integration and social prosperity within the EU, which aligns with the objectives of my dissertation.

1.2 STATEMENT OF PROBLEM

As evidenced by the Competition Commission of India's recent rulings, it is now clear that, in order to protect the interests of both consumers and the country as a whole, a closer examination of the laws and practices pertaining to market forces' abuse of dominance is required. In comparison to developed nations such as the European Union, India's competition law is still in its evolutionary stages. Furthermore, the Eu's competition law framework served as a model for India's contemporary competition law. Therefore, it is crucial to investigate how competition law's actual application of its provisions pertaining to abuse of dominance is carried out.

1.3 RESEARCH OBJECTIVES

- To Trace the evolution of concept of abuse of dominant position.
- To Analyse the concept of abuse of dominant position in India and EU and Evaluate how abuse of a dominant position is actually implemented under Indian and EU competition laws.
- To compare the regulations and practices regarding abuse of dominant position in the two nations.

1.4 RESEARCH QUESTIONS

Q 1. How has competition law evolved over time in both the jurisdiction i.e, India and European Union?

Q 2. What are the key differences in the concept of abuse of dominant position between the E.U., and India?

Q 3. What are the definitions and conceptual frameworks surrounding the abuse of dominance within the scope of competition law?

Q 4. What are the specific measures that India needs to consider in order to strengthen its competition policy with respect to abuse of dominance?

1.5 RESEARCH METHODOLOGY

The doctrinal method has been adopted in order to conduct a comparative study of the doctrine of abuse of dominant position. A diverse collection of material drawn from both primary sources (statues, government documents, census, legislative debates, etc.) and secondary sources (books, articles, research papers, and websites).

1.6 LIMITATIONS OF THE STUDY

This study's focus is restricted to the national antitrust laws of the EU and India, specifically the sections pertaining to abuse of dominance, monopolization, and attempts to monopolize. This study only provides an overview of the laws and how the abuse of dominance doctrine is applied. There is very little chance for an empirical investigation, so this study is by definition strictly doctrinal. For this reason, the research only uses secondary sources and data.

1.7 RESEARCH HYPOTHESIS

The hypothesis highlights that in order to prevent abuse of dominance and maintain fair competition, India must learn from more developed jurisdictions like EU and strengthen its competition policy.

1.8 List of Chapters: -

Chapter 1, titled 'Introduction,' I make a sincere effort to introduce the topic, its dimensions, controls, and research objectives. The research provided an overview of Abuse of Dominant Position in Competition Law: A Comparative Study of India and the EU. It includes a literature review, research objectives, the study's relevance, a problem statement, a research hypothesis, research questions, research methodology, and research limitations.

Chapter 2, titled "Overview of Competition Law," it provides a comprehensive introduction to the principles and framework of competition law. It explores anti-competitive agreements, abuse of dominance, and combinations—three core components of competition law. The concept of competition law is explained in detail in this chapter, emphasizing its importance in controlling market behavior and guaranteeing fair competition. It discusses the objectives of competition law, which include advancing consumer welfare, market efficiency, and innovation. It also examines the fundamental need for competition law.

The chapter also looks at how different societal elements like institutions, democracy, governance, and poverty alleviation interact with competition law. It emphasizes the importance of competition in promoting economic growth, upholding democratic principles, strengthening institutional frameworks, and alleviating poverty.

Chapter 3, titled "Origin and Evolution of the EU and India's Competition Law enforcement Provisions and Legislative Framework," offers a comprehensive exploration of the legislative framework and structure governing antitrust laws in both the European Union (EU) and India. The chapter provides an in-depth overview of the historical development and evolution of competition law in both jurisdictions, tracing its origins and highlighting key milestones in their respective legal systems. Moreover, it carefully analyzes the characteristics of the inquiry and investigation procedures within the EU and Indian competition regimes. This includes an examination of the limitations imposed by competition laws, relevant case law that has influenced the interpretation and application of these laws, and the penalties for

violations. The chapter provides readers with a detailed understanding of how these jurisdictions have approached the regulation of competition over time by contrasting and comparing the legislative frameworks and competition law provisions of the EU and India.

Chapter 4, titled "Definitions and Concepts of Abuse of Dominance under Competition Law", it provides an extensive exploration of the concept of abuse of dominant position within the framework of competition law, examining its application in both domestic and international jurisdictions. The chapter begins by defining abuse of dominant position and explaining its significance in the context of competition law enforcement. It explores the complex idea of what defines a dominant position and how it can be manipulated to stifle market competition. Finding the relevant market, which includes the relevant product and geographic markets, is one of the most important topics covered. The chapter highlights the importance of these markets in evaluating market power and competitive dynamics and goes into detail on the methodology used to define them.

In addition, the chapter offers a thorough examination of the different types of abuse of dominance, classifying them as practices that are either exploitative or exclusive. It examines case studies and real-world examples to show how dominant firms can act in ways that hurt consumers, competition, and innovation. Furthermore, a detailed analysis is conducted of the interaction between intellectual property rights and competition law with regard to the abuse of dominant position. The chapter delves into the complexities of balancing intellectual property holders' rights with the need to prevent anti-competitive behavior, providing insights into regulatory approaches used in both domestic and international contexts.

Chapter -5, 'Judicial Response towards Abuse of Dominance Doctrine in EU and India', it delves into the pivotal role of judicial review in shaping competition law, particularly in addressing the abuse of dominance doctrine within the frameworks of the European Union and India. It thoroughly investigates the role of judicial oversight in ensuring the effectiveness and fairness of competition law enforcement. This

chapter examines landmark cases that have had a significant impact on the jurisprudence governing abuse of dominance in both jurisdictions.

These cases are essential tools for understanding antitrust law and the changing landscape of competition jurisprudence. This chapter contributes to the development and improvement of competition law jurisprudence in the European Union and India by providing an in-depth analysis of court rulings that address abusive practices by dominant market players.

Chapter 6, 'Conclusion and Suggestions', includes the study's conclusion as well as key findings from Indian and European Union competition law jurisdictions on abuse of dominant position. Certain recommendations regarding the abuse of dominant position in India are put forth based on the jurisdiction of the EU.

CHAPTER – 2

OVERVIEW OF COMPETITION LAW

2.1 Introduction

Markets cannot function properly without competition. It makes the economy more vibrant and active and encourages innovation. It requires a company or a firm to operate efficiently and provide a wider range of high-quality products to customers in order to avoid competitors. However, competition fuels competitors, and in order to outdo one another and sweep up more profits, competing firms frequently engage in unfair trade practices. The governments of many nations have imposed legal barriers on competition in order to maintain a healthy competitive environment. Competition law generally refers to the rules and regulations designed to protect consumer interests, guarantee that all players have an equal opportunity to operate in the markets, and penalise those who abuse their power. Abuse of dominance harms the market by eliminating competition even before other players have a fair chance. Abuse occurs when a dominant enterprise behaves in such a way that it reduces its competitors' ability to compete or prevents new enterprises from entering the market, resulting in significantly reduced competition. Competition law is known by various names, including antitrust law in the United States, anti-monopoly law in China, competition law in the European Union and India, and so on. These laws are framed to meet the domestic requirements of each country, so the provisions differ from one to the other. But there are common elements in these provisions.

There are following of them are: -

2.1.1 (i)Anti Competitive agreements: “Anti-competitive agreements” are agreements between businesses that aim to reduce competition in the marketplace. An anti-competitive agreement may be between direct competitors (referred to as a horizontal agreement) or between businesses operating in different markets and at different stages of the supply chain (referred to as a vertical agreement) as manufacturers, wholesalers, or retailers. These agreements can take many different forms, and they may include strategies to stifle competition such as bid rigging,

market allocation, and price-fixing. These practices harm consumers, limits innovation, and undermine market efficiency. According to India's Competition Act,[11] agreements pertaining to the manufacture, supply, distribution, storage, acquisition, or control of goods or services that might have a negative impact on competition are considered anti-competitive agreements. When producers and consumers engage in such behavior, the market is manipulated. Consumers suffer because they do not receive the best product at the best price, and producers suffer because they are unable to compete on fair terms and are forced to close their doors. As a result, it becomes necessary to monitor the actions of firms that impede competition.

Types of Anti-Competitive Agreements:

1. Price fixing: When competitors agree to set prices at a specific level, it eliminates price competition. This leads to artificially high prices for consumers.

2. Market Allocation: Competitors divide markets to ensure each firm has a dominant position in a specific geographic area or market segment. This eliminates competition, allowing businesses to maintain higher prices.

3. Bid Rigging: When competitors per-determine who will win a contract or project, they manipulate the bidding process and prevent other firms from competing fairly.

4. Exclusive Dealing: When a supplier and distributor agree to sell only their products, competitors are excluded from the market, limiting consumer choice.

5. Tying and Bundling: This is the practice of a seller requiring a customer to buy the tying product in order to purchase the tied product. This can be used to take advantage of one market's dominance in another.

2.2.2 (ii)Abuse of dominance: "Abuse of dominance" is a critical issue in competition law and economics, encompassing various forms of anti competitive behavior committed by dominant firms.[12] A firm's significant market power, which allows it to set terms, affect prices, and regulate market outcomes, is referred to in this

[11] Competition Act, 2002, s. 3(1)
[12] Competition Act, 2002, s. 4 explanation

context as dominance. When this dominance is used carelessly, it can be used against rivals, customers, and the market's general health. The term "abuse of dominance" refers to a variety of behaviour intended to unfairly use market dominance for tactical advantage. For example, predatory pricing is intentionally lowering prices below cost in order to force competitors out of the market, then raising prices later to take advantage of the resulting monopoly position.[13] Exclusionary practices, on the other hand, seek to discourage or prevent competitors from entering or growing their market presence by employing strategies such as exclusive dealing, tying and bundling, refusal to deal, and discriminatory pricing. Margin squeeze occurs when a dominant firm, which controls both upstream and downstream markets, charges excessive prices for essential inputs, reducing competitors' margins and suffocating competition. Abusive licensing of intellectual property rights can also limit competition and innovation by imposing unfair or discriminatory licensing terms on opponents.

Abuse of dominance can have serious, far-reaching effects. As dominant firms take advantage of their market power to maximize profits, consumers suffer the higher prices, fewer choices, and diminished quality. Innovation and technological progress are stifled because competition, the primary driver of innovation, is suppressed. Market distortion occurs when entry barriers deter new competitors and resources are allocated inefficiently, reducing market efficiency. Ultimately, abuse of dominance degrades consumer welfare, slows economic growth, and undermines the integrity of competitive markets.

To combat abuses of dominance, governments enact competition laws and create regulatory bodies tasked with enforcement. These laws prohibit anti-competitive behavior and establish legal avenues for investigation and prosecution. Enforcement organizations look into claims of abuse of dominance, issue fines, and ask for injunctions against offenders. In the US, one such agency is the Federal Trade Commission (FTC). Market studies can be carried out to evaluate the degree of competition and spot instances of misuse, and corrective measures like fines, divestitures, and structural changes can be put in place to bring competition back and

[13] "Competition Commission of South Africa, available at: http://www.compcom.co.za/abuse-of-dominance/" (last visited on 20 April 2024)

stop misuses in the future. Promoting competition and discouraging anti-competitive behavior proactively is necessary to prevent abuse of dominance. Advocates for competition teach consumers and companies the value of competition and the

negative effects of abuse of dominance. Competition authorities monitor the market and conduct surveillance to detect suspicious behavior and investigate potential abuses. Regulatory oversight may impose regulations to prevent abuses of dominance in industries with limited competition. Encouraging competitive neutrality keeps the playing field level for all players in the market, stopping unfair advantages and discriminatory tactics.

2.2.3 (iii)Mergers and Acquisitions (Combinations): These are agreements for business organizations to combine. When two or more businesses mutually decide to merge, a merger occurs. Merger by absorption describes a situation in which one company maintains its identity while all others are absorbed into it. On the other hand, a merger by consolidation occurs when two companies combine to form a single entity. A merger may occur for a variety of strategic reasons, and depending on their nature, they fall into one of the following main categories:

- Horizontal merger- It takes place when one company merges with another that operates in the same industry, offering identical or similar products and services and is at the same production stage. Since the merging businesses are typically rivals, there are cost savings, increased market reach, and synergies. E.g.: merger of Flipkart and Myntra.

- Vertical merger: A vertical merger occurs when two businesses combine and operate along the same value chain, but at different stages of production. For example, a shoe manufacturer combining with a leather manufacturer. Such a merger is frequently carried out to secure the supply of necessities and avoid supply disruptions. E.g.: Tata Motors and Trilix Srl

- Conglomerate mergers: In this kind of merger, businesses from completely unrelated industries come together, regardless of how dependent or related

their products are on one another. Usually, it is done to share assets, diversify, or distribute product lines. E.g.: Microsoft and LinkedIn

- Concentric merger- It happens when the combining companies do not sell the same products but are related on some basis like technology, manufacturing tools, market strategies etc. Since it would be much simpler to sell products together and provide a one-stop shopping experience, it is done to better serve customers. E.g.: Citigroup and Traveler's Insurance

Mergers and acquisitions differ in that an acquisition occurs when one company assumes control of another. In this case, no new company is formed; rather, the acquired company is consumed by the company that purchases it. In a friendly acquisition, both parties agree to the terms of the deal; in a hostile acquisition, the business is taken over by force. There are several methods for doing it are: -

- Acquisition through asset purchase: In this method, the acquiring company specifically identifies and selects the assets and liabilities of the selling company. This protects the acquirer against unanticipated liabilities by buying specific assets and liabilities. The acquisition agreement specifies the values that were determined for each purchased asset and liability.

- Acquiring through stock purchase: In this scenario, the buyer buys all of the selling company's equity, or its assets and liabilities.

- Acquit-hiring- It is relatively a new concept. It is the process of purchasing a business in order to access its talent pool rather than its goods or revenue. The goal is to use the expertise of skilled workers to grow its own business. Acquit-hiring is becoming more common in the technology industry, where specific skill sets, such as software programming and app development, are in high demand but in short supply. By doing this, the purchasing company will be able to quickly acquire a skilled group of individuals who have demonstrated their aptitude in particular domains.

When two separate businesses combine their operations, they can increase value, reduce costs, and improve performance while eliminating competition. Mergers and acquisitions must be regulated because they may harm competition. It gives the business more market power, which could be abused to prevent rivals from using key distribution channels or obtaining necessary raw materials for production. In the business world, acquisitions and mergers take place practically daily. They are a component of corporate restructuring tactics. Different countries have different merger and acquisition strategies based on factors like tax obligations, government laws, and process ease. Given the large number of such agreements, investigating all mergers and acquisitions is neither feasible nor advisable. Furthermore, it is reasonable to assume that the likelihood of small combinations having a significant negative impact on market competition is very low. For this reason, different nations have set thresholds, and the companies involved in the transaction are obligated to notify the appropriate regulatory body when the value of the proposed combination surpasses the minimum level.

2.2 CONCEPT OF COMPETITION

Competition is a fundamental concept that pervades all aspects of human society, economics, and life itself. According to Professor Whish, "in the business world, competition refers to a struggle or contention for superiority." This denotes a pursuit of people's patronage and business in the marketplace.[14] Competition affects how we interact with each other, spurs innovation, and determines how resources are distributed in society. Examples of this include the intense rivalry between athletes on the field and the ruthless competition between businesses in the marketplace. We shall explore the various facets of competition in this paper, looking at its guiding ideas, practical applications, social dynamics, and moral issues. Fundamentally, competition is the rivalry or struggle between people, organizations, or other entities over a goal or scarce resource. Competition is the process of pursuing an advantage over an opponent, whether that advantage is gaining market share, securing a lucrative business contract, or competing for a championship title. Human nature is inherently driven by a competitive drive that arises from survival, achievement, and social status

[14] R.Whish (5th ed.), Competition Law 2 (London: Lexis Nexis, 2003)

instincts. It is untrue to believe that the ideal levels of "rivalry" in the market can be established, as business constantly develop new tactics for competing.[15]

Furthermore, competition law does not prohibit certain forms of firm collaboration, such as mergers, so using rivalry as a benchmark for competition is insufficient.[16] In the field of economics, competition is the engine that propels efficiency, innovation, and economic expansion in free markets and capitalist systems. The interaction of buyers and sellers, each attempting to maximise their utility or profit within a framework of supply and demand, characterizes the competitive marketplace. Competition encourages companies to provide goods and services that are more valuable to customers, more affordable, and of higher quality, which improves consumer welfare and societal prosperity. Competition promotes innovation by encouraging businesses to differentiate themselves, develop new technologies, and introduce novel products or services to the market. To preserve their competitive edge in a market where everything is competitive, businesses must always aim to outperform their competitors, adjust to shifting consumer preferences, and keep ahead of industry trends. According to economist Joseph Schumpeter, this dynamic process of creative destruction propels economic development, progress, and advances technology over time.

Furthermore, competition acts as a mechanism for allocating scarce resources, guaranteeing their productive and efficient distribution. In markets where there is competition among businesses for labor, capital, and other inputs to produce goods and services that satisfy consumer demand, resources are directed towards their most valuable uses. Competition guides producers' and consumers' decision-making and resource allocation by sending signals about relative scarcity, opportunity costs, and consumer preferences through the price mechanism. Competition has an impact on social dynamics, relationships, and behavior in a variety of areas of life in addition to its economic effects. Competition has a profound effect on the formation of social norms, group dynamics, and individual goals. This is seen in everything from political

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[15] P. Nicolaides,"An essay on Economics and Competition Law of the European Community" 27 Legal Issue of Economic Integration 18-19 (2000)

[16] P. J. Hammer, "Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs" 98 Michigan Law Review 849, 922 (2000); F. A. Hayek, Individualism and Economic Order 92 (London: Routledge and Kegan Paul, 1949)

contests in democracies to academic competitions in schools. In addition to fostering rivalry and hostility between rivals or competitors, competition can also promote teamwork and camaraderie among teammates or allies. It can encourage people to reach new heights, strive for greatness, and push themselves to the limit, but it can also exacerbate inequality, encourage marginalization, and maintain social divides. The competitive environment raises additional ethical issues since achieving success and victory can occasionally result in morally dubious decisions, dubious strategies, or unethical behavior. While healthy competition promotes fair play, integrity, and respect for rules and norms, unchecked competition can incentivise cheating, dishonesty, and exploitation. The ethical boundaries of competition are frequently blurred, especially in highly competitive settings where the stakes are high and the pressure to win is intense.

2.3 NEED FOR COMPETITION LAW AND OBJECTIVES OF COMPETITION POLICY

The world economy has experienced exponential growth since liberalization and globalization became pillars of the system. The rise in international trade, investments, capital flows, and other factors is contributing to the growing integration of the national and international economic systems. Therefore, businesses face competition both domestically and globally. Competition policy affects the market significantly in this highly competitive environment, where a single poor business decision could mean the difference between survival and bankruptcy for an enterprise. A competition policy can be thought of as a tactic used by the government to monitor market participants' behavior in order to improve the efficiency of the economy.

Leitmotifs include energizing and improving the competitive process, stopping unfair business practices that impede honest and open competition, and creating an atmosphere that benefits both consumers and producers. Creating a market that is less restrictive and competitive is the main goal of an effective competition policy. This necessitates both the thoughtful planning and execution of state market intervention as well as the efficient application of competition laws. In general, a competition policy consists of two parts. One has to do with creating policies that promote competition, like deregulation, privatization, easing import restrictions, etc., which increases

reliance on the forces of the market. The second is creating a legal framework and drafting laws, such as creating a competition law and making sure it is effectively enforced to stop anti-competitive behavior, monitor potentially anti-competitive mergers, and cut down on unnecessary regulations.[17] Canada passed its first competition law in 1889, and the United States followed suit in 1890. Since then, the number of nations with competition laws has significantly increased, rising from 32 in 1980 to 105 in 2006.[18] A lot of nations, including India, have also changed their competition laws over time to meet the new difficulties brought about by the constantly shifting markets. However, having a competition policy is not a very old practice. Australia is credited with being the first nation to implement a comprehensive policy in 1995.[19]

"According to the OECD, there is broad agreement that the main goal of competition policy should be to protect and foster competition as the best means of ensuring a fair distribution of resources in an open economy." According to a 2007 study by International Competition Network, the majority of competition regulatory bodies aim to promote consumer welfare and an open market economy by increasing efficiency.

The core goals that serve as the foundation for a competition policy are multifaceted and aim to create a balanced and fair economic environment. Firstly, it seeks to check the accumulation of economic power, preventing monopolies and ensuring that no single entity can dominate the market to the detriment of others. Secondly, it aims to remove artificial restraints on free trade, fostering an open and competitive marketplace where businesses can compete on a level playing field. Thirdly, protecting consumers' interests is a key objective, ensuring that they have access to a variety of goods and services at fair prices while safeguarding them from exploitative practices. Lastly, competition policy strives to secure a fairer distribution of resources, promoting equity and inclusivity within the economy. Together, these goals help maintain a dynamic and just economic system.

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[17] Joseph E. Stiglitz, Towards A Broader View Of Competition Policy,2017, PL 16

[18] UNCTAD - Directory of Competition Authorities, United Nation Confrence on Trade and Development,2006.

[19] Ibid

There are connections between market competition and other elements such as innovation, governance, democracy, and poverty reduction. The following is a discussion of these:

2.3.1 Competition and Governance

In the development agenda, the role of governance and the government in promoting competition has grown in significance. Competition is significantly impacted by politics, particularly in democracies. The competition regime is influenced by the governing government's ideology. A liberal government that supports free trade introduces pro-competition policies and encourages companies to grow both nationally and internationally. Numerous strategies, including tax rate reductions, investment incentives, labor policy reforms, expediting the environmental clearance process, etc., can be used to achieve this. On the other hand, a conservative government seeks to advance its own interests at home, which leads it to advocate for laws that protect home businesses from foreign competition.

The United States of America under Donald Trump's presidency is the most pertinent example of such a situation today. He has revived the America First slogan and taken steps to protect the American labor industry from foreign competition by imposing stricter visa requirements for immigrants who come to the United States in search of better opportunities. A nation's competitive strategy is influenced by international institutions like the World Trade Organization and the International Monetary Fund.The World Trade Organization seeks to guarantee unhindered and unrestricted trade between nations. It also offers a forum for trade agreement negotiations and dispute resolution. With 164 member nations, it has the power to influence governments to start reforms that would allow free competition in their markets and give businesses a fair playing field, thereby promoting trade that would benefit all parties. India implemented the LGP reforms in 1991 in order to comply with the IMF's requirements. When India's economy was about to crash, she had to consent to allow foreign investors into the country in order to receive financial support from the IMF. Even though the economic liberalization process had started, the LPG policy was not fully implemented until 1991. Since then, trade restrictions have gradually been lifted, foreign direct investment (FDI) and limited foreign ownership (FII) limits

have been raised, and trade ties have grown. The Indian economy is now more competitive as a result of all these initiatives, and the country's competition policy has also changed to meet new difficulties.

Competition is occasionally hampered by government policies intended to curb anti-competitive behavior. This is frequently observed in less developed and developing nations where overly cautious policy choices prove to be counterproductive by limiting the growth prospects of firms. For instance, the capacity to diversify operations through mergers and acquisitions may be restricted by stringent policies designed to prevent collusive behavior.Such conduct is restrained by a healthy market,

which also reduces the chance of non-transparent and immoral lobbying. It aids in creating an atmosphere that is favourable for the growth of both large and small businesses. Fair and unrestricted competition can contribute to improved governance in instances such as state agencies' public procurement. The government regularly purchases items such as medications, books, stationery, and building materials for roads, bridges, and other structures in order to achieve the welfare goal. A competitive process guarantees the best possible use of public funds by making it easier to obtain the best products at reasonable prices.

2.3.2 Competition and Innovation

Innovation has the amazing power to advance both economic growth and quality of life. The OECD claims that innovation is responsible for the gains in living standards that have occurred since the Industrial Revolution.[20] Although many contest this relationship, it is generally accepted that open, free competition stimulates innovation. Since competition pushes businesses to outperform one another in the market, it is believed to foster innovation. If a company in a competitive market does not enhance its offerings or manufacturing method, it is probable that a competitor's new product will draw in customers, reduce sales and profits, or worse, force the company to close. In a competitive market, there are also few barriers to entry, so businesses must be

[20] OECD, "Innovation and growth rationale for an innovation strategy, 2007, available at: http://www.oecd.org/sti/inno/39374789.pdf" (last visited on 22 April 2024)

cautious of new companies entering the market with the newest products. As a result, businesses face constant pressure to innovate in order to continue operating and turning a profit. The mobile technology industry is the most pertinent example of this kind of situation, where manufacturers are driven to evolve quickly by intense competition. Competing companies are always fighting to offer new features on mobile devices that will pique customers' interest. In contrast, the monopolist market's holder has much less incentive to invest in innovation. This is due to the fact that there is limited entry into the market as the sole supplier, eliminating any threat from competing companies. When a new product is introduced, monopoly firms may innovate to keep competitors from undermining their profits. Therefore, innovation is discouraged in monopoly markets due to their inherent characteristics. As a result, market competition is crucial for fostering innovation and ensuring the nation's long-term prosperity.

2.3.3 Competition and Democracy

"Market competition and democracy are guided by the same fundamental philosophy of free will, freedom of choice, opposition to abuse of power, decentralization of decision-making, and public good." The basic goal of increasing efficiency to generate outcomes that are deemed desirable by society is what connects democracy and competition. Both place a strong focus on advancing the general welfare. The freedom of the economic actors to operate is a crucial aspect of an open market. The strength of the democratic foundations can also be determined by looking at the level of free market competition. A democratic state's regard for economic rights is demonstrated by its competition policy, which should be transparent, logical, and effective. Furthermore, economic endeavours necessitate the exercise of several fundamental rights and the freedom to conduct any kind of business, which in turn calls for government protection and non-interference in the functioning of the market. For instance, the unimpeded advancement of economic activity can be guaranteed by the freedoms of expression, association formation, property ownership, privacy, and a fair trial in the event of a dispute. By enacting laws and creating policies that encourage healthy competition, democratic states can aid citizens in exercising their rights and liberties.

Democracy and competition support one another. Nobel laureate Amartya Sen claims that it is difficult for the ruling government to disregard the demands of the populace in a democratic system. According to renowned economist J. Schumpeter,[21] in order to increase efficiency and prevent the abuse of power, competition in politics is necessary, just as it is in markets. Democracy, according to him, is a "competitive struggle for people's votes."[22] He created an analogy of a market to illustrate the parallels between a democratic government and a free market economy. To shield society from unforeseen mistakes made by the government and market, a clear and comprehensive regulatory framework is necessary. As a result, by upholding a system of corrective action, democracy and competition are complementary. A democratic form of government has been established in India by the constitution. The freedom to engage in any line of work and to carry on any kind of commerce or business is guaranteed by Article 19(1)(g). By getting rid of restrictions that make it difficult for people to exercise their democratic rights, competition laws support and strengthen these fundamental values. Some have even compared competition law to political democracy on an economic level.

2.3.4 Competition and Poverty Reduction

In a nation, combating poverty is a top welfare priority, and competition policy plays a crucial role in efforts to uplift the poor. Effective competition can significantly contribute to poverty reduction. Poor households, which engage in various economic activities, allocate the majority of their income to purchasing necessities such as food and commodities. Competition can impact these households in several ways: it prevents market concentration, ensures that products are not overpriced, and enhances income distribution. By addressing these factors, competition policy helps improve the economic conditions of impoverished households.

When it comes to monopolies (or any other type of less competitive market) in essential goods, lower income households lose more than higher income households. Food and medicine are examples of essential goods with less elastic demand, meaning that consumer demand for them does not change significantly when their processes

[21] Irvin M. Grossack, Joseph Alois Schumpeter, 1989, Vol. 32, Issue 5, Elsevier Advanced Technology Publications.

[22] Richard Swedberg, Joseph A. Schumpeter, Capitalism, Socialism and Democracy,1949.

change. This is so that these products can satisfy our most basic needs. Due to their lower income, a large portion of household expenses is spent on their purchases. Additionally, spending less on necessities would free up money that could be saved or used to purchase other items in the consumption basket.

A small number of companies, referred to as dominant firms, hold the majority of the market power due to cartels, monopolies, collusive business practices, and even irrational government policies. Their ability to charge more than what is reasonable is derived from this. Increasing competition will improve the welfare of the impoverished by impacting price and quality, which is one strategy to lessen dominance. According to Connor's (2014) research, cartel overcharging averages 49%.[23]

Many of the poor in developing and underdeveloped countries are small farmers or small business owners. In order to conduct trading transactions, these entrepreneurs need an equal platform in the market. A market with free competition gives producers the opportunity to sell their goods at fair prices, obtain inputs at reasonable prices, and take advantage of simple entry and exit regulations. Governments frequently get involved in the agricultural markets to assist farmers in selling their products for a price higher than what the market will bear. Even though the goal of these government initiatives is to boost farmer income, numerous studies have demonstrated that poor households are typically the ones who suffer more from rising food prices because they are frequently net consumers of food.[24]

The distribution of income is positively impacted by competition as well because it drives down prices, which primarily help the poor, and raises the income of small producers who outperform when they compete fairly. The Indian government has been working nonstop to combat poverty through a variety of programs and initiatives. In addition to government efforts, an efficient competition policy that supports small businesses and discourages cartelization can be implemented.

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[23] John M Connor, "Cartel overcharges" http://www.emeraldinsight.com/doi/pdfplus/10.1108/S0193-589520140000026008 (last visited on 23 April 2024)

[24] Competition and poverty, available at: http://documents.worldbank.org/curated/en/6248146818053669/pdf/104736-REPF-Competition-and-Poverty.pdf"(last visited on 23 April 2024)

Chapter - 3

ORIGIN AND EVOLUTION OF THE EU AND INDIA'S COMPETITION LAW PROVISIONS' REMEDIAL STRUCTURE AND LEGISLATIVE FRAMEWORK

3.1 Introduction

Competition law and policy play an important role in the development of third-world countries because they help them achieve the twin goals of securing their internal markets and competing fairly and justly in the international arena. Competition laws are seen as the foundation of the entire sustainable development paradigm.[25] They also have the dual functions of preventing anti-competitive behaviour and decreasing economic growth. The framework of competition jurisprudence does not have a one-size-fits-all approach, as we have seen in the cases of other jurisdictions as well, since it is closely correlated with the degree and phase of national development[26] The evolution of the competition law framework typically follows the trajectory of the country's economic and general development. “The Monopolistic and Restrictive Trade Practices Act 1969 (MRTP) and the Competition Act 2002 are two significant legislative enactments that can be used to trace the historical roots of India's competition regime.” These two laws turned out to be crucial in forming India's antitrust law as it stands today.

3.2 Evolution of competition law in India

Three major stages may be distinguished in the development of Indian competition law:

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[25] Prof W. Lachmann, The Development Dimensions of Competition Law & Policy, UNCTAD Series on issue in Competition Law and Policy (United Nations New York and Geneva, 1999)

[26] S.V. Mazzhuvanchery, "The Indian Competition Act: A Historical and Development Perspective", The Law and Development Review Vol. 03 Issue 02 241 (2010)

3.2.1 Immediately post-independence 1947

There were a few isolated industrial developments in India during the colonial era, but no concentrated or long-term efforts were made in this direction, mainly because the colonial government had little interest in development. Soon after gaining independence, the nation implemented the Indian Industrial Policy to guarantee a swift industrialization across the country in order to achieve socioeconomic development.[27] This policy has accepted the State's primary role in the process of economic development.

A significant policy decision made during this phase was Resolution of 1956, which established the framework for government regulatory intervention in the economic sphere. Following this, the government began to take an active role in the form of an interventionist approach in order to expedite India's industrialization process. In this case, the public sector was given control over important core sector industries and, consequently, over "commanding heights" in the economy. In contrast, the private sector was limited by license requirements. Despite the fact that the government was at the forefront of most economic activities, from hotels to consumer durables, there were high tariffs and a lack of fair market determined competition. Some very powerful figures in the private sector used official favouritism to secure the required licenses and permits. As a result, they enjoyed commercial success with government backing without having to contend with any genuine competition. However, this led to a situation in which certain large businesses engaged in anti-competitive behavior with the intention of hurting the interests of regular people in order to increase their profits by suppressing competitors. This prompted calls for changes, such as laws to curb businesses' anti-competitive behavior and the development of fresh strategies for dealing with rivalry.

3.2.2. Period of MRTP Act 1969

The era began in the first half of the 1960s, when an increasing body of evidence indicated that the Indian government needed to take action to stop anti-competitive

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[27] Pardeep S. Mehta, Evolution of Competition Law, and their Enforcement: A Political and Economic Perspective 74 (1st edn., Roultdege Publication, 2012)

issues that were surfacing in the country's economy. These facts were highlighted by three significant studies conducted by government-appointed commissions and committees:

“Hazari Committee Report on Industrial Licensing Procedure 1955”: It filed its report in 1967, despite the fact that it had been formed earlier. It made clear that the way industrial licensing laws have been implemented has benefited large industrial conglomerates, leading to unequal economic growth.

“Mahalanobis Committee Report on Distribution and Levels of Income 1964”: This study showed that the way the nation's economic model operated led to significant gaps in the distribution of income, heavily favoring a small number of powerful individuals and corporations.

“Monopolies Inquiry Commission (MIC) Report of Das Gupta, 1965”: This study emphasized how the real power in the Indian economy is held by a small number of powerful companies, and anti-competitive behaviors like monopolistic and restrictive business practices are frequently used.

The MIC drafted bill in response to its conclusions regarding the prevalence of anti-competitive behavior, overbearing government regulation, and a weak legal framework to address these issues. This bill eventually became law and became known as the “Monopolies and Restrictive Trade Practices Act of 1969”. On June 1, 1970, the act came into effect.[28] The roots of the MRTP Act can be traced back to the Indian Constitution, which states in Article 39 20(b) and (c) respectively that the State shall aim its policies to ensure that "the ownership and control of the material resources of the community are so distributed as best to serve the common good" and that "the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment."[29]

The MRTP Act had three main objectives: "to control the monopolies, prohibit Monopolistic trade practices (MTP)[30],Restrictive trade practices (RTP) and Unfair

[28] The Monopolies and Restrictive Trade Practices Act, 1969: policy provisions and performance", Ministry of Corporate Affairs (Annual Report, 2009) ch 4

[29] Ibid

[30] Dr. S. Chakravarty, Why India adopted new Competition Law, CUTS International 06 (Jaipur, 2006)

practice trade (UTP)"[31].After an amendment in 1984, the MRTP Act included unfair trade practices (UTP)[32]. The following were some of these practices: "holding or destroying goods, promoting false and misleading promotional contests, bargain sales, false representation in advertisements, and free riding over the reputation of others."

(i) Provisions of MRTP Act to deal with MTP, RTP and UTP

Section 10 of the MRTP Act gave the MRTP commission the authority to investigate any matter pertaining to "monopolistic or restrictive trade practices" after the Indian federal government made a reference in this regard. The "unfair trade practices" were covered by Section 36[33] of the act. The act provided for the appointment of a Director General to oversee registration and conduct investigations. Additionally, it was the responsibility of DG to maintain the database pertaining to trade restrictions.

The MRTP Commission may receive complaints from individuals, consumers, and trade associations through any of the following channels: directly to the Commission, through government agencies, or through both. Any complaint that the commission received had to be investigated prima facie by the DG of Investigation and Registration. After that, his findings would be sent to the MRTP commission for review in accordance with the relevant act sections. When no case was found during the DG's initial investigation, the case was closed. On the other hand, the commission intervened against the guilty parties by awarding temporary injunctions in situations where the act's offence was proven. Additionally, a clause for compensating the complainant for their losses was included.

(ii) Amendments in MRTP Act

The MRTP act saw two significant revisions passed in 1984 and 1991. The MRTP act was amended in 1984 to include clauses protecting consumers from "unfair trade practices" that are detrimental to their interests. The recommendations of the Sachar Committee 1978 served as the foundation for these provisions.[34] This amendment's primary goal was to guarantee that customers could be protected from unfair business

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[31] Ibid

[32] Ibid

[33] Supra note 10.

[34] Supra note 4.

practices. The second amendment was implemented in 1991 against the backdrop of India's economy opening up as a result of globalization, privatization, and liberalization. Before 1991, the MRTP Act governed the operations and growth of larger organizations with a total market value of more than one hundred crore rupees.[35] In addition, the act helped these units obtain government approval for amalgamations, the creation of new affiliates, and the maintenance of preexisting units, among other things.

The 1991 amendment eliminated the provision of the act that addressed the aforementioned problems, such both as obtaining government approval for new affiliate units, amalgamations, and "concentration of wealth and power of monopoly companies. The primary emphasis shifted to identifying and managing MTP, RTP, and UTP in order to protect suppliers, customers, and other economic participants, regardless of their size or scope.

(iii) Major decisions under MRTP Act

For a better understanding of how the MRTP act operates, it is crucial to examine the key rulings made under it. The Registrar of Restrictive Trade Agreements v. Bata India Ltd. case is the first in this category.[36] This case addressed the respondent Bata Company's dominant position in the Indian footwear market. The primary source of dispute arose from the parties' agreements, which restricted small-time traders, typically consisting of cobblers and small manufacturers, to acquiring raw materials for footwear manufacturing only from vendors authorized by Bata. The MRTP commission concluded after reviewing the matter that the agreements in question were monopolistic and restrictive in nature, making them indicative of the MRTP act of 1969.

In DG (I & R) v. Modern Food Industries, the MRTP commission addressed the problem of predatory pricing.[37] The respondent company produced goods for bakeries. The respondent company began selling its bread at a price lower than the cost of production in an attempt to gain a dominant market share. As a result, it was

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[35] Supra note 10.

[36] 46 Comp Case 441 (1976)

[37] 3 Comp LJ 154 (1996)

decided that setting prices below even marginal costs in an effort to eliminate competition constituted monopolistic trade practices.

3.2.3 Period of the Competition Act 2002

Numerous issues and deficiencies were noted in the way the MRTP Act operated, particularly since the start of the LPG era in the Indian economy. Along with the MRTP commission's ruling, a number of Supreme Court of India decisions have emphasized the necessity for more comprehensive and detailed regulations in this area. The MRTP Act's shortcomings in handling cases involving "bid rigging, cartels, collisions and price fixation, predatory pricing and abuse of dominance" have been brought to light by a number of factual situations that have arisen over the years.[38] It became essential for India to implement a competition policy system where the goal is changed from preventing monopolies to one that promotes free competition among market players due to the shifting views on "true competition" in the globalized economy. A more comprehensive interpretation of the modifications could be that they represent an effort by the Indian legislature to bring the country's competition laws into line with those of other preeminent international legal systems. As previously stated, in the liberalized era of India, it was crucial to eliminate the trade barriers and restrictions that were impeding competition. A new bill was introduced in Parliament as a result. The Competition Act of 2002 was derived from the Competition Bill, which was approved by the Parliament in 2001. On January 13, 2003, the President of India gave his assent, and on January 14, 2003, the Indian Gazette published it.

On May 20, 2009, the provisions of the Competition Act pertaining to anti-competitive agreements and abuse of dominant position became partially enforced. The combination regulations were also notified in May 2011 and went into effect on June 1st of that same year. The preamble of the Competition Act of 2002 outlines several key goals: preventing practices that negatively impact competition, promoting and sustaining market competition, protecting consumer interests, and ensuring the freedom of trade for other market participants in India. These objectives aim to foster a fair and dynamic economic environment.

[38] Supra note 4.

The Competition Commission of India (CCI) was established in accordance with the Act, and it began operations on October 14, 2003. The Competition Commission of India (CCI) is a quasi-judicial body. The Commission looks into claims of violations of the Act's provisions, either independently, after receiving information from anyone, or after being referred to it by the federal, state, or local governments, or by a statutory body.[39] One may appeal to the Competition Appellate Tribunal (COMPAT)[40] or the Supreme Court regarding orders issued by the CCI under the specified sections listed in Section 53A of the Act. The Competition Act of 2002 addressed four major aspects of competition law, which the Competition Commission of India (CCI) began enforcing gradually. These aspects include anti-competitive agreements (Section 3), abuse of dominance (Section 4), combinations regulation covering mergers and alliances (Sections 5 and 6), and competition advocacy (Section 49). These provisions aim to create a fair and competitive market environment.

The CCI has evolved through three phases, and its workings have changed accordingly. -

In phase 1, the CCI focused exclusively on competition advocacy. The Commission took extensive advocacy measures, raising awareness and providing training on competition issues in a variety of forums.

In phase 2, the CCI began adjudication work on anti-competitive agreements and abuse of dominance. Anti-competitive agreements include any agreement relating to the production, supply, distribution, storage, acquisition, or control of goods or the provision of services that has or is likely to have a significant negative impact on competition in India. Abuse of dominant position occurs when any enterprise or group, among other things, imposes unfair or discriminatory conditions or prices on the purchase of goods or services, limits or restricts the production of goods or the provision of services.

[39] Section 53A of the Competition Act 2002

[40] Part XIV of Chapter VI of the Finance Act, 2017

Belaire owner's association Vs. DLF (2001)

The CCI issued an order against DLF Ltd. in Belaire Owners Association vs. DLF, imposing a penalty of $124 million, or 7% of the average turnover of the company for the three previous years. Leading real estate company DLF Ltd was discovered to be abusing its dominant position and putting unfair terms in their contracts with clients. The CCI discovered that DLF had decided on its own to expand the building from 19 to 29 stories without first obtaining permission, and that this had caused significant delays in construction, preventing the buyers from taking possession of their apartments until much later than specified in the contract. The Belaire case's CCI penalty order had been stayed by the competition tribunal. In addition, it mandated that DLF provide an undertaking to deposit the full fine plus nine percent interest in the event that the business lost the case. The decision implied that future abuse of dominance cases may find that consumer welfare plays a major role in their determination. In order to protect consumer interests, the decision also introduced the concept of government planning in the real estate market as a regulator. A decision appeal was filed with the COMPAT.

Santuka Associates v. All India Organization of Chemist and Druggists (AIOCD)

In May 2011, Santuka Associates lodged a complaint with the CCI. According to the complaint, the trade association representing nearly 750,000 Indian retailers and wholesalers engaged in widespread anti-competitive practices. According to these accusations, the manufacturers fixed prices, restricted the number of new manufacturers entering the market, charged manufacturers a fee to be listed in the Associations' Product Information Service (PIS), and boycotted any manufacturers who disobeyed the restrictions. The CCI concluded that there was a prima facie case, and despite the informant withdrawing the complaint, the CCI went ahead and took the case independently. The CCI concluded that the AIOCD's mandate that a statement of non-objection be obtained before entering the wholesale or retail market was an unlawful moderation restricting the distribution of pharmaceutical products. Furthermore, the fees that drug manufacturers had to pay to have their products listed on the PIS restricted the number of new drugs that could enter the market and forced them to raise prices in order to cover the cost of the fees. Drug prices increased as a result of the AIOCD's boycott of producers who disregarded these mandated

requirements, raising concerns about the accessibility of different medications for the general public. The AIOCD was fined roughly $50,000 US by the CCI.

In phase 3, the CCI began enforcing provisions governing combinations (mergers, acquisitions, etc.). Combinations are specific kinds of transactions that, in accordance with the Act, must meet a certain financial threshold and be reported to the CCI. The CCI will review them to determine whether they will likely have a negative impact on competition. Before the CCI has specifically approved the transaction, such transactions cannot be finalized. This Act permits the transactions to take the form of mergers and de-mergers, amalgamations that satisfy certain financial thresholds, and acquisitions of shares, voting rights, control, or assets. As of 2017 the Competition Commission of India has handled 868 antitrust suits, 498 merger filings and almost 500 advocacy programs.[41]

The Government notified the public on May 20, 2009, regarding the enforcement of the Act's provisions regarding anti-competitive agreements (Section 3 of the Act) and abuse of dominant position (Section 4 of the Act). The Competition Appellate Tribunal was established, as required by the amended Act, to hear appeals.

Notice of acquisition filed by Walt Disney Company (Southeast Asia) Limited (August,2011)

After receiving notice in August 2011, the CCI approved the proposed combination of Walt Disney Company (Southeast Asia) Private Limited (the "Acquirer") and UTV Software Communications Limited within a quarter of a century. This was the first case in which the CCI approved the sanction on the grounds that the broadcasting sector is highly competitive, innovative, and dynamic, with a large number of players competing fiercely.

The "Effects Doctrine," one of the Competition Act's additional features, allows the CCI to look into anti-competitive acts occurring outside of India but having a noticeably negative impact on competition within the country. Regulators have the authority to extend their jurisdiction beyond the "principle of territoriality" under Section 32. CCI has yet to use this provision, so it will be interesting to see how the

[41] Competition Commission of India, Annual Report 2016-17 (CCI New Delhi)

case law develops. Also, the Competition Act of 2002 expressly excluded some acts from the above-discussed provisions. This includes the freedom to demand reasonable restrictions or to stop any infringement of an individual's intellectual property rights that are safeguarded by laws such as the Trademarks Act of 1999 or the Patents Act of 1970.

The Competition (Amendment) Act of 2007 was passed by Parliament in September 2007 and received Presidential assent on September 24, 2007. Significant modifications were made to the Competition Act's then-current regulatory framework by the amendment. The CCI's designation is one of the main modifications brought about by this amendment. Although it was originally intended to serve as a court, it is now able to prevent and control anti-competitive behavior as an expert body acting in an advisory capacity.

The Competition (Amendment) Act, 2012: The main changes that the Cabinet approved concerned defining "turnover," "Group," lowering the total time limit for completing combinations from 210 days to 180 days, and adding a new Section 5A that gives the Central Government the authority to establish different thresholds for any class or classes of enterprises in order to examine acquisitions, mergers, and amalgamations by the Commission. This authority is consulted with the Competition Commission of India.

The Competition (Amendment) Act 2009, which was further amended in 2009, was ratified by the Indian president on December 22, 2009. One of the main changes brought about by this amendment was the transfer of all pending Monopolies Act and MRTC cases to the Competition Appellate Tribunal. Additionally, under the Consumer (Protection) Act of 1986, unfair trade practices were transferred to the National Commission, while monopolistic and restrictive trade practices were transferred to the CCI.

3.3 Inquiry and Investigation under the Competition Act ,2000

Under the Competition Act, 2002 (the "Act"), the Competition Commission of India (CCI) was created to look into any cases and/or complaints that are brought before it.

The Central Government appoints the Director General ("DG") of the CCI to carry out its main duty of conducting investigations into violations of any Act provisions.

Fundamentally, the CCI initiates an investigation based on a referral it receives, or based on knowledge or information it obtains in compliance with Section 19 regarding anti-competitive agreements and abuse of dominance. Under Section 20 of the Act, inquiries are made regarding combinations. The Commission is required to reach a preliminary determination that a case is present, and upon reaching this determination, it instructs the DG to initiate an inquiry.

3.4 Inquiry and Investigation into Anti-Competitive Agreements and Abuse of Dominance .[42]

The CCI's inquiry procedure is outlined in Section 19 of the Act. Specifically, the Commission conducts the inquiry in the following ways in cases of agreements that are allegedly in violation of the Act or in response to information alleging that a business has abused its dominant position. The CCI must determine whether there is a prima facie case of anti-competitive agreement or abuse of dominance upon receipt of a reference, its own knowledge, or information obtained under Section 19. Once it has reached this determination, it will instruct the DG to launch an investigation into the matter.[43] When a prima facie case cannot be found, the CCI will close the case, issue the proper order, and notify the parties involved.

The Director General must deliver a report to the CCI on his findings within the time frame that the Commission may specify:

- If the DG recommends that there is no evidence of an anti-competitive agreement, abuse of dominance, or violation of the Act's provisions, the CCI will request comments and suggestions from the relevant parties. If the DG is agreed upon by CCI after taking into account these objections or suggestions, the matter will be closed. If CCI disagrees with the DG's recommendation, it may request that the DG conduct additional research or may choose to carry out additional investigation on its own.

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[42] Section 19 and 26 of the Act

[43] Section 26(3) of the Act

- If the DG recommends in its report that there is a violation of the Act's provisions and the CCI believes that more investigation is necessary, it will look into the violation in compliance with the Act's provisions.

In **CCI v. SAIL,** it was noted that the CCI inquiries into the matter right away and, if, at that stage, it determines that there is a prima facie case for a violation, it instructs the DG to look into the matter in accordance with Section 26 of the Act.

Excel Crop Care Ltd. v. Competition Commission of India & Others addressed the DG's investigation's scope. In this instance, the SC felt that the DG ought to look into the matter in compliance with the guidance provided by the CCI. The SC concluded that the goal of a DG investigation is to "cover all necessary facts and evidence in order to see as to whether the persons against whom the complaint is made have adopted any anti-competitive practices." Thus, the SC stated that although "the DG would be well within his powers to include those as well in his report," "the starting point of the inquiry would be the allegations contained in the complaint" if "other facts also get revealed and are brought to light" during the investigating process.

Due to the CCI's initial inability to "foresee and predict whether any violation of the Act would be found upon the investigation and what would be the nature of the violation revealed through investigation," the Supreme Court made the above decision. The SC concludes that limiting the investigation process would be counterproductive to the primary goal of the Act. As a result, the SC's order has expanded the parameters and paradigm of DG investigations. When the DG learns of additional information about a violation that was overlooked by the CCI later on in the investigation, it is well within its rights to look into it.

3.5 Inquiry and Investigation into Combination by CCI .[44]

The Commission may investigate whether a combination significantly reduces competition in the relevant Indian market under Section 20 of the Act. The commission may begin an investigation based on its knowledge, information obtained, or a referral from the federal, state, or local governments, as well as from

[44] Section 20 and 29 of the Act

statutory authorities. Before the Commission can begin an investigation into a proposed transaction or combination, the law stipulates a number of filters. These are the following:

- If the outcome is higher than the legally mandated thresholds.
- Prima facie evidence of a significant negative impact on competition in the pertinent product and region markets in India. The law has statutory provisions that reduce arbitrariness in determining what constitutes an appreciable adverse effect on competition.[45]
- The law has established local nexus or "de minimis" thresholds for foreign transactions that negatively impact India. The Commission will not investigate cross-border transactions that fall below the legally mandated "de minimis" thresholds.
- Publicly and privately funded businesses are held to the same standards of scrutiny, guaranteeing a level playing field for rival businesses.

As guidelines, Section 20(4) requires that all or any of the factors listed in the aforementioned provision be taken into consideration when evaluating whether or not a combination has an appreciable adverse effect on competition in the relevant market. After reaching the preliminary conclusion that the combination has the potential to have a significant negative impact on competition in the relevant market, or has already done so:

Parties to the combination will receive a show cause notice from the commission, requiring them to provide justification for why an investigation into the combination should not be carried out within 30 days of receipt.

1. The commission may request a report from the DG within the time frame that may be specified following the receipt of the parties' response.

2. Upon receiving the DG report and response, the commission may determine, based on prima facie evidence, that the combination has or is likely to cause a significant adverse effect on competition. In such case, it may direct the parties to publish the combination's details within 10 days of receiving the

[45] Section 20(4) of the Act

order, so that the general public and those who will be affected by the combination are aware of it.

3. If there are any objections or suggestions, the public or the parties who will be impacted must submit them within 15 days of the publication.

4. The commission may request further information from the parties to the combination within the previously mentioned 15-day window.

5. The extra information must be submitted by the parties within 15 days of the 15-day period that the information was sorted.

6. After the 15-day period for providing the extra information has passed, the Commission must move forward with the matter within 45 days.

Therefore, the Commission starts an investigation under Section 19 to determine whether or not a combination has a noticeably negative impact on competition in the relevant Indian market based on its own knowledge, information obtained, or a referral from the Central Government, state governments, or a statutory body. The Commission shall conduct an investigation in compliance with Section 29 of the Act upon reaching a preliminary determination that the combination has caused or is likely to cause an appreciable adverse effect.

3.6 Penalty

The Competition Act of 2002 stipulates penalties for breaking its rules. The Act penalizes businesses or organizations that, either directly or indirectly, take advantage of their dominant position, set unfair or discriminatory terms for the purchase or sale of products or services, or charge exorbitant prices. Penalties may exceed 10% of the average turnover over the preceding three fiscal years. Businesses or groups that engage in anti-competitive practices, such as bid rigging or cartels, are subject to penalties under the Act that can amount to up to three times their profits or 10% of their average turnover over the previous three fiscal years. For violations of the Act, the Competition Commission of India (CCI) is empowered to look into the matter and

impose sanctions. If the Director-General finds a violation, the CCI has the authority to order an investigation by the DG, and based on the DG's report, the CCI can impose penalties. The Act also stipulates that noncompliance with the Director-General's or the CCI's directives may result in fines of up to ₹ 1 crore. With the Competition (Amendment) Act, 2007, the maximum penalty for anti-competitive agreements was raised from ₹ 50 lakh to ₹ 1 crore, and repeat offenders faced even harsher penalties. This strengthened the penalties already in place under the Act.

3.7 Limitations of Indian Competition Law

The Competition Act of 2002 contains specific exemptions that prevent this act from being applied. Among them are:

Government's Sovereign Functions

The definition of enterprise given in Section 2(h), which serves as the foundation for applying competition law to any entity, specifies that it excludes any government activity connected to "sovereign functions" of the government. The Competition Commission of India and its Appellate body have been interpreting the scope of "sovereign functions" narrowly through their rulings in a number of case laws. In a case where the state government's Registrar of Cooperative Societies was found to have imposed anti-competitive conditions, the former Competition Appellate Tribunal rejected the Registrar's defence of "sovereign functions”[46]. Similarly, the Competition Appellate Tribunal ruled that the State Government's Public Works Department is not performing sovereign duties because it is offering certain services to the public. For example, it is not possible to hold the Director General of Health Services of the central government accountable for performing sovereign duties because they are not considered to be inalienable.[47]

Exemptions from Section 3 for IPR holders and exporters

[46] Malwa Indus &M. F-C Coop. Society v. VIC (16.10.2022 - HC)

[47] Wing Cdr. (Retd.) Dr. B. P. Singh v. D. G. of Health Services and Ors. (Appeal no. 63/2014 COMPAT, 1.03.2014 - DELHC)

Exporters and other holders of intellectual property rights may be granted reasonable exemptions from anti-competitive agreement provisions under subsection 3(5). This is considering the general complementary nature of competition law and intellectual property rights. According to this clause, the following IPRs' right holders may impose reasonable restrictions and conditions under the corresponding statutes:

- Copyrights
- Patents
- Trademarks and Merchandise Marks
- Geographical Indications of Goods
- Designs
- Semi-conductors Integrated Circuits Layout-Designs
- Furthermore, since the AAEC in India is the model for Section 3 anti-competitive agreements—exporters operations are also free from the provisions of that section. Therefore, any exporter engaging in anti-competitive behaviour is not likely to result in an AAEC in the Indian market and is therefore excused.

Exemption via notification

According to Section 54 of the Competition Act of 2002, the Central Government may, by notification, exempt certain categories of enterprises from the provisions of Section 3 for a specified period. These exemptions can be made in the interest of the State or public, for the execution of any treaty, agreement, or conventional obligation, and for any enterprise entrusted with sovereign functions by any State or Central government.

Applying the power conferred by clause (a) of Section 54 of the Competition Act 2002 (12 of 2003), the central government, acting in the public interest, hereby exempts the vessel sharing agreements of the liner shipping industry from the

requirements of Section 3 of the Competition Act. This exemption will apply to carriers of all nationalities operating ships of all nationalities from any Indian port and will last for a year from the date this notification is published in the official gazette. On December 11, 2013, the Indian government issued this notification. The Directorate General of Shipping conducted a conditional check and monitoring of this class of agreements. After CCI and the Directorate General of Shipping completed a joint review of the exemptions, this exemption was then extended to 4 in February 2016. These exemptions are then extended through after June 2018.

Exemption for certain types of mergers in the banking sector

The Government has granted exemptions to the banking industry from the merger control regime of the Competition Law in India through a series of decisions made using the authority granted by Section 54(a). This appears to be an attempt to encourage the consolidation of the banking sector. The Central Government is authorized by the Competition Act 2002 (12 of 2003) to exempt a banking company, for which it has published a notification in accordance with Section 45 of the Banking Regulation Act 1949 (10 of 1949), citing the Competition Act of 2002's Sections 5 and 6. This exemption is granted in the public interest and will last for five years following the date the notice was published in the Official Gazette. This power was exercised by the Ministry of Corporate Affairs in a notification dated September 2013. In a similar move, the government announced on August 10, 2017, that Regional Rural Banks covered by the R. Rural Banks Act 1976 would also be granted the same exemption.

3.8 OVERVIEW OF EUROPEAN UNION COMPETITION LAW

3.8.1 Origin and Historical Background

The 1951 European Coal and Steel (ECSC) Treaty serves as the foundation for European completion laws, which resulted in deep economic integration among Belgium, Luxembourg, France, Italy, and the Netherlands. A Harvard Law professor named Robert Bowie was one of several antitrust specialists who wrote the treaty's

scant competition law sections.[48] “The three components of these competition provisions were a merger control system, a ban on the 'misuse' of economic power, and a ban on cartels.” The ECSC members quickly made the decision to expand their horizons and create the European Commission, or EC. The European Commission's drafters determined that the ECSC treaty's competition provisions, which establish a set of competition guidelines and have unsorted competition as one of their primary goals, can be a very helpful source of reference. “The Lisbon Treaty came into effect on December 1, 2009, changing the name of the European Community Treaty to the Treaty on the Functioning of the European Union (TFEU).”

Europe's competition law is divided into two sections. The first section discusses member states and how the law affects them. The second section governs trade and business relations between the member nations. France, Germany, Italy, the Netherlands, Luxembourg, and Belgium were among the signatory nations to the treaty that established a community for trade and business. The goals of this treaty are to guarantee member nations' equal opportunities in the production of steel and coal, to curtail Germany's power, and to promote free and healthy competition. Later, they realized that they needed common market regulations and atomic energy laws, which resulted in the creation of the European Economic Community (EEC), which was ratified by all of the signatory nations to the Paris Treaty in 1957. Articles 85 and 86 of this treaty, which forbid the abuse of a dominant position and void all agreements that interfere with trade between states by obstructing or restricting trade and thereby distorting market competition, are among its most significant provisions. The agreement was then renamed the “Treaty for the Functioning of the European Union (TFEU)”.

All agreements that have an impact on trade between member states are forbidden by Article 101 of the treaty. Additionally, it declares that all agreements and rulings that are anti-competitive are invalid. The article's third clause listed a few exceptions. Whereas article 102 of the treaty addresses the abuse of a dominant position and contains provisions about unfair selling or

[48] “Rodger, B. J., & Gerber, D. J. (2000). Law and Competition in Twentieth Century Europe: Protecting Prometheus”, the American Journal of Comparative Law, 48(2), 340. https://doi.org/10.2307/840974 (last visited on 24 April, 2024)

purchase prices as well as unfair trade conditions, such as limiting production or imposing different terms on similar transactions with other trading parties and putting them in a position of negative competition. Some case laws also had a role in forming European Competition Law.

3.8.2 INTRODUCTION TO ARTICLE 102 TFEU

In particular, the fundamentals of Article 102 TFEU are introduced the abuse of dominance. Article 102 TFEU limits the actions of businesses that hold a dominant position in a significant portion of the market or in the internal market.[49] These undertakings bear a unique responsibility to ensure that they do not impede or distort market competition. However, they are free to conduct business on the market in the same manner as their rivals. The European Court of Justice (ECJ) initially established the special duty for dominant undertakings to avoid distorting or impeding competition on the market in Michelin v. Commission.[50] According to the court ruling in this case, an undertaking's dominant position does not automatically constitute a breach of Article 102 of the TFEU unless it prevents legitimate, undistorted competition on the common market. Therefore, Article 102 TFEU restricts activities that do in fact hold a dominant position, rather than outlawing dominance. Furthermore, a dominating enterprise that enhances its standing by competing on the basis of merit is not subject to Article 102 TFEU. Having said that, there needs to be abuse for there to be a violation of Article 102 TFEU. It also requires the undertaking to hold a dominant position in the market, so non-dominant undertakings that engage in abusive behavior are excluded from the Article's purview.

Moreover, an undertaking need not be aware of its dominant position in the market in order for there to be an abuse that is forbidden by Article 102 TFEU. This means that there need not be a causal connection between an undertaking's abuse and its dominant position. In Tetra Pak v. Commission, for instance, the European Court of

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[49] TFEU (n 4) Article 102.

[50] “Case 322/81 Michelin v Commission [1983] ECR 3461.” (n 4) Article 102.

Justice (ECJ) found that the enterprise in question was leading, but not dominant, in a market that produced non-aseptic cartons, and dominant in one that produced aseptic cartons. The European Court of Justice went on to say that because the products have distinct uses and exist in distinct markets, they are not the same. But the ECJ concluded that a large number of the undertaking's consumers purchased both goods, which strengthened the ties between the two markets. Together with its dominance in one of the markets, the ECJ concluded that the undertaking had abused its dominant position in light of these facts.

3.8.3 Alternate Regulations on Competition

EU competition law originates from a number of sources, including regulations enacted by Council of Ministers. In addition to the TFEU laws concerning competition law practices, commissions also adopted other legal acts, such as guidance letters and block exemption regulations, among others.

- **The EU Regulation on Mergers**

The EC Treaty contained no provisions pertaining to merger control, nor had any system of such been established. “An EU merger control regime was established in 1989 by the Council with the aid of Regulation 4064/89. The Regulation was then updated in 1997 and 2004 (where it is currently known as Regulation 139/2004): The EU merger regulation is characterized as a one-stop shop for all kinds of transactions, while any that cross the threshold into exclusive EU jurisdiction fall under this category. The merger is under the national authorities' jurisdiction prior to these boundaries.

- **Provisions for Block Exemption**

Article 101(3) states that certain conditions must be satisfied for agreements "improving the production or distribution of goods or promoting technical or economic progress" to be exempt from the Article 101(1) prohibition. The commission clearly observed that the majority of the firms met these requirements.

Thus, the council decided to adopt "block exemption regulations." The Article 101(3) exemption applies to some types of agreements targeted at different industries.

- **"Soft" Legal instruments**

The adoption of several soft law instruments, also known as "guidelines" or "notices," to explain the operation of the competition law in a variety of situations has resulted from the law's growing complexity in both substance and application. These tools, which bind the commission, are extremely important and helpful for the firms in assessing the likelihood that the commission will contest their operations or a particular action. Guidelines on Technology Transfer Agreements,[51] Guidelines on Vertical Restraints, or Guidelines on the Evaluation of Horizontal Mergers are a few examples.

- **EC.J. case law**

The ultimate sources of competition law are also the European Court of Justice and the General Court of the EU. The ECJ's interpretations must be followed by the institutions responsible for enforcing EU competition laws.

- **Legal framework for national antitrust**

Aside from the EU competition rules, which are the same for all members, all member states practice national competition. These rules contain provisions identical to Articles 101 and 102 TFEU and follow a similar pattern to EU competition law. The enforcement of such laws must not allow practices that are prohibited by EU completion laws, but they may become more rigid in order to improve conduct.

3.9 EU Competition Policy

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[51] Bocken, J., & Bourgeois, J. H. (2005). Guidelines on the application of Article 81(3) of the EC Treaty or how to restrict a restriction. Legal Issues of Economic Integration, 32(Issue 2), 111–121. https://doi.org/10.54648/leie2005016 (last visited on 24 April,2024)

The EU competition policies, which are designed with the goal of ensuring the efficient operation of the EU economic field, are founded on five fundamental principles. Which are:

- Prohibition of partnerships, inter-company agreements, and coordinated efforts to influence trade among member states and to stop or restrict competition within the internal market.

- The internal market's dominant position cannot be abused to the extent that it interferes with trade among member states.

- Monitoring all forms of state assistance given by the participating nations that pose a risk to stifle competition by endorsing particular businesses or product manufacturers,

- Acknowledging the protective supervision for approval or disapproval of the proposed merger agreements,

- Liberalization of some industries, like energy, transportation, and telecommunications, where monopolies in the public or private sectors are common.

It is impossible to discuss EU competition policy without discussing EU competition law, which establishes boundaries and allows for the policy's implementation. Within most legal systems, the field of competition law is one that is fast developing. It interacts with many legal disciplines as well as political, economic, and social concepts, all while maintaining a unique style and personality. Any state that has jurisdiction over competition law cannot operate in a vacuum from the state of the economy as a whole. Because of this, even though competition law is founded on generally accepted principles, national laws relevant to that industry differ. The primary goal of competition law is to protect the competitive process, which results in the best use of resources and the greatest level of consumer welfare. Stated differently, the goal of competition law is to preserve a free market economy by regulating market behavior. However, competition regulations have had a significant impact on the evolution of EU law. The main purposes of competition law are founded on EU

competition law, as is the aim of establishing a single market, which is stated as a goal in the frequently discussed EU founding treaties. Competition law has significantly contributed to achieving that goal.

When comparing national competition laws with EU competition law, it becomes clear that member states have the right to pass and implement such laws. The commercial action cannot have an adverse effect on any other member state in order to be compliant with EU competition law. According to this framework, there are sometimes perceived conflicts between Union institutions and member states as a result of the competition policy, a field of policy about which national governments are very sensitive.

The Treaty on the Functioning of the European Union (TFEU) contains articles pertaining to competition that state that all parties involved in the internal market are entitled to the same opportunities and terms of competition.Furthermore, EU competition law serves to strengthen the European economy's competitiveness and power, as well as to protect the interests of the EU's 500 million consumers. Upon examining the organization of EU competition law in the context of these goals, one encounters both primary and secondary legal provisions. The following explanations apply to primary and secondary legal provisions:

Principal Provisions of the Law: Under the heading "Common rules on harmonization of competition, taxation issues and legislation," in the first section of heading 7 of the third part of the Treaty on Federal Election Law Enforcement (TFEU), are the regulations governing the competition regime in the internal market. The competition laws are separated into two sections within the framework of those articles: state aids (Art. 107-109) and enterprises (Art. 101-106). These clauses, which make up the main body of legislation pertaining to competition, are complementary and practically always serve to safeguard competition.

Secondary Legal Provisions: The Union's competition law is completed by these provisions. The secondary law provisions are found in the Council Code, Commission Code, Commission Declaration and Explanation, and, most importantly, the Code of Competition Procedure. Under the TFEU Article 103 axis, the Council has obtained a

number of codes in this regard. The Commission approved certain implementation plans for numerous of those codes. Within the framework of secondary law provisions, Competition Procedure Code No. 1/2003 holds a pivotal role in EU competition law. The sector-specific codes and group exempting codes, when combined with all of these, make up a significant portion of the secondary law provisions.

The six categories that the European Commission has identified as areas of competition policy within the context of EU competition law are as follows:

1. **Antitrust**: These could be referred to as anti-monopoly policies. These policies are based on two main rules. The first is an agreement between two or more independent market actors with the goal of limiting competition. According to TFEU Art. 101, this is a step below the restrictive agreements between businesses and involves more coordination. And the second one is taking advantage of the dominant position. This entails the use of economic or other forms of power that allow a business to obstruct or suppress efficient competition (TFEU Art. 102).

2. **Cartels**: A specific aspect of antitrust law is the fight against cartels. A cartel is a grouping of related but independent businesses with the goal of setting fixed prices, controlling markets or clientele, or limiting output. In the case of a cartel structure, the company's desire to produce new and better goods or services and sell them at lower prices is reduced, if not eliminated entirely. It is therefore impossible to reap the rewards of competition. Due to all of those factors, the European Commission declares these businesses to be unlawful and imposes harsh penalties on them.

3. **Mergers**: In its most basic form, a merger is defined as an action that results in long-term changes to the control structures of the participating companies. These processes can take place in a variety of ways. Examples of mergers include when one company acquires another or a seizable portion of its assets, when two businesses combine or form a joint venture that they both control, or when a joint venture changes into one that is controlled by just one of the

businesses. By collaborating, businesses can increase their market share, which could benefit the economy. However, certain mergers may create a condition that prevents competition. These mergers may strengthen or establish dominating companies in the market, thereby limiting competition.

4. **Liberalization or deregulation**: This entails opening up monopolistic markets such as transportation, energy, postal services, and telecommunications to competition. The general idea behind the EU liberalization (deregulation) directives can be summed up as follows: property and infrastructure rights are reserved, and production and infrastructure activities are assessed independently. Companies that provide services through their own infrastructures (networks) must be given the chance to compete with monopolists.

5. **State Aids:** A company that receives state aid gains a competitive advantage over its rivals. The TFEU prohibits state aids that are not related to overall economic development (Art. 107-109). The European Commission is in charge of identifying state aid exemptions, making sure that implementation restrictions are applied uniformly across the EU, and monitoring state aid compliance with the EU acquis.

6. **Internationalization**: Businesses now operate internationally in today's interconnected economy. An increasing number of mergers between nations and even continents are being realized on a gradual basis. Companies' global operations make mutual integration with other nations and international organizations inevitable.

3.10 Some EU Actions

- The EU has launched a number of well-known investigations and enforcement actions related to competition. In 2004, it was discovered that Microsoft had abused its dominant status with the Windows operating system by withholding interoperability data from rivals. Along with a €497 million fine, it was

ordered to alter its behavior. It eventually paid fines totaling €1.1 billion as a result of its lack of cooperation. There are still appeals pending.

- In May 2009, the EU Commission determined that Intel had abused its dominant position by making secret agreements with major manufacturers on the condition that they purchase all of their chips from Intel. Additionally, Intel paid the biggest PC retailer in Europe as long as it only carried Intel-powered computers. Ultimately, Intel was fined more than €1 billion by the EU Commission for this and other anti-competitive actions.
- A cartel comprising the sharing of market and other commercially sensitive information was operated by four glass manufacturers who held a 90% share of the EU market. The European Union Commission imposed a €890 billion fine. After an appeal, it was lowered to €750 million.

3.11 Institutions

(i) European Union Council

As the highest legislative body in the EU, it is called the Council of the European Union, or simply the Council of Ministers.[52] The Council does not work on competition policy on a daily basis. However, the Council has passed a number of important laws, including the EUMR, using the authority granted by Articles 103 and 352 TFEU. It has also given the Commission significant authority to enforce the competition laws of the TFEU through regulations, such as Regulation 1/2003. Finally, "it has given the Commission the power to grant block exemptions for particular agreements covered by Article 101(1) but meeting the requirements of Article 101(3)".

(ii) European Commission

In Brussels, the European Commission is at the centre of EU competition policy. Its duties include gathering information, pursuing legal action against infractions, issuing fines, establishing regulations pertaining to block exemptions, carrying out sector-specific investigations, looking into mergers and state aid, and formulating legislative and policy proposals. In addition, the Commission engages in international

[52] "Article 16 TEU and Articles 237-243 TFEU."

competition policy and collaborates with authorities in that domain.
Competition-related matters are specifically under the purview of one Commissioner, who holds

one of the most important portfolios in the Commission and is well-known in the public eye. The Commissioner for Competition has the authority to make decisions instead of the College of Commissioners. The Commissioner is directly accountable to two Hearing Officers in proceedings under Articles 101 and 102 and the EUMR, who ensure that the defence rights are upheld, and pertinent facts are considered when formulating commission decisions.

The Directorate General for Competition (DG COMP) is the specific body within the Commission responsible for competition policy. Its website is an invaluable resource, offering a wealth of information on various policy areas like mergers, state aid, antitrust, and international affairs. Each policy section includes a “What’s New” segment with updates on laws, case details, and statistical data. It also provides industry-specific details and information on the Commissioner for Competition Policy, DG COMP’s composition, and the European Competition Network (ECN). Articles 101 and 102 are enforced collectively by the ECN and the national competition authorities of the Member States. The website offers access to press releases, speeches, policy documents, and newsletters related to competition policy, as well as updates on public consultations and upcoming Commission events relevant to competition policy. Every year, DG COMP publishes an Annual Management Plan that includes a summary of its key objectives. “The Commission's Annual Report on Competition Policy, which also provides significant details on enforcement and policy-related matters, contains a statistical analysis of DG COMP's operations. DG COMP's website offers links to other pertinent websites, including those of the EU Courts and national competition authorities.”

“DG COMP is composed of one Director General and three Deputy Directors General.” Additionally, there is a Chief Competition Economist employed there who answers directly to the Director General. There are nine administrative units that make up DG COMP. Directorate A oversees the ECN as well as policy, strategy, consumer relations, and international relations. The operational units, known as Directorates B through F, are responsible for particular industries and manage cases

involving state aid in addition to managing cases under Articles 101 and 102 and the EUMR from start to finish, excluding cases involving cartels. Directorate H handles cohesion and enforcement-related issues that arise with state assistance, while Directorate G is exclusively focused on cartels, which the Commissions have identified as a top priority and are working to eradicate. The registry and resources are under the control of Directorate R. It is mandatory for the Legal Service of the Commission, with whom DG COMP works closely, to examine all official decisions rendered by the Commission. When appearing before EU courts, the Legal Service represents the Commission. DG COMP has an organigramme outlining its composition on its websites.

(iii) General Court

In competition cases (including state aid cases), the General Courts consider appeals of Commission rulings before initial actions seeking their annulment are filed. The General Court is required to adhere to the provisions of the TFEUS when assessing the legality of a decision. In the past, the Court of Justice heard cases involving Member States. One notable decision in this regard was the France v. Commission case, which established that the EUMR could be applied to collective dominance, among other things. But ever since the Nice Treaty was ratified, the General Court has heard cases involving the annulment of Commission decisions, even those started by Member States. When the Court of Justice and the General Court are handling cases that are substantially similar at the same time, the General Court will probably stop hearing arguments until the Court of Justice makes a ruling. In the case of the "Trish ice-cream war," for example, this happened when the General Court decided to postpone Van den Bergh Foods Ltd.'s appeal against the Commission's findings of violations of Articles 101 and 102 until after the Irish Supreme Court's Article 267 reference in the Master foods Ltd v. HB Ice Cream Ltd case was resolved.

The websites of the General Court and the Court of Justice are a great resource for information. They contain information about recent court rulings, views from the Advocates General of the Court of Justice, statistics on judicial activity, an Annual Report, and a bibliography of works on the case law of the EU Courts. In December 2000, the General Court's rules were amended to allow for a "fast-track" or "expedited" procedure for appeals in specific cases. “This expedited procedure was

used in an appeal against a commitment decision adopted by the Commission in accordance with Article 9 of Regulation 1/2003.as well as in numerous cases under the EUMR.”

(iv)Court of Justice

The Court of Justice is the only body that hears appeals from the General Court regarding legal matters. The Court of Justice has rigorously enforced the definition of an appeal on a legal matter, and it will not get involved in disputes over facts. The Court also deals with cases that national courts refer to it, in line with Article 267 TFEU. As was already mentioned, the Court's website has a wealth of useful information. An Advocate General, chosen from a panel of eight, advises the Court of Justice on each case that comes before it. Even though this opinion is not legally binding, the Court of Justice regularly follows it. It is frequently more persuasive than the Court of Justice's own judgment, which may be weak, particularly when it represents a compromise among the judges (the EU Courts do not issue dissenting opinions) Anyone interested in competition law would be well advised to read the Advocates General's opinions in these cases. These opinions are frequently of the highest quality and contain a wealth of important scholarly information.

In some cases, there may be significant delays, and the EU Courts may be overburdened. In May 1999, the Court of Justice issued a document outlining recommendations for dealing with a few of the issues it faces. According to Article 257 TFEU, the Council and the European Parliament can establish specialized courts affiliated with the General Court to handle specific types of cases. However, in March 2011, the Court of Justice determined that establishing a specialized court was "clearly preferable" to increasing the number of judges on the General Court. This finding is consistent with the House of Lords' European Union Committee.

(v) Advisory Committee on Restrictive Practices and Dominant Positions

“The Advisory Committee on Restrictive Practices and Dominant Positions” is made up of representatives from the member countries' competition authorities. They listen to oral hearings, review and comment on the Commission's draft decisions, and talk about proposed legislation and the overall evolution of policy. This Committee also addresses certain issues pertaining to the insurance industry, as well as the maritime and aviation sectors.

(vi) Advisory Committee on Concentrations

"The Advisory Committee on Concentrations" is made up of representatives from each Member State's national competition authority; under the EUMR, they must be consulted on draft decisions made by the Commission and must attend oral hearings.

(vii) National courts

The EU competition regulations are directly applicable and may be cited by both natural and legal persons (as claimants and defendants), and national courts are being asked to execute them more frequently. A database of some of the Member State court rulings on the application of Articles 101 and 102 TFEU, presented in their original language and chronologically arranged, is kept up to date by the Commission and can be found on its website. The goal of the establishment of the Association of EU Law Judges is to unite the judiciaries of the member states.

(viii) Parliament and ECOSOC

Competition policy matters are consulted with the "European Parliament, specifically the Standing Committee on Economic and Monetary Matters, and the Economic and Social Committee (ECOSOC)." The outcome of these consultations may influence the legislative process or the Commission's decision to act on a particular issue.

3.12 Penalty

The degree and consequences of a violation can determine the penalties under EU competition law. Here's an elaborate breakdown:

1. Fines: Businesses found guilty of violating competition law may be subject to fines from the European Commission. The fines, which are frequently determined as a percentage of the company's worldwide turnover, can be substantial. Higher fines may be imposed on repeat offenders.

2. Leniency Program: Under certain circumstances and with the provision of useful information, businesses that assist law enforcement in exposing cartel activity may be granted leniency or immunity from fines.

3. Orders to Cease and Desist: Businesses that engage in anti-competitive behavior may be subject to an immediate order to stop. In order to bring back competition in the market, they might also need to implement corrective measures.

4. Divestment: To restore a competitive market environment, a company may need to sell off certain assets or businesses if its market dominance seriously impairs competition.

5. Injunctions: While inquiries or court cases are pending, courts have the authority to grant injunctions to stop businesses from engaging in anti-competitive behavior.

6. Publication of Decisions: The European Commission frequently makes its rulings on violations of competition law public, which may have negative effects on the standing of the participating companies.

7. Director Disqualification: Directors or officers of businesses engaged in anti-competitive behavior may be barred from taking on comparable roles in other businesses in extreme circumstances of misconduct.

8. Criminal Sanctions: In severe circumstances, those engaged in cartel operations may be prosecuted and subject to jail time, fines, and other penalties.

9. Private Enforcement: Businesses injured by anti-competitive behavior may file a private enforcement lawsuit in a national court to recover damages. In the market of the European Union, these penalties are meant to safeguard consumers, discourage anti-competitive behaviour, and encourage fair competition.

3.13 Limitations of EU Competition Law

- **Applying EU Competition Law to Public Entities.**

All "undertakings," regardless of their legal status, are subject "ratione personae" to EU competition law. Public organizations are also subject to EU competition law and may face penalties for any infractions pertaining to economic activity. For instance, in Hofner and Elser, a public service organization was found to have violated Provision 102.

- **State Compulsion Defence.**

A unique circumstance emerges when a member state employs its legislative or regulatory powers in a manner that leads to businesses breaching EU competition laws. For instance, in the event that a public authority in a particular sector concludes a pricing contract and imposes it on businesses.[53] Under such circumstances, the European Court of Justice (ECJ) ruled that these companies would only be absolved of charges of violating Provision 101 if the State meddled in the dispute, directing businesses to behave a certain way and denying them the opportunity to challenge competitors in the market. To put it briefly, there is very little chance that businesses will try to circumvent the application of Provision 101 by claiming the state compulsion defence.

- **State-Related Offence**

Under EU law, the Member States may be sued for violating the goals and obstructing the efficacy of the TFEU. Political considerations could be the cause of the reluctance. Furthermore, many areas of EU law suggest political institutions to be in charge of carrying out EU competition laws. However, Council has the authority to ratify the legislation and make it legally enforceable. As a result, the Commission needs to be careful when interacting with Member States because pursuing aggressive legal action against their protocols could lead to judicial retaliation.

- **The impact on trade among the member states.**

EU competition laws apply to any arrangement that could impede trade among its member states. If the goal of this circumstance is to establish a jurisdictional threshold, then the restrictions found in Provisions 101 and 102 will be applicable. Only dominant companies that have a greater chance of having an impact abroad will be covered by TFEU.

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[53] D. Goyder, EC Competition Law, (4th ed. 1993) P. 479

According to Regulation 1/2003, national courts and NCAs incur significant legal costs when a custom affects trade among member states because they must apply both national competition laws and Articles 101 and 102 of the treaty, which may have an impact on trade among member states. In the event that no safe resolution can be found, national courts and NCAs may ignore EU competition laws in favour of applying domestic laws to cross-border disputes. There is no longer any question about how to determine whether trade between Member States impacts a particular practice under the ambit of Provisions 101 and 102 of the TFEU because the Court and the Commission have established clear guidelines on the impact on business models. After some time, the ECJ came to understand this requirement and found that it was possible to predict whether the agreement in question would have a direct or indirect impact on the structure of trade between member states by using neutral elements of facts and law, a sufficient amount of care, and chance.Thus, the European Court of Justice (ECJ) held that contracts involving businesses that are based in the same Member State have to satisfy the aforementioned evaluation. Furthermore, the agreement does not fall under the jurisdiction of Provision 101(1) regarding trade between Member States. It is true that not all cases present challenges when applying EU antitrust law, but precedent cases from the ECJ show a strict approach to defining "idea of influence on trade."

CHAPTER - 4

DEFINITIONS, CONCEPTS OF ABUSE OF DOMINANCE UNDER THE COMPETITION LAW

4.1 Concept of Abuse of Dominance in Competition Law

The concept of abuse of dominance, which holds significant importance in the field of competition law, refers to various actions taken by a dominant firm that are

detrimental to other businesses, consumers, or the competition. This can take many different forms, including exclusive dealing agreements, where a dominant company places restrictions on competitors' access to resources or customers, predatory pricing, where a dominant company sets prices below cost to drive rivals out of the market, tying, which is the practice of bundling products together to force consumers to purchase unwanted goods or services, and discriminatory pricing, where a dominant player charges different prices to different customers without any justification. The main objective of competition law is to create an environment where businesses can compete fairly, innovation can flourish, and consumers can take advantage of a wide range of products at competitive prices. For the purpose of preserving competitive markets and ensuring the welfare of consumers, it is imperative to recognize and address cases of abuse of dominance.[54]

Therefore, we must take an interdisciplinary approach, looking at the legal as well as the economic aspects of any dominance and how it is abused. In order to have a clear understanding of the comparison and contrast of the same, all the aspects relating to abuse of dominance under the respective legal provisions of the EU and India will also be examined.[55] The fact that EU laws regarding abuse of dominance have developed over time through numerous case laws is a key distinction, as the Indian legal system, with its national statute of 2002, is still developing despite being a fairly comprehensive and progressive piece of legislation.

In the language of economics, dominance denotes a level of market power that is noticeably greater than that of other businesses in the industry and that could be exploited to hurt other businesses' ability to make money by pushing them out of the market altogether.

4.1.1 Definition of AOD DOCTRINE

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[54] Cyril Shroff and Avantika Kakkar, 'India: Abuse of Dominance', The Asia Pacific Antitrust Review (March.19,2019)https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2019/article/india-abuse-of-dominance (last visited on 25April,2024).

[55] "Rizvi, Zisha, Decrypting the Concept of Abuse of Dominant Market Position: Trends in India and EU (February 26, 2020)https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3578864 (Last visited on 25 April,2024)."

In the context of competition law, the term "Abuse of Dominance" (AOD) refers to a complex understanding of how a dominant firm can use its market power to impede competition, stifle innovation, and harm consumers. It includes a range of actions taken by a dominant company to take unfair advantage of its position in the market to discredit competitors or limit the options available to customers. Fundamentally, AOD concerns the abuse or exploitation of market dominance in a way that distorts competition and produces unfavourable results for both consumers and market participants.

A broad definition of AOD includes a range of actions and tactics taken by powerful companies to preserve or increase their market dominance at the expense of rivals.[56]These tactics could include exclusive dealing agreements that prevent competitors from accessing necessary inputs or distribution channels, predatory pricing, where a dominant firm sets prices below cost to drive competitors out of the market, tying and bundling arrangements, discriminatory pricing, where a dominant firm uses its market power to charge different prices to different customers without any justification, and refusal to deal, where a dominant firm denies potential competitors access to necessary facilities or resources.

AOD identification and resolution within the framework of competition law aims to protect the market's efficiency and innovation while also advancing consumer welfare and the competitive process. Competition authorities work to keep markets open, dynamic, and innovative by putting a stop to dominant firms' anti-competitive behavior. This benefits consumers by offering a wider selection, higher quality, and more affordable goods and services. Implementing targeted regulatory measures aimed at restoring competitive balance and preventing the abuse of market power, along with a thorough analysis of firm conduct, are necessary for effectively combating AOD.

4.1.2 RELEVANT MARKET

[56] "KAJAL DHIMAN, ABUSE OF DOMINANT POSITION UNDER COMPETITION ACT (Jun 20,2002) https://articles.manupatra.com/article-details/ABUSE-OF-DOMINANT-POSITION-UNDER- (last visited on 25, April. ,2024)"

Under competition law, the concept of a "relevant market" encompasses a thorough evaluation of the parameters and nature of competition in a particular economic setting. It provides a fundamental framework for evaluating competitive impacts, analyzing market power, and developing regulatory interventions meant to maintain competition and safeguard the interests of consumers. Fundamentally, the process of defining the relevant market entails determining the product and geographic parameters that businesses compete in and where consumers make their purchase decisions. This involves defining the extent to which goods or services can be substituted, as well as the geographical region in which they are exchanged. When considering factors like price, quality, and other pertinent characteristics, consumers usually view products or services as reasonably interchangeable, which makes up the relevant market.[57] Both supply-side and demand-side substitution effects must be carefully examined in a comprehensive analysis of the relevant market, as must the existence of entry- or expansion-barriers that might limit competitive forces. When defining the relevant market, various factors are taken into account, including consumer preferences, industry structure, technological advancements, regulatory constraints, and the existence of network effects.

Furthermore, since market dynamics change quickly over time in dynamic industries, pertinent temporal dimensions are included in the analysis of the relevant market in addition to product and geographic boundaries. This temporal dimension takes into account variables that affect market dynamics and competitive conditions, such as innovation cycles, product life cycles, and the rate of technological advancement. In the end, determining the boundaries of the applicable market is a crucial first step in evaluating market power, spotting anti-competitive behavior, and creating efficient regulatory solutions that advance competition and safeguard consumer interests. Competition authorities can adjust their enforcement actions to target particular market distortions and guarantee that competitive forces can function freely to benefit consumers and advance economic efficiency if they have a thorough understanding of the relevant market.

[57] Viktoria H.S.E. Robertson, The Relevant Market in Competition Law: A Legal Concept, Journal of Antitrust Enforcement, Vol. 7, 2019, pages 158-176, SSRN (15 Feb 2019).

(I) RELEVANT PRODUCT MARKET

Different definitions of the product market are used or adopted by competition authorities in different nations.[58] The theme that unites the definitions—despite their lack of consistency—is that buyers and consumers can substitute goods and services for one another on the product market. In other words, products and services that buyers believe to be replacements are typically classified as belonging to the same product market, while those that they do not are classified as belonging to different product markets.[59]

From the demand perspective, the market for relevant products comprises all those alternatives that a customer would choose to use in the event that the price of the product under investigation went up. From a supply-side perspective, this would encompass all manufacturers who could transition to producing these replacement goods using their current infrastructure. A product market is held together by three components. They are as follows:

- **Price Increase**

The main problem with element price increases is that when the cost of a good or service goes up, consumers start looking for alternatives. The requirement that the price increase be non-transitory indicates that it is anticipated to last for the foreseeable future. When prices fluctuate temporarily or over a short period of time, buyers' responses are probably going to differ from one another. If cake bakers understand that the price increase for butter is only temporary, they are more likely to continue using butter in their cakes. Alternatively, if they are aware that this kind of price increase will last for a long time, they might make the investment to create a margarine-based recipe.

Thus, "butter and margarine are in the same product market if butter prices are expected to remain high for an extended period of time." The price increase should be small but significant. It is likely that the purchases will identify close substitutes with a slight price change. A significant price change is likely to identify more distant

[58] Shentk, Market Matters: Understanding the Significance of Relevant Markets in Competition Law, LAWYERSCLUBINDIA (May 22,2023) https://www.lawyersclubindia.com/profile.asp?member_id=948230 (last visited on 26 April, 2024).

[59] Ibid

substitutes. The Competition Authority may determine that it is necessary to include distant substitutes in the relevant product market if the price increase is substantial. If not, only similar alternatives would be included in the relevant product market. It is also important to emphasize that the price change needs to be substantial in order for customers to respond to it. A very small price adjustment might not trigger any purchases.

- **Reaction of Purchasers**

In general, buyers respond logically to price increases. Using the butter and margarine example again, let us say that everyone who bought butter at the previous prices did so. Butter and margarine would be in the same product market if butter's price went up and all buyers switched from butter to margarine, with margarine serving as everyone's replacement for butter. If consumers do not switch from margarine to butter when the price of butter increases, then margarine is not seen by consumers as a suitable replacement for butter, and as a result, the two products would not be found in the same market.

- **Small Size Requirements**

The market should consist of the smallest group of goods or services for which the buyer's response is held. This is the third component of the product market. Product markets are prohibited from grouping non-substitute products together by this rule. The justification for this component's inclusion is that goods should not be viewed as replacements just because their prices have increased relative to the goods that consumers need or use. Substitutability and price increases for the product that is in demand or being used should be directly related. Competition Authority may identify the relevant product market based on any or all of the following considerations:

- The physical attributes or intended use of the goods.
- The cost of the good or service.
- The preferences of the consumer.
- The exclusion of internal production.
- The presence of specialised producers.
- The classification of industrial products.

“Competition authorities may calculate the demand elasticity of a subset of products in the vicinity of current prices in order to determine the product market. Demand elasticity refers to the percentage difference between the percentage change in quantity demanded and the percentage change in product price. In order to gather sufficient information to enable the Competition Authority to make reasonable conclusions about the relevant product”, officials conducting the spade work investigation on behalf of the Competition Authority are advised to interview a variety of economic agents, as data for computing elasticity may not be available.

The following economic agents are potential sources of useful information:

- Buyers of the product.
- Buyers of comparable products; sellers of the product.
- Sellers of the same product in a different area.
- Sellers of similar products.
- Association of the product's buyers or sellers.
- Retailers and wholesalers of the item and related items.
- Bureaus of Statistics regarding the Product.

(II) RELEVANT GEOGRAPHICAL MARKET

Similar geographical boundaries can be defined for the relevant market. Determining the geographic region in which competition occurs is part of the geographic dimension. Geographic markets that are relevant may be local, national, international, or even worldwide depending on the specifics of each instance. Several factors that are pertinent to the geographic dimension include patterns of consumption and shipment, the cost of transportation, perishability, and the presence of obstacles that prevent the shipment of goods between adjacent geographic areas. For instance, the area surrounding the manufacturing facility may be the relevant geographical market given the high costs associated with transportation cement.

The product market and geographic market operate on similar principles. The perceptions of buyers regarding the interchangeability or sustainability of goods produced or offered at various venues characterize the geographical market.[60] When it

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[60] Shentk, Market Matters: Understanding the Significance of Relevant Markets in Competition Law, LAWYERSCLUBINDIA (May 22,2023) https://www.lawyersclubindia.com/profile.asp?member_id=948230 (last visited on 26 April, 2024).

comes to the same product, two locations are specifically deemed to be in the same geographic market if consumers at one location would migrate to purchasing the product sold at another location in reaction to a minor but noticeable and non-transitory price increase. If not, it is considered that the two locations are in distinct geographic markets.

For instance, because the cost of transportation accounts for a significant portion of the product's cost, markets for heavy but low-value goods such as sand, gravel, cardboard boxes, and refuse hauling are frequently quite small. Therefore, the boundaries of the geographic markets may be indirectly impacted by transportation costs. Transport costs, tariffs, trade barriers, and other factors frequently define the boundaries of geographic markets. For example, if domestic producers of a good are exempt from tariffs while foreign producers must pay one, the price increase for the foreign good may be so great that buyers would not choose the foreign good over the domestic one.

Similar to this, laws pertaining to health and safety may act as obstacles to the sale of particular products and services. The Competition Authority may consider all or any of the following factors in determining the relevant geographic market are:

- Legal trade restrictions
- Regional specifications
- Languages
- Sufficient distribution facilities
- National procurement laws
- Transportation costs
- Consumer preferences
- The requirement for quick after-sale services or reliable or consistent supplies.

Administrative decisions made by State agencies, laws pertaining to manufacturing and delivery conditions, professional standards of the legal profession, trade policy (tariffs, quotas, anti-dumping measures, etc.), financial barriers imposed by the State,

and barriers pertaining to techniques, technologies, and intellectual property rights are some of the obstacles that prevent new businesses from entering the market.[61]

4.1.3 RELEVANCE OF RELEVANT MARKET IN COMPETITION CASES

When examining Dominance and Abuse of Dominance Offences, Relevant Market is essential. According to the recently passed Indian competition law,[62] an enterprise that possesses a dominant position in a given market is one that gives it the ability to operate independently of the competitive forces that exist there or to influence consumers, competitors, or the market as a whole to its advantage. The same Act specifies, among other things, that an enterprise may abuse its dominant position in one relevant market in order to penetrate or defend another relevant market. An organization must be in a dominant position in a relevant market in order to abuse that position. Determining the relevant market is therefore the first step in evaluating an enterprise's actions.

The relevant market must also be identified in cases governed by the Merger Regulation. Typically, the Competition Authorities will block mergers (or combinations, to use a more general term) that have the potential to significantly harm competition within the relevant market. Therefore, the relevant market boundary is important when judging mergers based on the principles of competition. "An excellent example of the importance of the relevant market in merger regulation is the Boeing-McDonnell Douglas merger case.[63] Boeing was interested in purchasing McDonnell Douglas, a rival manufacturer of jet aircraft. This drew legal competition." Boeing signed agreements to be the sole provider of commercial jet aircraft to three major American airlines for a period of 20 years in connection with this merger (acquisition).

The European Commission exercised its jurisdiction in the matter despite the merger taking place on US soil because it believed that a large number of countries,

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[61] Ibid

[62] New Indian Competition Law – Competition Act, 2002

[63] "The United States of Boeing vs the European Union of Airbus", 16 Brookings Rev.30, U.S.(1998).

especially in Europe, made up the relevant market. The European Commission contended that, following the merger, the number of suppliers for jet aircraft had decreased from three to two, with the merged entity and Airbus Industries, a European consortium, being the only two suppliers. “The exclusivity agreements were viewed by the European Commission as a result of Boeing's growing market dominance (its share of commercial jet aircraft would rise to roughly 70% following its merger with McDonnell Douglas).” The European Consortium would be unjustly denied access to a significant portion of the market, according to the European Commission's other concern regarding the contracts. In the end, it only permitted the merger to move forward under the stipulation that Boeing give up the contracts' exclusivity and share McDonnell Douglas technology.

4.1.4 DOMINANCE

To prove an abuse of a dominant position, dominance is a legal necessity. Being dominant indicates having a significant amount of long-term market power, which is usually characterized by the ability to set prices above levels of competition, to exclude others, and to act without regard to customers or rivals. To demonstrate dominance, one common method is to measure market shares and entry barriers within a specified relevant market. However, direct evidence can also be used. While holding a dominant position is not a requirement for a finding of abuse, it is a violation of competition law in and of itself. US antitrust law does not include dominance; rather, it requires monopoly power.

Generally, a dominant position is identified in a particular product and geographic market, and the dominant firm's behavior is assessed to determine whether it is abusing its position. This is the standard legal framework for abuse of dominance across jurisdictions. Since businesses can legitimately become dominant through innovation, more affordable prices, better products and services, and more efficient production, dominance is not inherently bad. Rather, a finding of abuse is contingent upon the legal concept of dominance. The possible impact of anti competitive

behavior on the market increases with market power. Because of this, dominance serves as a cutoff point to direct the application of competition law enforcement against unilateral actions that present the greatest danger of harming the market.

In theory, there are two ways to demonstrate dominance: directly and indirectly. The assessment of dominance can theoretically be done directly using metrics like demand elasticity, price markup over marginal cost, and proof of a firm's profits. However, it is frequently impossible to obtain the accurate and thorough data required for a direct assessment of market power. Because of this, the most widely used technique involves estimating market power indirectly through market definition, market share analysis, and entry barrier analysis within a specifically defined, relevant antitrust market. Market shares are typically used as prima facie thresholds, and one popular technique for defining the parameters of the relevant market is the Hypothetical Monopolist Test. Market shares, however, usually need to be examined in conjunction with entry barriers and associated market conditions as they are not a reliable indicator of dominance on their own. This framework holds relevance when it comes to merger reviews, specifically when analyzing the effects of unilateral mergers.

The legal definition of dominance under Article 102 TFEU, as provided by the Court of Justice of the European Union in the case of United Brands, is defined as "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, customers, and consumers."[64] If a market share is 50% or higher, there is a rebuttable presumption of dominance; however, a dominant position is unlikely to exist below 40%. Possessing a dominant position is not illegal under TFEU Article 102. But according to the Court of Justice in the Michelin case, a company that has a dominant firm has an extra duty to ensure that its actions do not impede undistorted competition within the market. Decisions have also from time to time referred to positions with 90% or more of the market as super-dominance, where behavior is substantially more likely to be deemed abusive. After a dominant position is established, exclusionary

[64] Ibid

practices and exploitative abuses, like exorbitant pricing, can be subject to enforcement under Article 102 TFEU.[65]

In contrast, US antitrust law does not recognize the concept of dominance. It is illegal for anyone 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," according to Section 2 of the Dominance is not necessary for a monopolization claim; instead, one must have "monopoly power in the relevant market," which the US Supreme Court has defined as the "ability to control prices or exclude competition." Under EU competition law, monopoly power typically requires a higher market share threshold than dominance; it is typically having a market share of at least 70% and is unlikely to be less than 50%. Both monopolization and attempts to monopolize are covered in Section 2, in contrast to Article 102 TFEU. The latter entails anticompetitive behavior with the deliberate goal of monopolizing and a high risk of monopoly power acquisition.

Market strength

Finding the market share of any company that is being accused of having a dominant position is the first step in analyzing it. As such, the market share that an organization alone holds is a measure of power in the marketplace rather than a sign of a dominant position. The ability to maintain dominance over an extended period of time. Market share statistics give an indication of the relative strengths of businesses at a given moment in time. In the event that market share experiences substantial fluctuations over time, there may be a chance of effective competition.

In general, it is believed that if there are no exceptional circumstances, a very high market share denotes a reduction in dominance. The orientation to exceptional situations speaks of potential rivalry that exists outside of the existing market. Large market shares over an extended period of time also contribute to a stronger sense of domination; in Belaire Owners Association v. DLF Limited & Ors,[66] for example, a

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[65] “Jason Gudofsky, Evangelia Litsa Kriris and Lucian Vital, “Abuse of Joint Dominance” (Canadian Bar Association, Annual Competition Law Conference, 2010) P.1 https://pdfs.semanticscholar.org/2f77/f10bf98fbc1766eaabc9e1b475d373330213.pdf (last visited on 26 April,2024)”.

[66] “Case No. 19 of 2010 (Competition Commission of India, 12.8.2011)”

market share of 55% is commonly regarded as large. An organization is more likely to be found to be dominant in a market if it gains a larger share of the market. When a smaller market share is established, a number of additional factors are taken into account before any company establishes its dominant position.

Barriers to entry and exit

Determining an entity's dominant position also involves assessing the degree of entry and exit barriers. It is widely accepted that a cost that is higher for a new entrant into the market than it is for an established competitor is referred to as a barrier to entry. These fees are important because the fewer such barriers there are in the market, the harder it will be for an already inefficient player to keep new competitors out and maintain its dominance.

As a result, potential new entrants into a market will impose competitive pressures on established players, and this creates a situation in which the application of competition law is not necessary to check dominance. The large players with market power, however, have a greater chance of gaining market dominance in the presence of such entry barriers, and are therefore in a better position to have an anti-competitive effect on the marketplace. The majority of competition laws pertaining to preventing abuse of dominance include entry and exit barriers because of the crucial role they play in defining the existence of a dominant position. For instance, the Indian Competition Act[67] which takes this into consideration when determining dominant position in a relevant market, includes this provision.[68]

Vertical integration

The term "vertically integrated" refers to any business that oversees both upstream and downstream manufacturing facilities. An organization gains more control over the process of introducing a product to the market through this type of merger.

For example, bananas must go through several stages of cultivation, transportation, maturation, and dispersal before they can be sold in Europe. High levels of vertical integration were exhibited by the "United Brand Continental Company," which oversaw its own farms, maturing areas, cooled ships, R&D, and dispersal system. Due

[67] The Competition Act of India, 2002 (Act 12 of 2002)

[68] Ibid

to its complete control over the produce, this company benefited from a steady business. A new rival would have to invest heavily or rely on third parties to provide those services.

Legal provisions

Legislative or regulatory bodies empowered by national statutes can occasionally act as entry barriers or assist a specific company in gaining market dominance. For instance, the exclusiveness of the right holder is protected by intellectual property rights granted under the relevant IPR laws. Consequently, IPRs have the ability to effectively confer a dominance that will be safeguarded by national courts. Restrictions on government permits that prevent entry into a market may also have similar effects.

Financial resources

A dominant company with easy access to large sums of money, sometimes known as "deep pockets," will be able to use those numbers to protect itself from new rivals. One of the biggest issues facing every small and medium-sized business (SMEs) is access to capital.

4.1.5 Abuse of Dominance

Abuse of dominant position broadly classifies dominant firms' abusive behavior as either exploitative or exclusionary, though some abuse conducts combine elements of both.[69] The term "exploitative practices" refers to any actions that directly or indirectly result in the charging of exorbitant or biased prices for the sale or acquisition of goods or services. Abuse of dominance encompasses exclusionary practices, which are defined as any dominant firm action that limits the advancement of technology, production, entry of new firms, and related practices.

1.Exploitative Abuse of Dominance.

[69] Martin Stanley, How To Be A Civil Servant, Abuse Of Dominance, (4th edn., Richborne Publishing 2021)

Abuses of dominance through exploitation closely resemble monopoly-related economic simulations. The main concern is that a monopolist might be able to increase profits by decreasing production and raising the price of his goods on an economic basis. By ensuring this kind of price increase, the monopolistic company will mistreat its customers. This abusive and exploitative behavior is sometimes mistakenly marketed as having a positive effect on competition. This is because the absence of barriers to entry will encourage new players to enter the market and compete. But when barriers to entry exist in the market, the dominant firm cannot be effectively coerced, which may result in the imposition of unusually high prices.

- **Restricting production** – Possibly by refusing to grow or make investments—in order to boost prices and profits at the expense of clients who are unable to easily transfer.

- **Restriction of supply to distributors**- Once again in order to maintain high prices and profits. But in reality, this is frequently permitted. Manufacturers still have the ability to "recommend" retail prices for their products, which can verge on price-fixing. Furthermore, by limiting their availability, luxury goods can have their prices artificially maintained high. For example, very few stores are permitted to sell Rolex watches or Hermes scarves. This is due to the belief that a manufacturer ought to have some control over the value of its brand, in which it has frequently made significant investments.

- **Excessive pricing** - A clear (though difficult to identify) sign of abuse of dominant position would be unexpectedly high costs (and profits). It is interesting to note that the European Court (CJEU) determined that this type of pricing could be recognized if prices were significantly higher in a country where the company was dominant than in another where it wasn't. In more detail:

o The Court acknowledged that determining whether prices are unfair cannot be done using a single approach.

- Comparing rates in neighbouring countries is a useful approach, though, if the Member States under consideration share comparable characteristics (such as consumption patterns, economies, and citizen welfare).
- Additionally, the Court used a purchasing power parity index (or “PPP”) index to combine the previously described “geographic comparison” between neighbouring countries with a broader comparison among all Member States. This helps to overcome the differences between countries with heterogeneous economic conditions.
- The Court clarified that rates levied by a dominant undertaking must be deemed to be “appreciably higher” than those levied in another Member State in order to constitute an abuse of dominant position. According to this theory, a price difference can be deemed to be “appreciable” if it is both significant and ongoing, even though there is no minimum threshold above which a rate must be considered to be “appreciably higher.”[70] Thus, neither transient nor episodic. The national courts will be in charge of defining these terms, though.

2.Exclusionary Abuse of Dominance

In this situation, a dominant firm engages in behavior that, in the absence of market power, would be deemed perfectly legal, but that, once it acquires a position of dominance in the marketplace, may give rise to serious concerns. An entity having a principal place has “a special responsibility not to allow its conduct to impair undistorted competition on the Common Market,” the European Commission's Court ruled in a case, highlighting the fundamentals of the abuse doctrine. Therefore, any use of force by a dominant company to threaten the competitive structure in the market may be considered abuse.

These discriminatory cases of manipulation hurt competition because they allow dominant organizations to maintain their market dominance, usually by making it harder or more discouraging for new competitors to take on them in the marketplace.

[70] Robert Anderson, Timothy Daniel and Alberto Heimler, ‘Abuse of Dominance’ ; A Framework for the Design and Implementation of Competition Law and Policy (The World Bank, Washington D.C., and Organisation for Economic Co-operation and Development (OECD), Paris, 1999).”

These actions are especially harmful because they distort the very nature of competition.

- **Price discrimination** - It is the practice of offering price reductions and volume discounts to customers who might be tempted to switch to a competitor. [However, individual banks are not considered market leaders, so they are free to offer competitive interest rates to prospective clients while lowering those of existing ones.]
- **Tying** - It includes restricting consumer choice, denying competitors retail space, and linking the sale of one product to the sale of another. “As a result, Microsoft was fined € 497 million by the European Commission for integrating its Windows Media Player into the Microsoft Windows operating system.” In the 1990s, Microsoft was found guilty of illegally pressuring PC vendors to bundle its Internet Explorer browser, thereby blocking Netscape, and this led to a significant "tying" investigation in the United States. I am not sure if this qualifies as tying, but American Express will not allow merchants to encourage customers to use Mastercard or Visa, as they both have lower transaction fees. The Supreme Court of the United States concluded that these anti-steering provisions did not constitute an abuse of Amex's dominant position after the case was challenged in the United States.
- **Refusal to provide a facility that is necessary for any business trying to compete** - docks, bus terminals, and airports are the most obvious examples of necessary facilities in the transportation sector. The Competition Appeal Tribunal decided that the privately constructed and owned crematorium was not a necessary facility, despite the fact that its funeral director owner's exclusive use of it prevented any other funeral director firm from drawing business in that particular town.The makers of Fortnite, Epic Games, are suing Apple over the removal of their game from the Apple Store because they wanted to avoid paying Apple's 30% commission on in-app purchases. This is the main point of contention in their lawsuit.
- **Full line forcing** - It occurs when a retailer is compelled to carry every product offered by a manufacturer, leaving little to no space for goods from rival manufacturers.

- **Freezer and fridge exclusivity** - Birds Eye Walls was not allowed to lend freezers to small UK businesses if those businesses did not use them to sell ice cream produced by rival company Mars. In a similar vein, the EU mandated that Coca-Cola reserve 20% of its refrigerator space for beverages produced by rival companies like Pepsi.
- **Predation (or taking advantage of a victim). This includes Predatory pricing** - which is the practice of lowering a product's price to the point where smaller competitors are unable to pay their expenses and go out of business, is one example of this behavior. Other predatory behaviours include launching new bus services frequently in an effort to drive out new competitors. The Spanish company RENFE and the French company SNCF were accused by the European Alliance of Rail New Entrants of unfairly establishing new "low cost" subsidiaries in order to reduce the impact of competition from new domestic and international rail services.

  Combating predation can be challenging because the initial behavior—lower prices, for example—benefits customers. Therefore, rather than promoting competition, authorities must take care to avoid falling into the trap of shielding rivals.

4.2 The Intersection of Intellectual Property Rights and Abuse of Dominance

The intricate and diverse relationship between abuse of dominance and intellectual property rights (IPR) encompasses legal, economic, and ethical aspects. Fundamentally, intellectual property rights allow inventors and creators to have exclusive ownership over their innovations for a set amount of time. This encourages innovation and creativity because it gives creators the chance to profit from their labours. But these rights can also be used in ways that hurt consumers and distort competition when combined with a dominant market position.

First of all, businesses possessing substantial intellectual property rights—such as patents, trademarks, or copyrights—may strategically employ these rights to bolster their market dominance. Dominant companies can create obstacles to entry by utilising their intellectual property, which makes it harder for rivals to join the market and challenge their position. This may lead to less competition, which would raise

costs, stifle innovation, and give customers fewer options. Furthermore, in order to keep rival companies out of the market, dominant companies may use exclusionary tactics that take advantage of their intellectual property rights. For instance, they might participate in patent thickets, whereby they accumulate a sizeable portfolio of patents encompassing different facets of a technology, making it expensive and time-consuming for rivals to negotiate the patent system and create rival goods. As an alternative, powerful companies might use clever patent litigation or licensing strategies to stifle possible competitors or force them to pay disproportionate royalties, thus solidifying their position of dominance.

The conflict between intellectual property rights and antitrust laws is not new; it has existed since the Middle Ages. Gregory A. Stobbs traces the history of these two sets of rights in his book.[71] When intellectual property rights are combined with abuses of dominance, significant antitrust issues are raised. Antitrust laws are designed to protect against abuses of dominance and to encourage competition. Regulators face particular difficulties when it comes to the nexus of competition law and intellectual property rights. On the one hand, encouraging innovation and motivating funding for R&D depend on the protection of intellectual property rights. However, it goes against the fundamentals of innovation and competition to permit powerful companies to misuse their intellectual property rights in order to stifle rivalry. Regulators and competition authorities must strike a careful balance between defending intellectual property rights and preventing abuse of dominance in order to address these issues. This frequently entails carrying out in-depth analyses to evaluate the firm's actions' effects on competition while accounting for elements like market dominance, the type of intellectual property, and possible harm to consumers and competitors. Remedial measures to mitigate the harm caused by abusive practices and restore competition may occasionally include divestitures or compulsory licensing. The "Statute of Monopolies," which was put into effect in 1624, acknowledged that, in theory, competition is preferable to monopolies because it gives everyone a fair opportunity to participate in the market and compete.[72] This law permitted “patent monopolies” but outlawed “monopolies” in general.

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[71] Gregory A. Stobbs, Software Patents (3rd edn., Wolters Kluwer Law and Business, New York 2012)

[72] Competition Commission of India, Competition Law and Patents, Vol 22, July Fair play newsletter, New Delhi (2017).

Ultimately, managing the complex relationship between abuse of dominance and intellectual property rights necessitates a thorough comprehension of economic and legal concepts. Regulators can cultivate a dynamic and inventive marketplace that benefits consumers and society at large by fostering competition while preserving innovation.

4.2.1 IPR and AOD Doctrine in EU

The European IPR regime is highly developed, offering protection and exclusive rights to the relevant beneficiaries. However, any abuse of this dominance by a dominant firm is forbidden by Article 102.[73] It is questioned whether Article 102 can be used to restrict the special exclusionary rights that are given by IPR laws. According to the European Court, since Article 345 of the Treaty on the Functioning of the European Union provides protections against such attacks, ordinary proprietorship of intellectual property rights cannot be violated by the provisions of Article 102. Even though Article 102 could address situations involving unauthorised uses of intellectual property.

Article 8(2) of the TRIPS Agreement provides another basis for the application of antitrust laws in cases of abuse of dominance pertaining to intellectual property rights. It states that "appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by holders or the resort to practices which unreasonably restrain trade or adversely affect the inter-national transfer of technology." Numerous rulings in the European competition jurisdiction have resolved the ambiguous relationship between IPR-related privileges and abuse of dominance, and these case laws have shaped the EU's current position on the matter.

The most notable cases in this area are “Volvo v. Erik Veng and C. I. C. Autovericoli and Maxicar v. Regie National des Usines Renault.” In these cases, the third parties demanded that a "refusal to grant licenses" constitute an act of "abuse of a dominant position" in accordance with Article 102, and they yearned for licenses from the automaker to manufacture auxiliary auto parts. The European Court adopted a

[73] Article 102 of the Treaty on the Functioning of the European Union , 2007

traditional stance toward the application of Article 102 to "compulsory licensing" of IPRs, stating that national law should regulate the "nature and extent of protection" in such cases because there is no "EU harmonisation of laws on designs and models."

The European Court upheld its previous ruling in Oscar Bronner v. Media print[74] in the historic case of “IMS Health GmbH & Co. v. NDC Health GmbH & Co.”[75] The Court took into consideration the possibility that refusing to license NDC could prevent the introduction of a new product and eliminate all competition in a "secondary market." On this second point, the court agreed with state authorities that the competition angle will take precedence "only where refusal to grant a license prevents the development of the secondary market to the detriment of consumers" in the effort to strike a balance between the needs of IPR holders' economic liberties and those of preserving economic competition. Therefore, the court in this case clearly recognized that there is no right to have an IPR granted as a compulsory license for the sole purpose of doing what the IPR holder is doing, by outlining the contours of use of competition angle to limit the IPR privileges. Even so, the court acknowledged the problem of offering relief in certain "exceptional circumstances," as was previously mentioned.

However, the court's decision in Microsoft v. Commission[76],which maintained the Commission's decision against the massive technology company Microsoft, is another significant ruling in this area. In the Microsoft case[77],the European Commission determined that Microsoft dominated two "relevant markets": "personal computer operating systems" and "work group server operating systems." According to the Commission, Microsoft continued to "abuse its dominant position" by refusing to provide competitors with "interoperability information" that would have allowed them to produce and distribute goods that would have competed with its server market. Additionally, it was stated that Microsoft was accountable for "a misuse" since it "tied" its OS with its "Windows Media Player" product. The European Court held in its ruling that the requirement of "indispensability" to share the relevant resources is

[74] Case C-7/97 Oscar Bronner v. Media print [1998] ECR I-7791

[75] Case C-418/01 IMS Health GmbH & Co. v. NDC Health GmbH & Co. [2004] ECR I-5039

[76] Case T-201/04 Microsoft v. Commission [2007] ECR II-3601

[77] The Microsoft Case [2007] OJ L 32/23

met in this specific instance, even though it upheld the commission's decision. Additionally, the court agreed that Microsoft's action of denial will result in the removal of viable competition from a secondary market.

In the case of Eurofix-Bauco v. Hiltill, the authorities maintained that the dominant firm's demand for "excessive" royalties, which is also perceived as an attempt to eliminate competition in the market, is an abuse of its power and could delay the granting of a license that would otherwise be possible under applicable IP laws. As a result, the body of case law pertaining to EU competition law has increased significantly, and EU authorities have taken a proactive approach when it comes to setting rules and regulations.

4.2.2 IPR and AOD Doctrine in India

Compared to other jurisdictions like EU that we studied, competition law in India is comparatively more recent. The Indian Competition Act, which is one of the most comprehensive statutes pertaining to the Indian competition regime, states clearly in Section 4 that "No enterprise or group shall abuse its dominant position." Based on recently developed case laws, it may be argued that India has also witnessed a conflict between IPR and competition law. Before analyzing any statutes or case laws, it is necessary to analyze the jurisdiction of competition authorities in handling cases where both intellectual property rights and competition concerns are raised.

Since India has other regulators for IP cases, such as the Copyright Board, Patent Controller, Trademark Registrar, etc., and that the country's competition regime is relatively new, questions regarding the jurisdiction and competence of competition authorities to handle cases involving IP issues assume significance. In the case of "Aamir Khan Productions Put Ltd v Union of India"[78], the Bombay High Court made it clear for the first time that the Competition Commission of India, which was founded under the Competition Act of 2002, has the authority and capability to handle competition-related cases involving intellectual property rights.

Likewise, Bombay High Court also clarified in "Kingfisher v Competition Commission of India"[79], holistically the concerns that were brought in front of the

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[78] Aamir Khan Productions Put Ltd v Union of India [2010] 112 Bom L R 3778

[79] Kingfisher v Competition Commission of India [2010] Bom L R 3261

Copyright Board can also be contemplated in front of the Competition Commission of India. These case laws established the jurisdiction of competition authorities, such as the Competition Commission of India and the former Competition Appellant Tribunal, over cases involving IP and competition.

The case of “FICCI Multiplex Association of India v. United Producers/Distributors Forum (UPDF)”[80] is another notable one that addressed intellectual property in relation to copyrights and competition issues. The FCCI filed a complaint against the United Producer/ Distributor Forum (UPDF) and other organizations, alleging that they were "creating market cartels in films, against multiplexes." The Competition of India was notified of this. The Competition Commission of India directed its DG to look into the matter after deeming the accusations of abuse of dominance and anti-competitive agreement significant. The UPDF was accused of violating the law, and the Director General confirmed this. Rather than defending itself, UPDF went to the Bombay High Court and filed a petition arguing that since movies are protected by copyright, the CCI lacks jurisdiction, and the Copyright Board has prerogative. The High Court dismissed these arguments, holding that the CCI's jurisdiction cannot be excluded and that matters other than those brought before the Copyright Board may be brought before the CCI.

In this ruling, the Commission made the intriguing observation that "a copyright is a statutory right under the Copyright Act of 1957 and not an absolute right." The commission referenced a Delhi High Court ruling on this matter in G.C. of “India Ltd v. Super Cassette Industries ltd.”80 As a result, the commission's decision in the FICCI Multiplex case set the stage for further cases involving IPR abuse. The Commission explicitly stated in its ruling that "competition law is not completely superseded by intellectual property laws." As is evident from the wording used in Section 3(5) of the Act, the non obstante clause's scope is not absolute, and it only shields the right holder from the harsh requirements of competition law in order to prevent infringement of his rights. It also gives the right holder the ability to set reasonable restrictions, if needed, to safeguard those rights."

“The Competition Commission of India” addressed the matter of Standard Essential Patents in a case involving "Micromax" and "Ericsson," which is another instance of intellectual property. In the field of cellular handset technology, the Ericsson

[80] Case No 1 of 2009, FICCI Multiplex Association of India v. UPDF, Competition Commission of India [2011]

Company possessed several Standard Essential Patents, including Third Generation and Enhanced Data rates for GSM Evolution. Micromax was sued by Ericsson, which claimed that Micromax's mobile phones infringed upon its Standard Essential Patents. Moreover, Ericsson also brought legal action against Intex, a different manufacturer of cell phones. However, Micromax and Intex contended that Ericsson's "royalty rates" were excessive.

In the case of “T. LM Ericsson v. Competition Commission of India & Ors.”[81] Ericsson challenged the jurisdiction of CCI in the Delhi High Court. However, the challenge to the Commission's jurisdiction was dismissed by the bench of one judge. In this instance, it appears that Ericsson has a monopoly in the "relevant product market" of Standard Essential Patents for GSM-capable mobile phones in India's "relevant geographical market." Due to its Standard Essential Patents and the lack of any competing technology, Ericsson is able to exert complete control over both its current and prospective "licensees in the relevant market." By imposing royalty rates that are out of proportion to the product or patent, Ericsson appears to be acting in opposition to fair, reasonable, and nondiscriminatory terms. CCI is currently reviewing this case.

After examining how India's IPR and competition laws have developed over time, it is possible to conclude that, rather than being distinct and imprecise from one another, they are actually two sides of the same coin. IPR and competition law are complimentary in that they both seek to advance economic welfare, R&D, and the general welfare of society. To further explain the complementarity of these legal regimes, it can be argued that intellectual property rights (IPRs) offer incentives to inventors by protecting their labours and investments, if an effective legal framework for competition is a requirement for creating the conditions for businesses to compete in the development of new innovations. Finding a balance between these two laws is difficult, though, because patent law and intellectual property rights in general both seek to grant exclusive rights and the resulting market power, which could be abused in the wrong hands. Simultaneously, antitrust law attempts to eliminate market participants' anticompetitive behavior and discourages the possible abuse of such dominance. Therefore, managing the intersection of these laws seems confusing at times. But maintaining balance between the two acts is essential.

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[81] T. LM Ericsson v. CCI & Ors.[2014]W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 (DEL HC)

CHAPTER – 5

JUDICIAL RESPONSE TOWARDS ABUSE OF DOMINANCE DOCTRINE IN EU AND INDIA

5.1 THE IMPORTANCE OF THE JUDICIAL ROLE IN COMPETITION LAW

An effective competition policy is essential to the proper operation of market economies. A stronger regulatory framework for competition is becoming more and more necessary as globalisation and deregulation bring networked economies closer together. When it comes to carrying out competition law and policy, the judicial branch is crucial. Due to the extremely broad language used in the US and EU's antitrust laws, case laws set precedents and have legal force, even in continental Europe's non-common law system. Two main categories can be used to describe the crucial role played by the judicial branch in the application of competition law:

(1) Ensuring that the implementation authorities follow the due process of law in the procedural aspects of a case.

(2) Ensuring that the fundamental principles of competition law are applied correctly and consistently.

In the first category, the judicial authorities make sure the implementing authorities follow fundamental natural justice principles such as the right to a fair trial and the right to be heard. In contrast, the second category places economic policy under the "rule of law" due to the judicial bodies' consistent and accurate application of the substantive provisions of competition law.

The former Competition Appellate Tribunal of India highlighted the significance of procedural appropriateness and went on to issue several rulings that invalidated the Competition Commission of India's orders for failing to uphold the procedural fairness and natural justice principles According to the COMPAT, there is a specific instance where the law states that the officer who grants the objector's hearing must also submit the report or make a decision regarding the objection. If the objector's successor decides to proceed without holding a new hearing, the order will be deemed void as it was made against the principles of natural justice.[82] Similarly, in a case involving abuse of dominance,[83] the Commission dismissed the Commission's order

[82] Associated Cement Com. Ltd. & Ors. v. CCI & Ors., Appeal No.108 of 2012 (COMPAT 11th Dec. 2015)

[83] “Coal India & Ors. v. CCI & Ors. [2016] CompLR 716 (COMPAT)”

based solely on procedural fairness. These procedural protections are necessary to ensure that competition law's objectives are met in an impartial and responsible way. It is important to remember that procedural justice is not unqualified, as the courts must allow economic policy requirements to be met while enforcing antitrust laws.

Members of judicial forums are in a unique position when it comes to enforcing competition laws because they successfully balance substantive and procedural rules. One benefit of the judiciary's independence from other government branches is that it can maintain an unbiased and cogent legal interpretation of competition law. Second, the judicial branch's members are skilled in this practice, which involves judiciously interpreting the main goals of an act and fusing them with the requirement that the act be applied in a fair and understandable manner. In addition to these problems, the judicial forums add some flexibility to the competition law's implementation process, advancing legal development and utilising modern economic theory. This final attribute of the judiciary is particularly important in the emerging competition jurisdictions such as India, where the competition jurisprudence has not yet reached a critical level of maturity.

5.2 JUDICIAL EXAMINATION OF DOMINANCE ABUSE CASES

Different competition jurisdictions have different roles for judicial forums in cases involving competition. Since judicial precedents are a significant source of legal principles, courts, like those in the US and the EU, are effectively handling cases involving abuse of dominance. In the European Union, for example, market share-related legal precedents can be used to determine a company's market dominance. However, in India, the act itself provides clear guidelines for identifying abuse of dominance in this regard. The distinction between a question of fact and a question of law is a significant issue in the judicial review of cases involving abuse of dominance.

The majority of abuse of dominance cases are complex, making it difficult to classify them as either factual or legal issues. As an example, one such matter where law and fact are entwined is the definition of relevant market, which is a starting point in Abuse of Dominance cases. Although it is a fact-intensive exercise, the evaluation of pertinent facts must be done in accordance with a rigorous methodology of analysis,

which in and of itself may constitute a legal requirement. A small number of academics believe that questions related to abuse of dominance cases, such as determining the relevant market, examining entry barriers, determining the presence of market power, and evaluating an act that might be considered an attempt at monopolization or the abuse of dominant positions, can be divided into two categories: the first is the choice of the "analytical framework" for resolving the dispute, which is a legal matter, and the second is the actual application of this chosen methodology to the factual matrix of the dispute at hand. However, most cases involving the abuse of a dominant position involve both factual and legal issues, so this is not an absolute standard.

Analyzing the leading judgment in both the EU and India provides the best understanding of the main aspects of how judicial members apply abuse features. The cases that are being discussed are summarised in one brief overview in order to clarify the case's factual matrix. The important issue involved in each of those cases are then individually examined in order to clarify how the substantive and application portions of the competition laws of the relevant jurisdictions work. In order to highlight any over-reliance or mistakes that the jurist has found, a critical analysis of the pertinent judgment will also be included at the end, whenever possible.

5.2.1 Leading cases of the EU on Abuse of Dominant Position

The cases listed below have been chosen for a thorough examination in EU jurisdiction:

(i) "Tetra Pak International SA v. Commission of the European Communities" [84]

(ii) "AKZO Nobel Chemicals & Akcros Chemicals v. Commission of the European Communities" [85]

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[84] "CaseT-83/91 Tetra Pak International SA v Commission [1994] ECR II-755"

[85] Case T-125/03 AKZO Nobel Chemicals & Akcros Chemicals v Commission of the European Communities [2007] ECR II-03523

(i) "Tetra Pak International SA v. Commission of the European Communities" [86]

In this case, Tetra Pak International SA and its affiliated companies were sued in 1983 by Elopak Italia and other mostly dairy companies in the European Commission for engaging in abusive trade practices that were forbidden by Article [95] of the EEC Treaty. Elopak claims that Tetra Pak International SA's practices mostly involved imposing unjust terms on the provision of filling machines and selling equipment and cartons at exorbitant prices.

Tetra Pak International SA and its affiliated businesses were given a cease-and-desist order by the Commission for abusing their dominant position in the market for cartons and packaging machinery for liquid and semiliquid products. Tetra Pak International SA filed an appeal of the Commission's decision with the European Court of Justice, arguing that it should be reversed entirely or in part. Tetra Pak International SA was ordered to pay costs by the Court of First Instance after its application was dismissed. After receiving more appeals, the Court confirmed an ECU 75 million fine and directed Tetra Pak International SA to take specific actions to stop the violations.

Issues

The issues that the Court has taken on record are pertinent to the market in question. In addition, the Court reviewed the existence of market dominance. The Court considered the abuse by limiting supply and dividing the national markets within the European market when detaining the issues related to the abuse. The Court also considered predatory and discriminatory practices regarding the supply of cartons before coming to its decision.

Market Overview

Tetra Pak International SA, which has its headquarters in Switzerland, was the world's top supplier of cartons and machinery for liquid packaging. It specialised in

[86] Supra note 84

packaging supplies for both aseptic and non-aseptic food products in liquid and semi-liquid forms. The company worked with many international companies. In the European market, it was the leader in the aseptic packaging business, providing UHT processing for long-life liquid products, and it also accounted for a sizeable portion of the non-aseptic packaging market, which is used to store fresh liquids, frequently following pasteurisation.

Tetra Pak International SA was the only company offering the "Tetra Brik" system in the aseptic packaging space; PKL was the only company offering something similar. Elopak, which made the "Pure-Pak" carton to rival Tetra Pak's "Tetra Rex" carton, was its primary competitor in the non-aseptic carton market. Sales of cartons generated 90% of the company's revenue; packaging machines and related activities accounted for the remaining 10%. When it came to milk and other liquid dairy products, 90% of cartons were used in 1983; by 1987, that number had dropped to roughly 79%. The Commission's findings showed that fruit juice packaging made up approximately 16% of the total, with the remaining 5% consisting of wine, mineral water, tomato-based products, soups, sauces, and baby food.

Relevant Market

In the larger framework of competitive conditions in the liquid food packaging systems market, the Court stressed the significance of evaluating the “interchangeability” of aseptic and non-aseptic packaging systems, as well as systems using cartons and those using different materials. It is necessary to take into account these products' interchangeability when defining the relevant market[87] for them, taking into account not only their objective features but also the competitive landscape and market structure. Additionally, elements like supply-demand dynamics-and competitive conditions are critical when identifying the applicable market under Article 86 of the Treaty. The Commission's directive, which defined the relevant market as the European common market and community's supply of cartons and packaging machinery for liquid and semi-liquid products, was upheld by the

[87] Shentk, Market Matters: Understanding the Significance of Relevant Markets in Competition Law, LAWYERSCLUBINDIA (May 22,2023) https://www.lawyersclubindia.com/profile.asp?member_id=948230 (last visited on 30April, 2024).

Court. In addition, the Court noted that Tetra Pak International SA and its clients had standard contracts in place for machine sales, leasing, and carton supply that went back more than 15 years during the relevant period.

Dominance

The applicability of Article 86 is contingent upon a relationship between an abusive position and possibly abusive behavior, which is usually lacking when activities in a market distinct from the dominated one have an impact on that particular market. Under special circumstances, Article 86 may only apply to conduct on the associated, non-dominated market that influences the associated market when dealing with associated but distinct markets.

When both the aseptic and non-aseptic sectors were taken into account, Elopak held about 27% of the market for non-aseptic machines and cartons in 1985, with PKL coming in second with about 11%. Three companies controlled the majority of the carton market, while about ten smaller manufacturers made up the non-aseptic machine market. The Commission[88] emphasized Tetra Pak International SA's 90% to 95% quasi-monopolistic hold on the aseptic industry, with PKL serving as the primary rival. Comparably, the non-aseptic industry had an oligopolistic structure, with Tetra Pak controlling between 50% and 55% of the market in the European Community. The Court stated that an undertaking that is in the lead in closely related markets and dominates specific markets is equivalent to holding a dominant position throughout those markets collectively. Consequently, it may be possible for an undertaking accused of abusive behavior in those specific markets to be covered by Article 86 without having to prove dominance in each market separately.

Abuse of Dominance

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[88] "Competition Commission", Report of High-Level Committrr on Competition Policy and Law 1.1.9 (1999) www.competitioncommissiongov.in/Act/Report_of_High_Level_Committee_on_Competition_Policy_Law_SVS_Raghavan_Committee29102007.pdf (last visited on May 3, 2024)

It included the following components: -

Restrictive agreements

The Commission noted that Tetra Pak International SA kept tight control over the configuration of its machines in Italy, forbidding purchasers from moving the machines, adding accessories, or altering them. Tetra Pak was given exclusive rights to operate and maintain its equipment, as well as the ability to inspect it, under five different contract clauses. Tetra Pak held exclusive rights, with the exception of Spain, to equipment maintenance, the supply of spare parts, and international assistance. Monthly maintenance fees were often included in contracts; these fees were not set by actual maintenance requirements, but rather by customer loyalty.

By enforcing the use of its packaging machines and requiring the use of only Tetra Pak cartons supplied either directly or through approved suppliers, Tetra Pak used restrictive clauses to enforce customer loyalty. It was also mandatory for customers to give Tetra Pak any intellectual property rights arising from modifications made to cartons in Italy. These measures violated the Treaty of Rome and Article 86 of the EEC[89] by effectively restricting the use of competing brands and stifling competition in the European market for cartons and aseptic and non-aseptic machinery.

In order to enforce contract terms, Tetra Pak further reserved the right to inspect carton labelling in all contracts and to impose discretionary penalties in Italy equal to or greater than 10% of the initial rental fee. Leaseholders who violate the terms of the agreement will be subject to penalties, the amount of which will be determined at Tetra Pak's discretion based on the seriousness of the infraction. Price-fixing, which has been prohibited for more than 15 years and affects almost all Tetra Pak products, was recognized by the Commission as a significant impediment to market entry.

Discriminatory and Predatory Pricing

[89] Barry Eichengreen, European Economic Community (1992) PL 2

Tetra Pak International SA was found by the Commission to have engaged in discriminatory pricing practices both within and across European nations, with the intention of driving competitors and their technologies out of particular markets. For an extended period, Tetra Pak sold its non-aseptic "Rex" products at a loss, sometimes even less than the cost of raw materials, and used the money made from the sale of its aseptic "Brik" cartons to offset these losses. Competitors like Elopak suffered severe consequences as a result of this predatory pricing[90] including being forced to close an Italian production facility. “Pricing below average total costs but above average variable costs (considered abusive if intent to eliminate competition is demonstrated) and pricing below average total costs (always considered abusive) were the two points of differentiation highlighted by the Commission.” Tetra Pak was able to segment the European market through the use of restrictive contracts, which led to notable price differences for machines and cartons between states. Tetra Pak's actions were declared to be predatory by the court.[91]

Other Practices

In some instances, Tetra Pak International SA purchased rival devices with the specific goal of taking them off the market. In other instances, the company secured agreements from users to refrain from using the devices or to limit their use to their own property. Additionally, it obtained an exclusive commitment from one journal not to carry competing publicity for at least a year in an effort to stop competitors from advertising in Italy.

Tetra Pak Contentions

Tetra Pak International SA contended that the market would be incorrectly segmented, and that the Commission's definition of relevant product markets was erroneous and based on the incorrect legal standard. They argued that because of particular packaging features, different kinds of equipment could be used in its place. The Court disagreed, arguing that since both types of equipment and cartons are utilized in the

[90] Will Klenton, "Predatory Pricing: Definition, Example, and Why It's Used" (2024) https://www.investopedia.com/terms/p/predatory-pricing.asp#:~:text= (last visited on 18 May,2024)

[91] Ibid

liquid food packaging industry, a similar structure applies to both types of equipment and cartons. Tetra Pak attempted to divide markets according to the kind of product that was packaged, but the Court rejected this claim. It was discovered that the non-dairy product industry was outnumbered by the milk packaging industry, with non-aseptic fruit juice cartons holding a very small market share. The Court rejected other arguments made by Tetra Pak because there was insufficient evidence to support them, including higher costs and technological complexity.

Decision

According to the Court's ruling, Tetra Pak International SA's activities in the non-aseptic markets were covered by Article 86 of the Treaty without requiring the company to take a dominant position in each of those markets separately. Tetra Pak was given a degree of conduct that made it entitled to special responsibility under Article 86 to maintain genuine competition because of its substantial presence in the non-aseptic markets and close ties to the aseptic markets. The Court supported the application of Article 86 in this case because of the interconnection between the distinct but related markets, despite the customary requirement of a link between dominant position and abusive conduct. Tetra Pak enjoyed preferred supplier status in non-aseptic systems due to its dominant market share in both aseptic and non-aseptic cartons, as well as its near-monopolistic position in the aseptic markets. The Court emphasized that proof of Tetra Pak's realistic chance of recouping losses was not required, as the risk of competitor elimination was sufficient, consistent with the goal of preserving undistorted competition. The practice of predatory pricing below average variable costs, which Tetra Pak displayed from 1976 to 1984, was indicative of their intention to crush competition. The Commission's decision to fine Tetra Pak 75 MECU was upheld by the Court due to its severity, duration, and effect on competition in the European market. Despite objections, Tetra Pak was ordered to pay the costs of the proceedings because it was the unsuccessful party.

(ii) “AKZO Nobel Chemicals & Akcros Chemicals v. Commission of the European Communities” [92]

In the UK, a small company called Engineering and Chemical Supplies (Epsom and Gloucester) Ltd (ECS) produces benzoyl peroxide, an organic peroxide. The big international group AKZO has a subsidiary called AKZO Chemie BV. ECS claimed that AKZO Chemie BV used their dominant position in the organic peroxides market to eliminate their competitors, in violation of Article 86 of the EEC Treaty. ECS was satisfied that its business was negatively impacted by the implementation of a selective and below-cost price-cutting policy, and that it was barred from the competition.

Additionally, according to ECS, these policies in the UK and Ireland targeted a specific submarket. This hurt ECS and prevented it from planning an expansion into a larger EEC market for organic peroxides used in the plastics sector. ECS further expressed satisfaction that AKZO persisted in threatening ECS and making efforts to remove ECS from the market by implementing the aforementioned policies, even in spite of the High Court's injunction order.

After conducting an investigation regarding Article 14(3) of Regulation No. 17, the Commissioner issued an order for interim measures mandating that the United Kingdom subsidiary restore its profit levels to those that existed prior to the alleged threats being made and carried out. AKZO did not submit a request to annul the interim order. But in this case, the commission collected factual data in addition to applying the ECC competition laws to the same.

Dominant Position

A specialised chemical division emerged from the majority of the Dutch multinational AKZO NV’s chemical and fibers group. In 1984, AKZO NV reported a total net turnover of 6,608 million Euros and net profits of 300 million Euros. Documents from AKZO Chemie confirm its “dominating position” in inorganic peroxides, supported by a robust commercial and technical marketing organization, an extensive product range (over 100 compared to Interox’s 40), expertise in safety and toxicology,

[92] Supra note 85

widespread production and market coverage, and commitment to research and development.[93]

The Commission uncovered internal documents at AKZO Chemie indicating the company's dominant position, with a directive to maintain at least a 50% market share "by all means." AKZO Chemie sold its products across all Member States of the EEC. ECS alleged that AKZO introduced an extremely low-price policy as a threat to its rivals, initially targeting the United Kingdom and later extending globally, particularly affecting flour additives and plastics. However, the Commission's allegation focused solely on flour additives marketing in the UK. Documents related to AKZO's flour additives were used as evidence of its broader business tactics.

According to allegations, the UK flour additives industry should be concerned about the following principles:

- stealing the business of multiple separate Allied Mills from ECS by offering below-cost or absurdly low prices.
- obtaining the business of at least three significant "independent" clients from ECS through comparable low-cost offers.
- using vitamin blends and potassium bromate as enticement or loss leaders to acquire the entirety of the client's flour additive business.
- Pressuring ECS to reduce its rates to unfeasible amounts to hold onto the remaining clients.

ECS stated that AKZO UK threatened them during the first meeting, threatening to continue charging ECS's customers with selective cuts and price reductions if they did not leave the plastics market.

Abuse of Dominance

[93] Rishita Mall, DOMINANT POSITION - THE COMPETITION ACT, 2002, (2017) https://www.mcolegals.in/kb/Knowledge-Bank-September-2nd-version_2017.pdf (last visited on 19 May 2024)

Due to the significant negative impact that this price reduction would have on ECS, AKZO purposefully targeted the flour additives industry. Additionally, AKZO UK said that since the majority of their business partners supported the price reduction strategy, they were prepared to lower their prices below the cost of production if necessary. The spokesman for AKZO UK claimed that they followed the directives of their parent company, AKZO Chemie, which is what ECS assumed.

When ECS began supplying BASF with benzoyl peroxide in Germany, AKZO Chemie became dissatisfied. Rumour had it that AKZO intended to acquire ECS to eliminate the competition. The product manager of AKZO Chemie and the spokesperson for AKZO UK, according to ECS, threatened them nonstop during the second meeting in the Netherlands. After that, ECS requested an injunction under Article 86 of the EEC Treaty, and the court granted it during an ex parte hearing.

Issue Involved

1.Consumers have always preferred cheap prices, but what happens when cheap prices turn predatory?

2. Did AKZO Chemicals drive out ECS and other competitors with predatory pricing?

Judgment

As per the ruling in this particular case, a company would be engaging in abusive behavior in the market if it drastically cut prices below average variable costs with the aim of eliminating competitors.

It is interesting to wonder why a dominant business would charge such low prices for its goods. ECS found the answer to this question and asserted that their monopolistic position in the market would allow them to automatically recover all losses once they successfully eliminated the competitors.

AKZO takes into consideration two tests:

- Prices are below average variable cost and
- Prices are greater than average variable costs but lesser than average total costs.

The ruling rendered by CFL in the AKZO case had a big impact on how businesses would approach future consultations about lawful qualified privilege and competition law. After using its dominant position and engaging in predatory pricing, the Commission found AKZO guilty of violating Article 82 of the treaty, which forced ECS out of the plastic market. After giving careful thought to each argument, AKZO was fined and told not to set prices that would lead to unfair competition and price differences.

The court cited Hoffman La-Roche, where abuse was described as dominating company behavior that altered market structure by means other than those permitted by conventional competition law. The ruling demonstrated how unnecessarily low prices can turn predatory and have unfavourable effects. Article 86 prohibits potential dominant companies from suppressing competition to strengthen their position. The court came to the conclusion that AKZO intended to hurt ECS's business rather than help customers. However, proving the immoral intentions of a dominant company is challenging. AKZO's predatory pricing policy targeted a specific rival, though implementing such a strategy can be complex due to determining the most suitable costs

Criticism of Judgement

According to Article 82, a business cannot engage in predatory pricing unless it has a dominant position at the time. This may allow for situations in which a business gains dominance by using predatory tactics. In cases of predatory pricing, authorities ought to give top priority to evaluating financial resources in order to ascertain dominance. Competition law seeks to prevent competitors from using price-cutting tactics, but it can be difficult to discern between predatory pricing and true price competition because the latter helps the market. It is also challenging to gather data to distinguish between the two.

The AKZO test is criticised for favouring industries with low variable costs, like transportation and research-based trades. Uncertainty over the amount of time needed to recover losses is an additional disadvantage. Although OFTEL found that losses in the first year might not be considered predatory if improvements are anticipated in a reasonable amount of time, it is still unclear what constitutes a reasonable amount of time—is it the investor's expected return period or the economic life cycle.

When making decisions in predatory pricing cases, the court ought to take into account a number of factors, including future price valuation and a reasonable rate of return. While price reductions may be acceptable in some circumstances, predatory pricing is against fair competition and the interests of customers. It is, however, forbidden to sell goods for less than their variable cost.

The legal system lacks a defined methodology for computing costs and discounts from dealers to vendors, and it is unclear under what circumstances selling below cost will distort the market. However, this particular case establishes that it will be illegal to eliminate effective competition as the dominant firm. Numerous courts have cited this case in the past to control the market, highlighting the harsh penalties that will be meted out to businesses that abuse their dominant position by charging predatory prices.

5.2.2 Leading cases of the India on Abuse of Dominant Position

The cases listed below have been chosen for a thorough examination in India jurisdiction:

(i) "Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors." [94]

(ii) "MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & Ors." [95]

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[94] Case 03/2011 Shamsher Kataria v. Honda Siel Cars India ltd. & ors. [CCI order dated 25.08.2014] & Appeal no. 62/2014 (ComPAT judgment dated 09.12.2016)

[95] Case 13/2009 MCX Stock Exchange ltd. vs. National Stock Exchange of India ltd. & ors. [CCI Order dated 23.06.2011] & Appeal no. 15/2011 with IA no. 25/2011,26/2011 (ComPAT judgment dated 05.082.2014)

(i) "Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors." [96]

In 2011, Shamsher Kataria filed complaints[97] against three major car manufacturers—Honda, Fiat, and Volkswagen—claiming that they imposed strict restrictions on their original equipment suppliers. These limitations were said to have restricted access to original spare parts, software, diagnostic tools, and technical data on the open market, especially for independent repair workshops. Kataria further claimed that the OEMs controlled the pricing of spare parts and repair services, restricting the market access for independent repair workshops. These OEMs allegedly worked in tandem with their authorized dealers and service stations. It was claimed that these workshops, which are frequently small or medium-sized businesses and major employers, were unfairly marginalised and that this undermined the rights of consumers.

Furthermore, Kataria noted that the majority of auto repair services were offered by licensed service centres, most of which were located in cities, making them difficult for clients to access. Apart from that, he maintained that independent workshops charged between 35 and 50 percent less for auto repairs than authorized service centres. After completing an initial review, the Competition Commission of India (CCI) determined that there was enough evidence to support a follow-up investigation. As a result, the DG was instructed to begin a comprehensive investigation on April 26, 2011. The inquiry was then broadened by the DG to encompass 14 automakers: Ford, Hindustan Motors, Fiat, Nissan, General Motors, Premier, Mahindra, Maruti Suzuki, Tata Motors, Hyundai, Skoda, Toyota, Mercedes, and BMW. The DG came to the conclusion that these OEMs' actions were illegal under sections 3 and 4 of the applicable competition laws.

As a result, the 14 automakers were hit with a fine of about INR 25 billion, or 2% of their entire revenue, for what was allegedly anti-competitive spare part and after-sale services policies. Due to judicial challenges, the Madras High Court has temporarily stopped Maruti Suzuki's INR 4.71 billion fine from being enforced. The Competition

[96] Supra note 94

[97] Under Section 19(1)(a) of the Competition Act

Appellate Tribunal (COMPAT) remanded the case back despite upholding the CCI's decision. The reason given was procedural, as only three of the seven members who heard the case initially endorsed the order. At this time, the case is still pending further consideration in both the Delhi High Court and the Supreme Court.[98]

Issues

The primary concerns concerned defining the relevant market in the given case. Additionally, the CCI considered the agreements in question under Section 3(4)(d) of the Act after determining that the secondary market was the relevant market for the case. The CCI considered issues pertaining to abusive agreements under the Act's Sections 3(3)(a), 3(4)(d), and 3(3)(b). Further records were made regarding the abuse and position of dominance as per Sections 4(2)(a), 4(2)(b), and 4(2)(c) of the Act. Finally, the regulator addressed issues pertaining to the defence of intellectual property rights.

Relevant Market

The CCI's detailed findings highlight the thriving nature of India's automobile sector, as well as its significant contribution to the national economy. The absence of spare parts and diagnostic tools for independent repairers has fuelled the growth of a counterfeit spare part market, resulting in safety hazards, revenue losses, and employment setbacks for the automobile aftermarket, which employs over three lakh people and houses the majority of workshops. Understanding that identifying the relevant market is a crucial first step in evaluating an enterprise's market dominance, the CCI applies Section 4(2) of the Act to examine an enterprise's position in the market. Examining the necessary conditions for gaining dominance, the CCI highlights how important it is to define the relevant product market and geographic market, as stated in Section 2(r), (s), and (t). The CCI's conclusion indicates that there are two distinct relevant markets: one that is centered on the production and sale of automobiles, and the other that is concerned with the sale of repair services and spare

[98] C.A. No. 951/2017 “Case Nissan Motor India Pvt Ltd Vs. Competition Commission of India” (2017) Filed On 24-01-2017 Pending C.A. No. 000951/2017 Registered on 25-01-2017,18-07-2018

parts throughout the whole of India. In the case of primary and secondary products, the aftermarket holds particular importance, as the sale of spare parts is crucial. The CCI draws attention to the intricacies present in the automotive industry and draws attention to the monopolistic pricing of routine services, which is made worse by the limited availability of spare parts on the open market, allowing OEMs to control the aftermarket's supply of original spare parts. According to the Commission, this monopolistic hold negatively affects independent workshops, which are mostly made up of micro, small, and medium-sized businesses (MSMEs), and employ a significant percentage of India's industrial workforce. The situation is made worse by claims that OEMs are operating outside of aftermarket competition restrictions, which has a substantial negative impact on independent repairers and their customers. The limited interchangeability of OEM-produced spare parts and the restricted substitutability of body parts obtained from overseas suppliers and local OESs compound the limitations on consumer choice after a purchase. Additionally, OEMs impose strict restrictions on authorized dealers and most foreign suppliers are prohibited from providing supply internally. As a result, customers are mainly limited to aftermarket goods and services that go well with their original purchases, which makes switching to different primary products less likely. The Commission's final assessment clearly states that there is a primary market for car sales in India, as well as two distinct aftermarkets that sell spare parts and provide repair and maintenance services, respectively.

Dominance

It has been discovered that every OEM is the only supplier to this market segment, maintaining a monopolistic position in the aftermarket for their own brand of diagnostic tools and spare parts. OEMs prevent their authorized dealers from effectively competing with them in the aftermarket by severely limiting independent repairers' and multi-brand service providers' access to genuine spare parts and diagnostic tools. The CCI determined that these actions constituted a denial of market access and violated section 4(2)(c) of the Act. The market is severely restricted, giving OEMs total control over the supply of spare parts, demonstrating their dominance in the aftermarket spares market. Since section 4(2) of the Act does not have any exceptions, unlike section 3(5), exclusionary behavior under the pretence of

intellectual property rights is not a legitimate defence. According to CCI, independent repairers and multi-brand service providers in the aftermarket have been unfairly excluded from the market by OEMs. While non-dominant businesses can engage in vertical agreements that improve distribution efficiencies without hurting competition, dominant businesses are assumed to act in a way that hurts competition. Producers of durable goods monopolize the market by using their strength in the aftermarket to keep competitors from entering the market with similar products or services. This limits customers to purchasing spare parts only from OEM-approved dealers, and in order for independent service providers to continue operating in the Indian auto aftermarket, they need to have access to diagnostic tools and compatible spare parts for a wide range of car models.

Abuse of Dominance

It included following components:

Agreement

The CCI observed a number of contractual and customary arrangements between OEMs and OESs, as well as OEMs and authorized dealers, that restrict the direct sale of spare parts to aftermarket and independent repairers. Authorized dealers and OEMs are independent entities in a principal-to-principal relationship, but their agreements contain vertical exclusivity clauses that effectively bind the dealers to the OEMs, preventing independent aftermarket sales at all levels. Furthermore, the Competition Commission of India (CCI) found OEMs guilty of violating Section 4(2)(a)(ii) of the Competition Act, 2002 by placing unjust terms and exorbitant markups on the sale of spare parts. OEMs violated Section 3(4)(b), (c), and (d) by placing restrictions on their suppliers, prohibiting them from selling spare parts, technical manuals, diagnostic tools, and other items to authorized dealers as well as independent repairers. These limitations serve as entry barriers for OESs seeking to launch their R&D departments and provide OEMs and the open market with direct, authentic spare parts. OEMs force customers to buy repair services in addition to spare parts by effectively blocking 94.99% of service providers in the Indian auto aftermarket[99], such

[99] Automotive Component Manufacturers Association of India (ACMA) Annual Report 2011

as multi-brand retailers, semi-organised service stations, and unorganized garage workshops, from competitively accessing the aftermarket through their authorized dealer network.

Intellectual Property Rights of the OEMs

The CCI rejected the protection of intellectual property rights (IPRs) under section 3(5) for agreements between OEMs and OESs, citing that the Act only recognizes IPRs conferred by Indian legislation listed in 3(5). It rejected any defence claiming exclusionary conduct in the context of car manufacturers' intellectual property rights, particularly because the IP rights are held by parent companies in foreign jurisdictions. Technology transfer agreements (TTAs) were not covered by the Act's Section 3(5) exception, and OEMs were unable to prove their ownership of intellectual property rights. CCI argued that TTAs did not prohibit OEMs from selling spares and diagnostic tools on the open market because they only granted the right to exploit, not the IPRs themselves. As mandated by 3(5), the other OEMs did not have secured rights in India; only Ford held some patents over specific body parts. There is no exemption to section 4(2) of the Act, even if they did have such rights. TTAs were unable to resolve the matter unless rights were awarded in accordance with particular statutes. It was not the IPR rights per se that the OEMs had the right to utilize, but rather certain IPRs that belonged to their parent companies. If an agreement allows an enterprise to eliminate competition and gain dominance, then factors prioritised under section 19(3)(a) -(c) should take precedence over those under section 19(3)(d)-(f) when evaluating the agreement. The Copyright Act, which requires registration under the Design Act, 1911, limited the claims of copyright protection over engineering drawings as “literary works.” The protection expires if the owner or licensee uses the design more than fifty times. The intellectual property rights (IPR) of such products are not always violated by their sale on the open market.

Abuse

According to section 4(2)(a)(ii), the Commission found that there were notable price differences and markups between independent repair workshops and authorized

dealers/service stations, which constituted unfair exploitation. According to Section 4 of the Act, excessive pricing must be assessed based on circumstances and economic analysis. The Commission underlined those monopolies can create unfairness not just when they lead to unnecessarily high prices but also when they create special conditions that leave consumers with no other options. Due to their dominance in the aftermarket for spare parts, OEMs violated Section 4(2) by using this to their advantage to enter or defend the repair and maintenance market. OEMs protected their authorized dealers by enforcing a network of agreements and practices that effectively gave them monopoly status over the auto repair and service industry. OEMs ensured market access for their authorized dealers by indirectly excluding independent repairers from the market by withholding diagnostic tools and technical information. Even though OEMs assert that they are not directly involved in the servicing market, their actions have the effect of driving independent repairers away and giving preference to their affiliated authorized dealers.

Replies of Opposite Party

According to the OEMs, the relevant market consisted of an indivisible, unified systems market in which auto sales and auto spare parts sales were interdependent. They claimed not to have a dominant position in this unified market, citing strong competition. They claimed that buyers anticipated future ownership costs and took the whole-life cost into account when making their car purchases. On the other hand, the CCI disagreed, stating that anti-competitive behavior would be evaluated with reference to the distinct market for diagnostic tools and spare parts. The Commission disapproved of the idea of a single market for systems, arguing that data accessibility and computational viability were essential, and that the OEMs had not proven these points. Hence, the relevant market was deemed to be related to spares. The original equipment manufacturers (OEMs) disagreed with the conclusion that customers were “locked-in” and only bought from authorized dealers, claiming that a sizeable percentage switched to independent repairers after the warranty expired. Due to the substantial presence of both organized and unorganized dealers, the Commission's conclusion of restricted market access and entry barriers was contested. The OEMs further alleged that in calculating markups, the Directorate General (DG) disregarded

other costs and statutory levies. However, the Commission maintained that excessive markups constituted anti-competitive behavior, rejecting claims about revenue share and production costs. Despite the OEMs' assertion that consumers switched to independent repairers after the warranty expired, the CCI dismissed it due to a lack of supporting evidence provided by the OEMs.

Decision

“The Competition Commission of India (CCI)” under Section 4 of the Competition Act, 2002 found that the OEMs held dominant positions in the markets for their respective brands, affecting about 20 million car consumers. The Commission came to the conclusion that every automaker controlled the aftermarket for diagnostic tools and spare parts associated with their brand, thereby acting as the only provider to this market. The CCI claimed that this abuse of dominance was against Sections 4(2)(a)(1) and 4(2)(c) of the Act.

In addition, the OEMs violated Section 3(4)(b), (c), and (d) by placing limitations on original equipment suppliers (OESs) through agreements and practices, prohibiting them from providing technical manuals, diagnostic tools, and spare parts to independent repairers and authorized dealers. Furthermore, contracts with approved dealers and service centres that limited the availability of parts, equipment, and software required for auto maintenance and repairs violated Sections 3(3)(a), 3(4)(d), and 3(3)(b) of the Competition Act of 2002.

Due to their monopoly over the supply of genuine spare parts, auto manufacturers' actions in limiting the sale and supply of spare parts, technical data, diagnostic tools, and equipment have an indirect impact on the cost of buying or selling vehicle spare parts as well as servicing, maintenance, and repair services. This was against the Competition Act of 2002's Sections 3(3)(a) and 3(3)(b). Also, OEMs violated Sections 4(2)(a), 4(2)(b), and 4(2)(c) of the Act by denying independent service providers market access to the repair and maintenance market by placing unfair conditions on authorized dealers and OESs.

In order to facilitate consumer choice and foster fair competition in the market, the CCI directed all automakers (OEMs) to furnish pertinent information about spare

parts, their Maximum Retail Prices (MRPs), availability arrangements, details of comparable quality alternatives, maintenance costs, and any other pertinent information. Furthermore, the OEMs were directed to terminate warranties solely in situations where defective repairs were performed outside of their approved network, provided that all appropriate precautions were taken.

Furthermore, OEMs were directed to allow OESs to sell spare parts in the open market without restriction, to refrain from imposing barriers on independent repairers/garages, and to standardize training and diagnostic tool availability. Restrictions on single dealerships were also implemented. The Commission emphasized the necessity for India to create training programs for inexperienced repairers, regulate the standard and caliber of spare parts used by independent repairers, and put in place legal and regulatory frameworks for the certification and management of repairers and garages.

(ii) "MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & Ors."[100]

In 2009, MC Stock Exchange Ltd. filed a complaint[101] against "National Stock Exchange India Ltd. (NSE), Dot Ex International Ltd. (Dot Ex), and Omnesys Technologies Pvt. Ltd. (Omnesys)" for allegedly abusing their dominance in India's stock exchange services market, particularly in the currency derivatives segment. The complaint focused on the NSE's alleged strategy of waiving transaction fees in its Currency Derivatives (CD) segment to drive MCX out of the market. This move, combined with other alleged exclusionary practices, raised concerns about unfair competition and market manipulation.

In 2011, after a divided 4:2 ruling, the Competition Commission of India (CCI) majority determined that NSE was the dominant player in the CD market and was taking advantage of its position to draw in business. The CCI declared that NSE had engaged in unfair pricing practices and that it had a deliberate plan to drive out rivals.

[100] Supra note 95

[101] Under Section 4 of the Competition Act

Consequently, NSE was directed to immediately stop engaging in unfair pricing practices and pay a penalty of INR 55.5 crores, which is equal to 5% of its annual turnover over the previous three years.

NSE challenged the ruling before the Competition Appellate Tribunal (COMPAT), which upheld the CCI's conclusions and pointed to NSE's policy of charging no transaction fees as a prime illustration of discriminatory behavior. The COMPAT observed the disparity in market strength between MCX and NSE and concluded that NSE's actions had made it more difficult for MCX to effectively compete. The case was taken to the Supreme Court, which halted the proceedings and ordered NSE to pay a penalty of INR 55 crore.

Afterwards, MCX—later renamed Metropolitan Stock Exchange of India (MSEI)—asked NSE for INR 588.65 crores in damages.[102] The National Company Law Appellate Tribunal (CLAT) received the application, and after consulting with industry experts, MSEI revised the compensation claim to INR 856 crore.[103] The ongoing legal battle raises concerns about punitive damages and the "passing-on" defence, which examines whether losses caused by anti-competitive behavior were transferred to consumers or other stakeholders. The decision is still pending before the NCLAT and could have an impact on upcoming regulations pertaining to competition.

Issues

To determine the relevant market in this case, the Competition Commission of India (CCI) carefully considered a number of factors. The CCI also carefully addressed and examined concerns regarding the company's dominance in this market. The Competition Commission of India (CCI) examined the allegations of abusive actions by NSE after both sides submitted evidence about the degree of market competition. Before issuing its order, the Commission examined a number of elements specified in the Competition Act as well as the market's dynamics.

[102] Under Section 42A of the Competition Act, 2002

[103] Bureau Report, NCLAT to hear INR 856 crore predatory price against NSE (The Hindu Business Line September 27, 2018) P.13

Relevant Market

“The Director General (DG) of the Competition Commission of India (CCI)” defined the market as the foreign exchange trade that stock exchanges engage in, including equity, debt, equity futures and options (F&O), currency derivatives (CD), and over the counter (OTC) products. However, the CCI determined that the relevant market was the stock exchange services associated with the currency derivatives (CD) segment. The CD segment was determined to be a distinct market by the CCI despite the fact that services from different segments were similar but neither interchangeable nor substitutable. The CCI majority order stated that equity or F&O products could not replace the CD segment and stressed the uniqueness of every product traded on exchanges. The CCI pointed out that each product segment operated in a different market, despite having comparable technical, financial, or infrastructure capabilities. In contrast, the Competition Appellate Tribunal (formerly COMPAT) identified the entire stock exchange services market as relevant, with the National Stock Exchange (NSE) deemed dominant, as opposed to CCI's focus solely on the CD segment. The order from the CCI emphasized NSE's leadership position, especially in the CD segment. It cited examples such as NSE's substantial market shares across multiple segments and its zero-pricing strategy on currency future contracts. Furthermore, NSE's extensive presence in India and vertical integration bolstered its dominance. The CCI also emphasized the importance of aftermarket services, such as data feeds, provided by software applications such as NOW and ODIN, and how denying access to the NSE's interface code for CD segment derivatives constituted exclusionary conduct and violated competition regulations.[104]

Dominant Position

A dominant position, as defined by the “Competition Commission of India (CCI)”,is a “position of strength” that enables an entity to function independently of market forces or to sway rivals and the market at large to its advantage. There are other considerations besides market share that need to be taken into account when assessing

[104] Violation of Section Sections 4 (2) (b) (i) and (ii); 4 (2) (c) and 4 (2) (d)

this strength, such as the size of competitors, their economic status, and entry barriers. According to the CCI, the National Stock Exchange (NSE) possessed a strong position in the relevant market that allowed it to exert undue influence over rivals. This judgment was made using a number of factors:

1. Predatory pricing or intent

2. Past conduct

3. Leveraging from other businesses

4. Exclusionary conduct

The CCI emphasized that other factors must be considered in order to determine dominance, as standalone market share figures are insufficient in the Indian context. The investigation discovered that NSE had abused its dominant position by offering fee waivers in the currency derivatives segment that were not offered in other segments.

Abuse of Dominance

“The Competition Commission of India (CCI) found that the National Stock Exchange (NSE)” benefited from its operations in other markets, allowing it to offset costs in the currency derivatives (CD) segment with profits earned elsewhere. The CCI highlighted that businesses would not engage in market expansion without potential for profit, and that NSE’s strong financial position allowed it to take bigger chances and wait longer. When compared to rivals like MCX, who served fewer markets and therefore possessed less financial stability, this advantage was apparent. As a result, it was discovered that NSE had used its strength in one market (the non-CD segment) to enter or defend another (the CD segment), as demonstrated by its CD segment pricing strategies, which the CCI found to be unjust and anticompetitive. The CCI disagreed, claiming that zero pricing was below cost and constituted unfair pricing, despite the NSE's claim that the CD segment incurred no fixed costs. While the Competition Act does not define “unfair,” the CCI pointed out that fairness must be evaluated on an individual basis and cannot be established only by cost benchmarks. A prime example of predatory pricing, which is unfair pricing, is the

NSE's zero pricing policy, which is especially detrimental to rivals like MCX that have no other source of revenue.[105] It was believed that the free distribution of NSE's NOW software and the denial of access to APIC for MCX's ODIN software were actions taken to protect NSE's standing in the CD segment. The CCI concluded that NSE's disregard for shareholder dividends and commercial viability was inexplicable and suggested a more comprehensive plan that might have the goal of eradicating competition.

Majority Order

"The Competition Commission of India (CCI) found that the National Stock Exchange (NSE)" had violated the Competition Act in its majority decision. As of April 1, 2012, NSE is required by the CCI to modify its zero-pricing policy in the currency derivatives (CD) segment, apply suitable transaction costs, and keep distinct accounts for each segment. Furthermore, NSE was directed to guarantee members autonomy in choosing brokerage software for trading CD segments. The RBI-SEBI Standing Technical Committee report on exchange-traded currency futures, which stressed the necessity of a separate CD segment from other securities on recognized exchanges, was cited by the CCI. The CCI's determination of the relevant market as the CD segment was influenced by this report. The majority ruling determined that competitors such as MCX were unfairly disadvantaged by NSE's zero pricing strategy. The CCI found that NSE's pricing was unfair because it was less than the cost of production, with the intention of stifling competition, even though it acknowledged that discounts could foster competition. The CCI held NSE liable for abusive conduct under pertinent sections of the Competition Act, even though the claims of predatory pricing were not proven. This was done without requiring evidence of a noticeably negative impact on competition.

Dissenting Order

According to the dissenting opinion, the stock exchange industry is heavily influenced by networks, providing a different and network economics-based viewpoint. The

[105] Violation of Section 4(2)(e) of the Competition Act

dissent contended that, because market dynamics are fluid, intervening in such a dynamic environment runs the risk of arbitrariness. Members who disagreed argued that the NSE's zero pricing policy was not an abuse of its position, but rather the outcome of market dynamics. In the context of stock exchanges, they emphasized the complementarity between users, non-traditional pricing and costing dimensions, increasing returns to scale, rapid market expansion, and structural disparities in market share and profit as important characteristics of network industries. When these industry characteristics were considered, the dissent concluded that NSE's zero pricing was not unfair or predatory.

The dissenting opinion warned against mistaking price dynamics in the network industry, such as zero pricing, for predatory pricing. It claimed that strong competition existed in the CD segment, as evidenced by the entry of competitors such as USE and MCX. The dissent criticised the majority decision for reaching its conclusion based on subjective perceptions of unfairness rather than economic analysis, raising concerns about potential negative effects on innovation and competition in the new economy.

In reference to predatory pricing, the dissent pointed out that it is not enough to simply show that a price is below cost to suggest recoupment and harm to competition. For abuse to be proven, recoupment must be reasonably expected. The CCI guidelines, which define predatory pricing as below average variable cost, were cited by the dissent to cast doubt on the notion that zero pricing equates to predatory pricing. In theory, the trading service for the CD segment could have zero variable costs because NSE offers a variety of stock exchange services. Thus, in order to prove abuse, the dissent highlighted the necessity of a thorough evaluation of predatory pricing, including intent.

Chapter – 6

CONCLUSION AND SUGGESTION

6.1 Conclusion

Market forces are driven by the complementary but opposing forces of competition and self-interest, according to Adam Smith,[106] who is regarded as the founding father of modern economics. The free market model, which dominated the world economy for nearly a century, is only now recognized as the most effective one globally in the last quarter of the 20th century. As a result, there is a growing reliance on markets to help countries achieve their objectives for economic development as the free market model of national economies gains traction across the globe. However, there are disadvantages to free markets as well, like corporate anti-competitive behavior and abuses of dominance. A strong framework for competition law is required, as is its effective application, in order to reduce the negative connotations associated with the free-market model and promote competition in order to safeguard consumer prosperity and allocate resources within an economy. In this context, advanced economies, such as the European Union, benefited from a robust system of competition law and policy in their markets. Developing nations and emerging markets, such as India, have achieved notable strides in this area by instituting a robust competition framework to counteract market manipulation and deceit, and by fostering a "competition culture" throughout all facets of the national economy. Combating the abuse of dominance/monopolization by major market players in their respective fields is one such area of interest for competition law scholars.

The MRTP Act[107] was passed in India as a first step toward addressing competition issues in the context of establishing a mixed economy. The enactment of several LPG-focused reforms resulted in a number of economic and societal changes that made the MRTP Act unable to meet the needs of the Indian national economy. This created a gap between the antitrust legislation in place at the time and the changing

[106] Joy Blenman, "Adam Smith: The Father of Economics"(2017) Available at http://www.investopedia.com/updates/adam-smith-economics/ (last visited on 20 May 2024)

[107] Monopolies and Restrictive Practices Act 1969 (54 of 1969)

commercial landscape, which prompted the government to address this crucial issue. These conditions led to the creation of a High-Level Committee on “competition law and policy,” whose mandate was to develop appropriate guidelines in this field. To address India's changing economic structure, this group strongly advocated for the implementation of new competition laws and regulations. They believed that tinkering with the then-current MRTP Act would not help achieve the desired results.

India was unable to afford to adopt a full replica of either of the functional forms of competition law, despite the existence of several such forms, such as the EC model. Due to the fact that these types of competition law are deeply ingrained in the economies of the nations in which they are implemented and have distinctive qualities of their own. India, being different from the world's advanced economies in both quantitative and qualitative aspects, needed a model of competition law that would have been most suitable for its own stage and level of economic evolution and development. Due to these factors, India chose to adopt a “sui generis” approach when drafting the Competition Act, 2002,[108] which meant that the needs of the Indian economy were taken into consideration.

Aside from all the other modifications, the Competition Act of 2002 differed significantly from the MRTP Act in the areas concerning abuse of dominance. An entity is not allowed to misuse its dominant position under Section 4 of the Competition Act of 2002. In the context of India, “dominant position” is defined as “a position of strength enjoyed by an enterprise in the relevant market, which enables it to operate independently of Competitive forces prevailing in the relevant market or affect its competitors, consumers, or the relevant market in its favor.” This section reveals “the Competition Act 2002's attitude, which clarifies that a monopoly situation in and of itself is not against public policy; rather, the use of monopoly powers to the detriment of potential and actual competitors and consumers is strongly discouraged.”

[108] The Competition Act, 2002, (Act 12 of 2003)

6.2 Lesson from EU

For a long time, EU competition law has been heavily influenced by traditional ordoliberal thinking, which emerged in response to the anti-competitive effects of market power seen in 1920s Germany due to the presence of cartels. Due to this, the EU began concentrating on market features such as accessibility, concentration, structure, and power, with the main objective being to safeguard rivals' freedom to operate. Ordoliberals believed that holding a dominant position conflicted with the principle of fair market competition. Because of this, early rulings by EU antitrust authorities frequently followed a form-based methodology, in which conclusions were drawn from presumptions regarding market structure, market share thresholds, and anti-competitive behavior.

A notable example is the 1979 "Hoffman-La Roche v. Commission case", in which the European Court of Justice ruled that abuse of dominance occurred when a dominant firm's actions reduced market competition, deviating from normal competitive behavior.

However, the form-based approach was criticized for failing to consider potential efficiencies. This sparked calls for more economic analysis in evaluating antitrust practices, and the EU gradually began to shift toward an effects-based approach, beginning with merger control and antitrust agreements. This shift eventually spread to cases of abuse of dominance. Despite ongoing efforts to fully adopt an effects-based approach, remnants of the form-based approach remain. In the 1991 "AKZO Chemie BV v. Commission case", the European Court of Justice took an effects-based approach to predatory pricing. AKZO violated the law by pricing its product between average total cost and average variable cost with the intention of keeping competitors out, the Court found using economic analysis. It was proven that in an effort to force its rivals out of the market, AKZO specifically targeted their customers.[109]

Similarly, the European Court of Justice (ECJ) applied the "as efficient competitor" test from the AKZO case in the "Post Danmark A/S v. Konkurrenceradet (2012)

[109] Martin Mandorf and John Sahl, "The Role of the 'Equally Efficient Competitor' in the Assessment of Abuse of Dominance" (Konkurrensverket Working Paper Series in Law and Economics, 2013)

case”, which involved selective rebates intended to acquire a competitor's customers. The Court determined that, while the selling price fell between the average variable cost and the average total cost, there was no evidence of exclusionary behavior. The ECJ recommended conducting a cost analysis to investigate the exclusionary effect and stated that if the cost analysis revealed an anti-competitive impact, Post Danmark should be given the opportunity to justify its actions, emphasizing the potential for efficiency. This case marks a significant shift from determining anti-competitive intent to assessing the risk of eliminating competition.

Thus, the EU is gradually shifting to an effects-based approach in abuse of dominance cases by implementing regulatory changes, developing new guidelines, and establishing precedents through ECJ decisions. In contrast, India primarily employs a form-based approach to assessing abuse of dominance. This entails evaluating whether the dominant firm's actions are abusive in accordance with the law after establishing dominance in the pertinent market. In a developing country like India, where the market is expanding constantly and where economic interactions can result in a variety of efficiencies, this strategy might not be effective. In the event that Indian competition law fails to acknowledge these efficiencies, it may result in unfair outcomes. Therefore, in order to promote innovation, improve consumer welfare, and stimulate economic growth, effects-based competition law enforcement is more important in India.

The effects-based approach is consistent with the objectives of the Competition Act (2002), which seeks to promote economic development. According to the preamble, the “Competition Commission of India's” role necessitates the adoption of an effects-based approach and the incorporation of thorough economic analysis in decision making. Certain provisions of the Competition Act, such as determining if a company can "operate independently" or impact competitors, customers, or the relevant market, already make it easier to apply an effects-based approach. Simply looking at market share or firm size is insufficient for drawing conclusions. Furthermore, the Act's emphasis on market structure, vertical integration, and consumer reliance on businesses highlights the need for an effects-based approach. This approach has been used in some cases in India.

Some examples of this are given below.

In "MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd[110], the Competition Commission of India (CCI)" determined that the National Stock Exchange (NSE) dominated the currency derivative segment of stock exchange services. This conclusion was drawn from the NSE's larger size and resource base within the Indian capital market in addition to its market share. The dominance of a firm was evaluated by the CCI based on factors other than market share, such as its ability to function without interference from rivals, customers, or the relevant market. Similarly, in "Indian Competition Review v. Gateway Terminals India Private Limited (GTPL) India Pvt Ltd & Others (2017)"[111] the CCI determined that, while Gateway Terminals had a market share greater than 40%, the presence of four other terminals and 33 container freight stations effectively prevented GTPL from operating independently in the market. This evaluation showed that dominance could not be established solely by market share; other important factors in the analysis included the competitive landscape and the existence of other major players.

In "Dhanraj Pillay v. Hockey India (2013)"[112], the Competition Commission of India (CCI) investigated the sports institute's restrictive conditions. The CCI determined that these conditions were consistent with the goals of the sport and could not be held liable per se. This meant that Hockey India's restrictive rules would only be viewed as an abuse of dominance by the CCI if they had an anti-competitive effect. These cases demonstrate that, although the CCI has occasionally adopted an effects-based approach, the form-based approach is still widely used. Because of the intricate relationships and dynamic nature of markets, evaluating anti-competitive behavior can be difficult. A more dependable assessment and sound conclusions can be reached with the aid of the effects-based approach.

Another area where we could benefit from EU competition law is analyzing competition concerns in the emerging field of "Big Data." With the rapid advancement of technology and the Internet, large-scale data collection and

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[110] Case No. 13/2009 MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd, CCI (23.6.2011)

[111] Case No. 47 & 56/2016 CCI Indian Competition Review v. GTPL India Pvt Ltd & Others, CCI (08.02.2017)

[112] Case No. 73/2011 Dhanraj Pillay v. Hockey India, CCI (31.05.2013)

processing by businesses has raised concerns about privacy and data security. “Big Data” refers to the rapid collection of large and diverse data sets, which are then processed using software to generate commercially valuable new knowledge. Numerous competition agencies are currently looking into the anti-competitive effects of big data, including abuse of dominance, even though data protection laws primarily govern data collection and use. They are worried about whether companies can use big data to gain a competitive advantage and whether having access to big data can lead to highly competitive, crowded markets. Concerns about consumer privacy have also been brought to light by recent mergers and acquisitions in the IT industry, prompting questions about whether privacy is a significant factor in non-price competition. In the Microsoft-LinkedIn merger,[113] the European Commission stated that, while privacy concerns are governed by data protection laws, they can also be considered a non-price competition parameter if customers regard them as an important part of the quality of services provided. Recently, Facebook was fined $132.26 million by the European Commission (EC) for failing to disclose that, upon acquiring WhatsApp, it would be able to reliably match users' accounts on Facebook and WhatsApp.

Another concern is exclusionary conduct. For example, to obtain a competitive advantage, a dominant firm may enter into exclusive agreements with data providers or data analysis firms. This can lead to market foreclosure by making it more difficult for customers to switch to competitors. Furthermore, self-learning pricing and profit-maximizing algorithms may cause horizontal agreements to become digital price-fixing cartels. These problems demonstrate the need for competition agencies to pay greater attention to the expanding use of big data.

In India, increasing digitization and rapid advancements in technology-enabled businesses such as e-commerce, cab aggregators, and e-payments have made markets vulnerable to potential anti-competitive threats. The Competition Commission of India (CCI) should take advantage of the rise in mergers and acquisitions to carefully investigate any potential big data-related issues and make sure that data is used for the good of society.

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[113] Case Comp/ M.8124 Microsoft-LinkedIn merger (EC Regulation No. 139/2014) EU DG Competition

Platform markets have received special attention from the EU competition regime. The rapid advancement of technology and the growth of the global web have facilitated the exchange of goods and services between businesses. Platform marketplaces like social media, price comparison websites, online shopping portals, and search engines have grown in popularity in recent years. The swift expansion of digital platforms has sparked apprehension regarding antitrust laws since the current regulatory frameworks are insufficiently expansive to tackle problems associated with these emerging virtual marketplaces.

To regulate any activity, the first step is to define the market, but delineating the boundaries of online platforms is difficult. The European Commission tried to define an online platform as "an undertaking operating in two or multi sided markets, which uses the internet to enable interactions between two or more independent groups of users, generating value for at least one of the groups." The Commission did admit that there is not agreement on a single definition of online platforms because a precise definition would cover a lot of different internet services and be either too broad or too narrow. Rather than implementing a universally applicable definition, the Commission suggested a more pragmatic method by pinpointing essential characteristics shared by numerous online platforms to characterize platform markets. Because of network effects, economies of scale, and economies of scope, online platforms frequently experience rapid expansion. They have changed how businesses operate and how markets function, which presents new difficulties for regulatory bodies trying to enforce competition laws because digital markets lack the traditional means of defining the relevant market.

Rapid innovations in online platforms constantly disrupt and sometimes create entirely new markets. It is challenging to provide an accurate description of the relevant market because the boundaries of online markets are constantly being redefined. Moreover, businesses frequently provide free services in cases where market identification is impossible through price-based assessments. The widely used SSNIP test does not take into consideration the interdependence of prices in two-sided markets and is not applicable when the initial price is zero. Likewise, the ways in which dominance is currently determined do not take dynamic competition into account. There are many obstacles in separating abusive behavior from appropriate business practices.

The European Commission supports a problem-driven approach to internet platform regulation, only getting involved when necessary to provide guidelines in response to issues that have been clearly identified. India's platform markets are growing as well. “The Competition Commission of India (CCI)” has refrained from taking a strong stance in the early stages of digital markets because it is still in their infancy. When the CCI was looking into a complaint against the online platform Snapdeal[114] in 2014, it did not see the online and offline markets as two separate but relevant markets, but rather as different channels within the same market. In contrast, India adopted a different position in a historic ruling involving Google, in which the CCI fined the company more than $21 million for engaging in anti-competitive behavior. Although the CCI acknowledged that Google had a unique duty as an Internet gateway, it also issued a warning that excessive regulation and hurried intervention could impede technological advancement. The regulation of online platforms and competition law is a critical concern for regulatory institutions, given the substantial impact these platforms have on people's lives. India should now take advantage of the opportunity to create a comprehensive platform market regulation policy along the lines of the European Union.

Another aspect that India could emulate from the EU is the penalties for breaking competition law. In the EU, monetary fines of up to 10% of a guilty enterprise's global turnover can be imposed to reflect the gravity of the abuse and serve as a deterrent. Furthermore, competition authorities in the EU have the authority to remove individuals who have committed willful violations of competition law from positions of management. On the other hand, fines in India are only allowed to be 10% of relevant turnover because of the Excel Corp case ruling by the Indian Supreme Court. This amount is insufficient to act as a meaningful deterrent.

[114] Case No. 61 of 2024 M/s Jasper Infotech Private Limited (Snapdeal) v. M/s Kaff Appliances (India) Pvt. Ltd. CCI (29.12.2014)

6.3 Suggestions and Recommendations

• In cases of abuse of dominance, it is critical to identify the relevant market—both geographically and by product. This is a crucial step because it is the basis for determining potential competitors, assessing entry barriers, and evaluating market power. As a result, it is recommended that, similar to EU jurisdiction, the Competition Commission of India develop guidelines for determining the Relevant Product Market and Relevant Geographical Market to bring clarity and certainty to this process.

• When it comes to cases involving abuse of dominance, the Competition Commission of India rarely uses the expertise of experts in economics, commerce, accountancy, international trade, or any other relevant discipline, even though Section 36(3) of the Competition Act, 2002 allows the Commission to request such assistance. The Commission should consult experts more often to improve its ability to handle complex cases, considering the variety of cases it handles under these provisions, from the entertainment industry to sophisticated software-based transaction platforms.

• Enforcing competition law requires avoiding undue delays, especially in cases involving abuse of dominance, where late interventions may be ineffective due to changing market dynamics. "The Competition Commission of India" (CCI) is currently dealing with the issue of untimely decisions, which are a major flaw in the laws governing abuse of dominance. To address this, the CCI should enact procedural rules allowing paper hearings to replace oral hearings in typical disputes, thereby speeding up the resolution process.

• The Indian Competition Act, 2002's Section 4(2)(a) deals with unfair or discriminatory pricing or conditions, but it is not entirely clear what exactly qualifies as such. In order to define precisely what constitutes unfair or discriminatory terms or prices, guidelines must be introduced.

• The CCI should actively participate in advocacy efforts to foster a culture of competition and raise awareness about the negative consequences of abuse of dominance, particularly among associations and trade groups involving film artists and the pharmaceutical wholesale and retail industries. It will be easier to identify and bring charges against cartels in India if the economic harm that these abuses cause is made clear.

• Similar to the provisions in European competition law, the Indian Competition Act of 2002 must be amended to include provisions for dealing with collective dominance. This can be accomplished by adding pertinent elements to the Act's current sections.

• Appropriate amendments should create a special dedicated bench of judges with experience in business and economic matters on the Supreme Court to hear and decide cases pertaining to competition in a timely manner. The Competition Commission of India should also be subject to writs, and benches in High Courts should be set aside specifically to hear and decide on these cases. This will cut down on needless delays and the stalling of competition case investigations.

• As a proactive measure, the CCI should conduct research into the emerging field of Big Data and devise strategies to counter potential abuses of dominance by large corporations in the future.

• Following the example of the EU, clear and transparent guidelines for platform markets are required. This includes identifying the relevant market for two-sided markets, determining dominance, and detecting abuse of dominance.

• It is necessary to establish guidelines for imposing fines in order to eliminate the CCI's inconsistent standards, which have been challenged by the Appellate Tribunal and the Supreme Court.

• The concept of relevant turnover for the purpose of imposing fines should be eliminated by a suitable amendment, and the ten percent cap should be determined by total turnover. Fines should be based on worldwide turnover rather than just Indian operations in accordance with EU competition law.

• In order to better accomplish the goals of competition law, the CCI should evaluate abuse of dominance by incorporating more effects-based analysis, in line with EU practices.

• The relationship between intellectual property rights (IPRs) and competition law particularly about abuse of dominance needs to be highlighted through targeted advocacy campaigns.

• There is a need to include provisions in Indian competition law that are similar to the EU's Regulation 1/2003, particularly Article 9. This gives a business the opportunity to offer promises to address issues brought up by the Competition Commission during its initial evaluation. The Commission may then issue an order binding on these promises. These clauses would save time for the Competition Commission of India.

• “The Competition Commission of India” (CCI) should have access to market intelligence and knowledge from other investigative bodies like the Enforcement Directorate and the Serious Fraud Investigation Office in order to increase its efficacy.

• Building capacity is a constant and continuing process. Institutional and personal knowledge and capacity develop gradually, and a lack of required skills can compromise the CCI's efficiency. As a result, capacity building and skill enhancement for personnel are critical to the Commission's proper operation and should be prioritized.

• To convey to the market the significance of an open and efficient competition regime, India should create a clear and transparent competition policy.