

**Athens Institute for Education and Research**  
**ATINER**



**ATINER's Conference Paper Series**  
**BLE2017-2257**

**Abuse of Dominant Position:  
An Analysis of Indian Scenario**

**Sayali Ganu-Dabake**  
**Lawyer**  
**PhD Candidate**  
**Gokhale Institute of Politics & Economics**  
**India**

An Introduction to  
ATINER's Conference Paper Series

ATINER started to publish this conference papers series in 2012. It includes only the papers submitted for publication after they were presented at one of the conferences organized by our Institute every year. This paper has been peer reviewed by at least two academic members of ATINER.

Dr. Gregory T. Papanikos  
President  
Athens Institute for Education and Research

This paper should be cited as follows:

**Ganu-Dabake, S. (2016). “Abuse of Dominant Position: An Analysis of Indian Scenario”, Athens: ATINER'S Conference Paper Series, No: BLE2017-2257.**

Athens Institute for Education and Research  
8 Valaoritou Street, Kolonaki, 10671 Athens, Greece  
Tel: + 30 210 3634210 Fax: + 30 210 3634209 Email: info@atiner.gr URL:  
www.atiner.gr  
URL Conference Papers Series: www.atiner.gr/papers.htm  
Printed in Athens, Greece by the Athens Institute for Education and Research. All rights reserved. Reproduction is allowed for non-commercial purposes if the source is fully acknowledged.  
ISSN: 2241-2891  
01/09/2017

## **Abuse of Dominant Position: An Analysis of Indian Scenario**

**Sayali Ganu-Dabake**  
**Lawyer**  
**PhD Candidate**  
**Gokhale Institute of Politics & Economics**  
**India**

### **Abstract**

The Competition Act, 2002 (the Act) is a legislation which was introduced to bring the Indian law relating to competition at par with the global scenario. This legislation was designed following the philosophy of modern competition laws across world. The primary aim of the law is to protect the Indian markets from the various anti-competitive practices prevalent in the Indian markets and in turn protect the end-users from these mala-fide actions of the strong market players.

This legislation prohibits anticompetitive agreements, abuse of dominant position by enterprises, and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India. The Competition Commission of India (CCI) established under the Act has been proactive since its inception. It has made its existence and authority known in some of the tough cases. Various decisions of the CCI have been milestones in the development of modern competition jurisprudence in India.

This paper is an attempt to analyse some key decisions of the CCI regarding abuse of dominant position and their effect on the Indian markets.

**Keywords:** Competition, Dominant Position, Abuse, India

## Introduction

A market is a mechanism through which buyers and sellers interact to determine prices and exchange goods and services<sup>1</sup>. Market structure and relationships usually depend on multiple factors. The most important factors are - the nature of product, the number of buyers, the number of sellers, interdependence of buyers and sellers.

An ideal market economy is one in which all goods and services are voluntarily exchanged for money at market prices. But, this being the ideal situation, is not observed in reality. Perfect Competition remains a hypothetical situation discussed by the academicians and economists. Imperfect competition is the most prevalent in almost all economies in the world at present. Thus, the government needs to interfere in such imperfect competitions in order to increase the efficiency in the market. This is usually done by promoting competition, by regulating prices, prohibiting anti-competitive actions of the buyers and sellers.

The need for competition policy as explained by the European Competition Commission<sup>2</sup> is ensuring low prices for all - so that the consumers can afford to buy the products which in turn encourages businesses to produce and therefore boosts the economy in general; better quality - competition encourages businesses to improve the quality of goods and services they sell — to attract more customers and expand market share; more choice - so consumers can select the product that offers the right balance between price and quality; innovation - businesses need to be innovative in their product concepts, design, production techniques, services, etc.; and better competitors in global markets: to be able to hold their own against global competitors.

The most important and effective tool of government intervention in any imperfect competition is Competition Policy and Competition Law. Competition law is enforced by government in order to reduce the entry barriers, encourage innovation and reduce prices. Broadly, competition laws in most of the jurisdictions seek to increase economic efficiency, enhance consumer welfare, ensure fair trading and prevent abuse of market power. The three areas of enforcement that are provided for in most competition laws are – (i) anti-competitive agreements (ii) abuse of dominance, and (iii) mergers which have potential for anti-competitive effect.

First US law regarding anti-trust - Sherman Act was passed in 1890. It was later supplemented by the Clayton Act and Federal Trade Commission Act in 1914. Sherman Act prohibits "every contract, combination or conspiracy in restraint of trade" and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize". The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit such as, mergers and interlocking directorates, mergers and acquisitions where the effect may be substantially to lessen the competition or to tend to create a monopoly. It also

---

<sup>1</sup> Samuelson P.A. and Nordhaus W.D., Economics, Tata McGraw Hill, 18th Edition, New Delhi.

<sup>2</sup> [http://ec.europa.eu/competition/general/obvverview\\_en.html](http://ec.europa.eu/competition/general/obvverview_en.html)

bans certain discriminatory prices, services and allowances in dealings with merchants. The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices"<sup>3</sup>.

The European anti-trust policy is based on two rules as set out in the Treaty on the Functioning of European Union. Article 101 of the Treaty prohibits agreements between two or more independent market operators which restrict competition. This provision covers both horizontal agreements and vertical agreements. Certain exceptions are provided to this provision. Article 102 of the Treaty prohibits firms holding a dominant position in the given market from abusing that position<sup>4</sup>.

## **Competition Law in India**

### *History of Indian Law Relating to Competition*

Monopoly and Restrictive Trade Practices Act (MRTP Act) was the law governing monopolies and trade practices in India since 1969. The MRTP Act was passed and implemented in Indian economy when industries were strictly regulated and needed to obtain licenses for new activity. The MRTP Act was amended time to time in order to meet the needs in various areas requiring attention at the relevant times, including opening up of Indian economy in the 1990s, Emphasis of MRTP Act was to avoid concentration of economic power and monopolistic behaviour. The nature of the MRTP Act was generic. Thus, it was at times difficult to interpret the provisions of the Act leading to uncertainty about legal situation regarding issues like abuse of dominance, cartels, collusion, price fixing, bid rigging etc.

Therefore, as observed by the then Minister of Finance of India during his budget speech in Parliament in February, 1999 the MRTP Act had become obsolete in certain areas in the light of international economic developments relating to competition laws. A need to shift the focus from curbing monopolies to promoting competition was felt. Accordingly, the Government appointed a "Raghavan Committee" to examine the range of issues and propose a modern competition law suitable for Indian conditions, which would also be in line with the international developments. The Competition Bill, drafted on the basis of the recommendations of the Raghavan Committee, was introduced in the Parliament of India and the Competition Act, 2002 was passed in December 2002. It was later amended in 2007 changing the nature of Competition Commission established under the said Act from a judicial authority to a regulatory body. Thus, the Competition (Amendment) Act, 2007 was passed and implemented in 2009.

---

<sup>3</sup> <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>

<sup>4</sup> [http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html)

*Competition Commission of India*

Competition Commission of India (CCI), which has been established by the Central Government with effect from 14th October 2003 as per the provisions of the Competition Act, 2002.

CCI consists of a Chairperson and two to six numbers of members whole time members appointed by the Central Government. The Chairperson and every member of the Commission need to have special knowledge of international trade, economics, law, commerce, finance etc.<sup>5</sup>. The Chairperson and members hold offices for five year term and can be reappointed<sup>6</sup>. Central Government has the power to appoint, suspend and remove the members of the Commission but only on fulfillment of certain pre-requisites<sup>7</sup>.

It is the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in the markets of India<sup>8</sup>. The CCI has the duty to inquire into any alleged contravention of the provisions of the Act relating to anti-competitive agreements or abuse of dominant position<sup>9</sup>. It also has the authority to inquire whether any combination has already caused or likely to cause any appreciable adverse effect on the competition of India within one year of such combination<sup>10</sup>. The Commission is also required to give opinion on competition issues on a reference received from a statutory authority established under any law and to undertake competition advocacy, create public awareness and impart training on competition issues<sup>11</sup>.

Central Government appoints a Director General (DG) to assist the Commission in conducting inquiries into contraventions of any of the provisions of the Act<sup>12</sup>.

The Commission has authority to direct any enterprise, person or association of enterprises or persons to discontinue their contravening actions, impose penalty up to 10% of the average turnover for preceding three financial years, to modify agreements, issue directions, direct division of enterprise enjoying dominant position, to issue directions that any combinations having adverse effects on competition shall not take effect<sup>13</sup>. It can issue interim orders<sup>14</sup>.

The Commission has extra-terrestrial jurisdiction also in certain cases<sup>15</sup>. The Commission has freedom to regulate its own procedure<sup>16</sup>. At present the procedure typically followed by CCI can be summarily stated as follows:

---

<sup>5</sup> Section 8, The Competition Act, 2002

<sup>6</sup> Section 10, The Competition Act, 2002

<sup>7</sup> Section 11, The Competition Act, 2002

<sup>8</sup> Section 18, The Competition Act, 2002

<sup>9</sup> Section 26(1), The Competition Act, 2002

<sup>10</sup> Section 20, The Competition Act, 2002

<sup>11</sup> Section 49, The Competition Act, 2002

<sup>12</sup> Section 16, The Competition Act, 2002

<sup>13</sup> Section 26 to 31, The Competition Act, 2002

<sup>14</sup> Section 32, The Competition Act, 2002

<sup>15</sup> Section 18, The Competition Act, 2002

- i) Complaint/ Information by Informant
- ii) Inquiry
- iii) Preliminary Analysis/ Detailed Investigation
- iv) Submissions by the Parties regarding the investigation reports
- v) Decision

CCI is not an adjudicating body or judicial authority. It is a regulatory body regulating various actions adversely affecting competition in India. CCI in its own judgments has expressed the nature of its duties. As explained in the dissenting judgment in MCX Stock Exchange case<sup>17</sup>, the proceedings before CCI are not meant to be adversarial but it is more in nature of enquiry into competition related issues in the market.

However, it was later explained by the CCI in Honda case<sup>18</sup> that the CCI has to keep in mind the objectives with which it was established. It is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction necessary to achieve these objectives. It is also given freedom to decide its own procedure. The direction given to the DG by CCI for investigation into possible contravention of provisions of the Act is an administrative action. It is not an adjudicatory or determinative process.

This view was developed and based on the order of the Supreme Court of India in the *CCI v/s Steel Authority of India Limited* case<sup>19</sup>, wherein it was opined by the Supreme Court, that the nature of proceedings before the CCI being largely inquisitorial in nature, it is not required to confine the scope of inquiry to the parties named in the information received by CCI. The scope of inquiry is much broader. Also, CCI is not restricted to consider the material placed on record by the parties only.

In fact, even if the Informant subsequently does not participate in the proceedings or is unable or does not provide any evidence during the investigation or intends to withdraw the case, the proceedings still may be continued by the CCI till the logical end. This, is because it is an expert body, mandated by law to examine the issues relating to practices of parties having adverse effect on competition in holistic manner.

However, while deciding its own procedure for investigation, inquiry and regulation in every case, the Commission is under obligation to follow principles of natural justice. Also, the material on which CCI relies to decide while arriving at any conclusion regarding contraventions of Section 3 or 4 of the Act shall not be unverified material available in public domain e.g. any material downloaded from internet not having any evidentiary value<sup>20</sup>.

---

<sup>16</sup> Section 36, The Competition Act, 2002

<sup>17</sup> MCX Stock Exchange Ltd. v/s National Stock Exchange of India Ltd. & other, Case no. 13/2009

<sup>18</sup> Shri. Shamsheer Kataria v/s Honda Siel Cars India Ltd. & 16 others, Case no. 3/2011

<sup>19</sup> (2010) Comp LR 0061 (Supreme Court)

<sup>20</sup> Board for Control of Cricket in India v/s CCI & another, Appeal no. 17/2013

*Indian Law Relating to Abuse of Dominant Position*

The Competition Act, 2002 (The Act) has a very clear stand with respect to dominant position. 'Dominance' in itself, is not a matter of concern. Only specified acts that constitute an 'abuse of dominance' are in contravention of the Act and thus are prohibited.

Dominant Position<sup>21</sup> has been defined as a position of strength in the relevant market<sup>22</sup> in India which enables any enterprise to i) operate independently of competitive forces prevailing in that market, or ii) affect its competitors or consumers or the relevant market in its favour.

Abuse of dominant position has been defined in the Act to include i) directly or indirectly imposing unfair or discriminatory conditions or prices in purchase or sale of goods or services; ii) restricting or limiting either production of goods, services or market therefor or technical or scientific development relating to goods or services to the prejudice of consumers; iii) indulging in practices resulting in denial of market access; iv) making the parties accept supplementary obligations which have no connection with the subject of the contract between the parties and v) using dominance in one market to move into or protect other markets.<sup>23</sup>

CCI, while inquiring whether an enterprise enjoys a dominant position or not needs to consider factors such as market share, size and resources of enterprise, size and importance of competitors, economic power of the enterprise, vertical integration of enterprises or sale and services networks of enterprises, dependence of consumers on the enterprise, entry barriers, countervailing buying powers, market structure and size etc.<sup>24</sup> The question of dominant position in market is determined after determining if a market constitutes "relevant market". Accordingly "relevant geographic market" and "relevant product market" needs to be taken into consideration. Thus, the Act also lays down the factors to be considered by CCI while assessing "relevant geographic market"<sup>25</sup> and "relevant product market"<sup>26</sup>.

---

<sup>21</sup> Section 4 Explanation (a) of the Competition Act (the Act)

<sup>22</sup> Section 2(r) of the Competition Act defines "relevant market" as the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

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

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

<sup>23</sup> Section 4 of the Act

<sup>24</sup> Section 19(4) of the Act

<sup>25</sup> Section 19 (6) of the Act says that CCI shall have due regard to all or any of the following factors while determining the "relevant geographic market" - regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences, need for secure or regular supplies or rapid after-sales service



## **Analysis of Decisions of the Competition Commission of India**

While deciding any case relating to the abuse of dominant position, the CCI discusses three basic questions:

i) What is the relevant market in the present case?

The CCI has in every decision has discussed the factual situations in that case and accordingly delineated relevant product market, relevant geographic market and therefore, relevant market.

ii) Is the player in a dominant position in the said relevant market?

After delineation of relevant market in each case, CCI has taken stock of the nature of the market, the number of players in the market, market share of each player and many other factors as enlisted in the Act and has decided if the player in question is in dominant position in that particular relevant market or not.

iii) Whether there is abuse of such dominant position?

Whenever a player in question is found to be in dominant position in that particular relevant market, the CCI has discussed its various practices and concluded if these are detrimental to the consumer or competition or not.

Whenever, a player is found to be abusing its dominant position in any relevant market, the Commission has issued cease and desist order, penalty or both and also in some cases conditions are imposed on the players abusing their dominant position in the market.

The delineation of relevant market is done only after it is confirmed that the Opponent in the case filed is "Enterprise"<sup>27</sup> within the meaning as contemplated in the Act.

*DLF case*<sup>28</sup> is probably the most known decided by the CCI, as the amount of penalty levied by the CCI on DLF for abuse of dominant position was about 630 crores<sup>29</sup>. Till this decision such high amount of penalty was rarely levied

---

<sup>26</sup> Section 19 (7) of the Act says that CCI shall have due regard to all or any of the following factors while determining the "relevant product market" - physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers, classification of industrial products

<sup>27</sup> Section 2(h) of the Competition Act, 2002 defines "Enterprise" as a person or department of the government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the at the same place where the enterprise is located or at different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

<sup>28</sup> *Belaire Owners' Association v/s DLF Ltd. & others*. Case no. 10/2010

<sup>29</sup> 1 crore is equal to 10 million

on defaulting party. In this case, the relevant market was identified as the "High-end residential accommodation in the geographical area of Gurgaon. DLF was held to be in dominant position in that relevant market. It was held that DLF abused its dominant position as the buyers' agreements were heavily loaded in favour of DLF. A penalty at the rate of 7% (as against maximum 10% penalty leviable under the provisions of the Act) on the average turnover of the company on the preceding three years, amounting to 630 crores (6.3 billions).

In the case of *HDFC Bank*<sup>30</sup> the informant alleged that, being in a dominant position in the banking business in India, HDFC Bank was abusing its dominant position while issuing credit card i.e. sale of service by imposing unfair and one-sided terms and conditions by way of the "Card-member Agreement" which was unilateral and biased in favor of the HDFC Bank, and it was violation of Section 4(2) (a) of the Act.

The DG report observed that the activities being performed by the HDFC Bank were covered in the definition of 'enterprise' under section 2 (h) of the Act. But, it was observed that HDFC Bank does not enjoy dominant position in the relevant market of credit card services in India considering the market share and also choice available to the consumer in the market in selection of credit card service provider. The terms and conditions as well as charges levied by all the players are more or less similar. Levying impugned charges and imposing alleged terms and conditions may be termed as 'unfair trade practices' but not abuse of dominant position as there is no dominant position. Majority members of the CCI agreed with the findings of the DG report and held that there being no dominant position, there is no abuse of dominant position.

However, there was a dissenting judgment by a single member in this case. He elaborately discussed on main four points in his judgment.

- i) He opined that from the facts and evidence of the case, it was clear that this particular case was only against the HDFC Bank, but all the banks in credit card market follow the same practices. Therefore, it is in fact a class action.
- ii) He further held that, in such case there are different relevant markets - a banking market and a credit card market. But when a consumer opts for a credit card, he is out of both markets and shifts to another relevant market, often known as the aftermarket or the market of servicing of credit taken on credit cards. Bank, which has issued credit card to the consumer, is a dominant player in such market. Here, reliance was placed on the US Supreme Court case of *Kodak*<sup>31</sup>, wherein the US Supreme Court laid down that the market of photocopiers is different from the market of servicing and maintenance of the photocopiers.
- iii) He also said that the cardholder agreement in question is a Contract of Adhesion. There is not offer and acceptance, but it is a unilaterally

---

<sup>30</sup> Shri Pravahan Mohanty v/s HDFC Bank Ltd., Chennai & another case no. 17/2010

<sup>31</sup> Eastman Kodak Co. Vs. Image Technical Services Inc. 504 U.S. 451(1992)

drawn up document which has to be accepted by the consumer if he wants to use the card.

- iv) To conclude he opined that the practices followed by the banks act as brake to the economic development and therefore are anticompetitive. It is unfair to charge interest after the operation of the card and later compounding the said interest. The interest charged by the banks is also usurious and therefore needs to be decreased at a rate lesser than 30%.

In another case of *MCX Stock Exchange*<sup>32</sup> the case was filed against the anticompetitive behaviour and abuse of dominant position by the National Stock Exchange of India Ltd. (NSE) with an objective of i) eliminating competition from the Currency Derivatives (CD) segment, ii) discouraging potential entrants from entering the relevant market for stock exchange services and iii) achieving foreclosure of all competition in the market of stock exchange services.

In this case the question was whether stock exchange business as a whole constitutes the relevant market. The DG has considered the following segments for arriving at a relevant product market: - (i) Equity segment; (ii) Equity Futures & Options segment; (iii) Debt segment; (iv) CD segment; and (v) Over The Counter market for trades in foreign currency. According to the DG report, since any exchange can easily start operations in any of the segments of capital market, there is supply side substitutability between the segments. According to the DG report, the entire stock exchange market service is a single relevant product.

The CCI has explained that Indian law gives formula definition of "relevant market" and also specifies factors which need to be considered while determining that market. Therefore, there is no scope for any arbitrariness. While discussing the applicability of tests like SSNIP<sup>33</sup>, it opined that use of this particular test is irrelevant in a case like this, as there is absence of historic data of prices. Also this test is merely a tool of econometric analysis to evaluate competitive constraints between two products. It is used for assessing competitive interaction between different or differentiated products.

Dissenting with the DG report, CCI held that exchange traded CD market is fundamentally distinct from other segments of the capital market. In fact, it did not exist prior to August, 2008. A market that earlier did not exist and which was consciously created by the policy makers as a new and distinct market cannot be said to be part of a market that existed. Thus, CD segment is clearly and independent and distinct relevant market.

Going further, CCI held that NSE not only enjoys position of strength in the relevant market, but the zero price policy of NSE is unfair. In fact, it is destructive or annihilating pricing. It was also held that NSE had used its position of strength in the non CD segment to protect its position in the CD

---

<sup>32</sup> MCX Stock Exchange Ltd. v/s National Stock Exchange of India Ltd. & other, Case no. 13/2009

<sup>33</sup> Small but Significant Non-transitory Increase in Prices Test

segment. Thus, penalty at the rate of 5% of the average turnover was levied on NSE.

In an appeal<sup>34</sup> against this decision of the CCI, Competition Appellate Tribunal (COMPAT) held that though the relevant market in the case was not limited to the CD segment, but in fact was the securities services market, still there was no doubt that the NSE had abused its dominant position even in this market with application of the zero price policy. Thus, the appeal was dismissed.

In case of *Atos Worldline*<sup>35</sup> the relevant market was held to be market of Point of Sale (POS) terminals in India, as there were no reasonable alternatives or substitutable machines available to which the merchants can switch over the POS terminals and conditions of competition regarding POS terminals are similar throughout India.

It was held that in terms of size, resources and economic power, Verifone had advantageous position over the nearest competitor. In terms of its capabilities in terms of hardware and software and the number of machines presently in use makes the consumers dependent on it. The Commission also noted that in the POS Terminal market there was vertical integration of upstream hardware market with the downstream service provision market which enables the enterprise to act independent of others. Therefore, Verifone was held to be in dominant position of relevant market of POS terminals in India.

It was observed by the Commission that being in a dominant position in the relevant market, Verifone was strengthening its position in the downstream market by imposing restrictive clauses in the Software Development Kits (SDKs) agreement, by refusing the Value Added Services (VAS) providers to allow access to development tools like SDK on reasonable terms and conditions and also by seeking disclosure of sensitive business information from its customers in the downstream market in order to enter the downstream market of VAS.

Thus, a penalty of 5% of the average turnover for preceding three financial years was levied on Verifone.

The *Honda case*<sup>36</sup> is one of the most important decisions of the CCI for many reasons. One of the reasons is that the case was initially filed by the Informant against only three car companies on the ground that genuine spare parts of automobiles manufactured by these companies were not made freely available in the open market.

During the investigation by the DG, it was observed that the real issue was in fact larger than stated by the Informant and related to the anti-competitive conduct of the automobile players in the Indian automobile sector & its implications on the consumers at large. On this basis, DG proposed that the investigation should not be restricted to the three car manufacturers but should

---

<sup>34</sup> NSE v/s CCI & other Appeal No. 15/2011 before COMPAT

<sup>35</sup> M/s Atos Worldline India Pvt. Ltd. V/s M/s Verifone India Sales Pvt. Ltd Case No. 56/2012

<sup>36</sup> Shri. Shamsheer Kataria v/s Honda Siel Cars India Ltd. & 16 others, Case no. 3/2011

be expanded to examine the alleged anti-competitive trade practices of all car manufacturers in India.

This proposal was accepted by the CCI and investigation was initiated against initial 3 and 14 additional Original Equipment Suppliers (OEMs). Two separate orders were passed against these two groups of car manufacturers.

After a very detailed analysis of various types of markets like primary market, secondary market, aftermarket, unified systems market, cluster market; discussion about different tests and criteria to assess the relevant market in a case - like European Union's Notice on the Definition of the Relevant Market, Whole life cost analysis, "Commercial Reality" test as applied in the USA, Reputation Effects; and various cases in different jurisdictions in the world discussing the definition of relevant market viz. *Brown Shoe v/s United States*<sup>37</sup>, *Kodak case*<sup>38</sup>, *Omega Nintendo Case*<sup>39</sup>, *Phila Nat'l Bank case*<sup>40</sup>, *Hugin Kassaregister AB v. Commission of the European Communities*<sup>41</sup>, *Volvo AB v. Erik Veng*<sup>42</sup>; *CEAHR v. European Commission*<sup>43</sup>; two separate product markets were identified in the vehicle sector in India - the primary market of manufacturing and sale of the passenger vehicles; and secondary market, which in nature essentially is "Aftermarket", of i) spare parts, diagnostic tools, technical manuals and ii) after sales services & maintenance services required to be purchased after the purchase of primary product.

The relevant market for the present case was the secondary market of spare parts, diagnostic tools, technical manuals used to efficiently provide the after sales services & maintenance services.

It was concluded by the CCI that each OEM was 100% dominant entity in the aftermarket for its genuine spare parts, technical manuals, software and diagnostic tools and correspondingly in the aftermarket for the repair services of its brand of automobiles.

On finding that OEMs involved in unfair trade practices causing distortion of the aftermarket, CCI provided for corrective measures by way of cease and desist order, and various orders to ensure availability of spare parts in open market without any restriction, provision of diagnostic tools to the independent garage owners/ mechanics, training the independent repairers/ garage owners in using the diagnostic tools, cancellation of blanket conditions that warranties would be cancelled if consumer avails services of independent repairer and also penalty.

In the *Board for Control of Cricket in India (BCCI)*<sup>44</sup> case, the Commission analysed the specificities of sports activities to understand the differences with other business activities, as the allegations were regarding organization of Indian Premier Leagues (IPL) and the sale of various rights

<sup>37</sup> 370 U.S. 294, 325 (1962)

<sup>38</sup> *Eastman Kodak Company v. Image Technical Services Inc.*, [504 U.S. 451]

<sup>39</sup> *PO Video Games, PO Nintendo Distribution, Omega-Nintendo* [2003] OJ L255/33]

<sup>40</sup> *United States v. Phila. Nat'l. Bank*, 374 U.S. 321 (1963)

<sup>41</sup> (C-22/78) [1979] ECR 1869

<sup>42</sup> (UK) Ltd (C-238/87) [1988] ECR 6211

<sup>43</sup> (Case T-427/08)

<sup>44</sup> *Shri. Surinder Singh Barmi v/s Board for Control of Cricket in India*, Case no. 61/2010

associated with IPL - like Franchise Rights, Media Rights, and other Sponsorship Rights etc.

It was also observed that BCCI was acting as a regulator of the sport of cricket - therefore, it had the status of National Sports Federation but it was not established under any particular law. It is an autonomous body administration of which not controlled by any statute or any other authority including government of India. Also, at the same time it was acting as an organizer of cricket events. Therefore, it was also commercial beneficiary of the sport. Thus, there was overlap in both functions of BCCI.

The CCI had to therefore, determine the real role of BCCI and scope of its activities so as to analyse if it falls in the ambit of the definition of "Enterprise" as contemplated under the Act. The CCI interpreted the definition of Enterprise in substance considered the nature of activity of the person. Thus, it concluded that whether the person was 'not-for-profit' society or not, it would be treated as Enterprise if its activities fall within the ambit of activities contemplated under the scheme of the Act. All Sports Associations are to be regarded as an enterprise in so far as their entrepreneurial conduct is concerned and treated at par with other business establishments. For this interpretation, CCI relied upon the case of MOTOE decided by the Grand Chamber of European Court of Justice<sup>45</sup> and decision of High Court of Delhi, wherein it was held that All India Chess Federation (which performs similar functions as BCCI for the game of chess) was an enterprise for the purposes of the Act<sup>46</sup>.

The relevant market for the case was identified as the Organization of Private Professional Cricket Leagues or Events in India.

Dominance of BCCI in this relevant market was concluded on the factors of i) BCCI is de facto regulator of sport of cricket in India; ii) the approval of BCCI is critical to the organization and success of any competing league; iii) powers to give consent to application for authorization to organize cricket events is vested with BCCI; iv) infrastructure owned and controlled by BCCI and v) being organizer of First Class/ International Cricket events, BCCI controls pool of cricketers under contract thus, controls the input essential for the success of the cricket leagues.

It was held that BCCI abused its dominant position as the overlap in its dual role of custodian of cricket and organizer of events has caused restricted competition and benefits of competition, thereby compromising the objective of BCCI of promotion and development of game of cricket.

Thus cease and desist orders were issued and penalty was also levied on BCCI.

The same principle regarding application of the Act to Sports Associations was later followed in *Hockey India*<sup>47</sup> (HI), which is National Sports Federation

---

<sup>45</sup> Case No: C-49/07, REFERENCE for a preliminary ruling under Article 234 EC, from the Diikitiko Efetio Athinon (Greece), made by decision of 21 November 2006, received at the Court on 5 February 2007, in the proceedings, Motosykletistiki Omospondia Ellados NPID (MOTOE) v Elliniko Dimosio, THE COURT (Grand Chamber)

<sup>46</sup> Hemant Sharma & Others v/s Union of India, Delhi High Court, WP(C) 5770/2011

<sup>47</sup> Dhanraj Pillay & Others v/s Hockey India, Case no. 73 /2011

of India for the sport of Hockey, affiliated with Indian Olympic Association (IOA), Asian Hockey Federation (AHF) and International Hockey Federation (FIH). The Informants in case were national level hockey players. Case was filed for abuse of dominant position by HI by creating barriers in the World Series Hockey (WSH) a hockey league arranged by Indian Hockey Federation (IHF), which also is a National Sports Federation of India for the sport of Hockey, affiliated with IOA, but not with AHF or FIH.

Furthering the Competition Jurisprudence applicable sporting activities as developed in the BCCI case, CCI analysed the manner in which competition laws are applied to sports federations because sports involve specificities which make them different from other commercial activities. CCI applied the "Inherent - proportionality test"<sup>48</sup> used to address the competition issues in the sports sector.

The relevant market in the case was delineated as the market for organization of private professional hockey leagues in India.

As held in BCCI case, it was reaffirmed that the regulatory powers is the source of dominance in case of sports federations.

However, majority opinion in this case was there is no abuse of dominant position, as the restrictive conditions in issue here were inherent and proportionate to the objectives of HI and therefore could be fouled on per se basis. However, it was also explained that, in future, if there is any instance of application of regulatory powers in disproportionate manner, there may be abuse of dominant position, and there may be regulatory action by the CCI against such abuse.

Another interesting case is of *Kapoor Glass Pvt. Ltd. v/s Schott Glass India Pvt. Ltd.*<sup>49</sup> where the CCI declared its orders in public domain subject to the confidentiality obligations of the Commission.

In this case, to decide whether Schott Glass was in a dominant position in the relevant market or not, the CCI analysed multiple factors in detail including market share, size and resources of enterprises, size and importance of the competitors, economic power of the enterprise including commercial advantage over the competitors and dependence of consumers, countervailing buying power, entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, economies of scale, marketing barriers, technical barriers etc.

On consideration all the factors jointly, the Commission held that the Schott and JV together - Schott Kaisha were in dominant position in the relevant market.

On the count of abuse of dominant position, CCI held that on the basis of available information, there was no sufficient evidence to establish predatory pricing. Thus, rise in prices after 2008 was not to recoup losses due to

---

<sup>48</sup> This test provides that if the alleged restrictive conditions is inherent to the objectives of the sports federation and the effect of restrictive condition on economic competition among stakeholders or on free movement of players is proportionate to legitimate sporting interest perused, the same may not be viewed as anti-competitive.

<sup>49</sup> Case no. 22/2010

predatory pricing, but was due to various other factors like increase in prices of raw materials and resources consumed during manufacturing process, which were sufficiently established by the Opponent.

But, considering the upstream and downstream relevant markets and nature of competition, the Commission concluded that the discount policy of the Opponent was definitely unfair and discriminatory and therefore, violative of the provisions of the Act relating to abuse of dominant position. At the same time, the discount policy did have exclusionary effect, but it did not cause any entry barrier in the upstream market for the other players.

CCI observed that in cases like Hoffman La Roche<sup>50</sup>, United Brands<sup>51</sup> it was held by the European Court of Justice that large market share in itself is evident of dominant position.

## **Conclusion**

Indian competition jurisprudence is still in the nascent stage of its development. The new law relating to competition was passed in 2002 and became operative in 2009. Thus, it is not as old as the American jurisprudence which has been developing since 1890s. However, there are many cases from different verticals and segments have been decided by the CCI during this short period. It has dealt with issues in and relating to industries like cement, automobile, real estate, pharmaceutical, entertainment industry, sports, media, commodities and other financial instruments, manufacturing, telecom, technology and aviation industry to name a few.

However, this is just the beginning of the road. CCI has to cross many hurdles before it can be called as effective and fair controller of competition in India including availability of infrastructure, funds and resources to function efficiently and effective realization of the penalties levied by it.

Through the well-known decisions like in DLF case, CCI has made its presence felt in a very short period of time. It has created assurance in the minds of the Common man and fair players in markets in India that there is a regulatory body, watching over the unfair trade practices in markets. It also has gained reputation in short period of time, due to the well-reasoned and detailed judgments capably discussing different complex issues involved in any case.

The CCI has been strict in its approach by admitting cases for investigation only after they pass through the various filters set at the initial level. Many cases have not been entertained as there was no prima facie case - be it for the reason that the player in question was not in dominant position, or there is no case of any adverse effect on competition etc. Frivolous cases filed with vindictive motives are not at all accepted.

CCI has been following the footsteps of USA and EU while developing the competition jurisprudence in India. At the same time, it is also careful in not following the all the tests and principles established in these jurisdictions

---

<sup>50</sup> Case 85/76

<sup>51</sup> Case 27/76



blindly - like not following the SSNIP test in MCX Stock Exchange case. It has carefully molded these tests and other principles of international competition laws so as to suit the Indian market and economic conditions, taking into consideration different social, cultural and other local factors as well.

India is one of the largest and fastest growing economies in the world. It also has seen fastest growing service sectors. The flow of foreign direct investment in India is constantly on the rise. Against all this back drop it is very important to have a strong, capable, effective and efficient authority to regulating the competition in India. With robust powers conferred upon the CCI, the statutory efforts to enable the CCI to function independently without being directed or controlled by the Central Government and the flair with which CCI has been working since its inception is expected that it will become this strong, capable, effective and efficient authority required in next few years. The competition jurisprudence in India will also be mature in few years' time.

## References

- Samuelson P.A. and Nordhaus W.D., Economics, Tata McGraw Hill, Eighteenth Edition  
<http://www.competitioncommission.gov.in/Act/acts.htm>  
<http://www.cci.gov.in/>  
<http://compat.nic.in/>  
[https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf)  
<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>  
[http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html)

## Cases referred

1. Shri Pravahan Mohanty v/s HDFC Bank Ltd., Chennai & another case no. 17/2010
2. Eastman Kodak Co. v/s. Image Technical Services Inc. 504 U.S. 451(1992)
3. MCX Stock Exchange Ltd. v/s National Stock Exchange of India Ltd. & other, Case no. 13/2009
4. NSE v/s CCI & other Appeal No. 15/2011
5. M/s Atos Worldline India Pvt. Ltd. v/s M/s Verifone India Sales Pvt. Ltd Case No. 56/2012
6. Shri. Shamsher Kataria v/s Honda Siel Cars India Ltd. & 16 others, Case no. 3/2011
7. PO Video Games, PO Nintendo Distribution, Omega-Nintendo [2003] OJ L255/33]
8. United States v. Phila. Nat'l. Bank, 374 U.S. 321 (1963)
9. Shri. Surinder Singh Barmi v/s Board for Control of Cricket in India, Case no. 61/2010
10. Hemant Sharma & Others v/s Union of India, Delhi High Court, WP(C) 5770/2011

ATINER CONFERENCE PAPER SERIES No: BLE2017-2257

11. Dhanraj Pillay & Others v/s Hockey India, Case no. 73 /2011
12. Kapoor Glass Pvt. Ltd. v/s Schott Glass India Pvt. Ltd. Case no. 22/2010
13. Belaire Owners' Association v/s DLF Ltd. & others. Case no. 10/2010