

LESSONS FROM SELECTED JURISDICTIONS ON ABUSE OF DOMINANCE

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I

ABSTRACT

Abuse of dominance is a serious menace all across the world. More than 100 jurisdictions across the world have identified abuse of dominance as an anti-competitive activity. India also considers Abuse of Dominance a wrong under section 4 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007. The article examines abuse of dominance in selected jurisdictions and mentions the way ahead.

I. INTRODUCTION

The leading jurisdictions across the world treat abuse of dominance as serious anti-competitive activity and punishes the alleged wrong-doers in their own way. Dominance is not considered a per-se offence in any jurisdiction. Abuse of dominance is considered anti-competitive. All the jurisdictions examine relevant market in their own way.

The European Commission in a number of judgments mentioned the criteria to be examined in determining relevant market in the context of a abuse of dominance. *Hoffman La Roche v. Commission of the European Communities*¹ observed that it is essential to define the relevant market and it must be defined both from the geographical and the product points of view.

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

In USA also abuse of dominance is tested seriously with the first consideration of relevant market. The American Courts have emphasized the importance of first defining the relevant markets, taking into account both the product and geographic aspects in the following cases,

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¹Case 85/76. European Court reports 1979 Page 00461

*Walker Process Equipments Inc. v. Food, Machinery and Chemical Corp,*² *Image Technical Services Inc v. Eastman Kodak Co,*³ *Green Country Food Market, Inc v. Bottling Group,*⁴ *LLC and Bottling Group Holdings, Inc, United States v. E.I. du Pont de Nemours & Co.,*⁵ *Brown Shoe Co. v. United States,*⁶ etc.

Australia has its own considerations. Section 4(e) of the Australian Trade Practices Act, 1974 defines market as –*For the purposes of this Act, unless the contrary intention appears, market means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services*||. ⁷ The Australian Courts begin a determination of –misuse of market power|| by defining both dimensions of the relevant market.

India has its own criteria to determine abuse of dominance. Section 4 of the Act prohibits the abuse of dominance by any enterprise or group of enterprises. ⁸ The Act prescribes a three-step test for the determination of abuse of dominance: defining the relevant market; assessing dominance in the relevant market; and establishing abuse of dominance.

Each of the above steps is key to establishing liability under section 4 of the Act.

A. DEFINING THE RELEVANT MARKET

The dominance of an enterprise is always determined with respect to a particular relevant market. The concept of the ‘relevant market’ is critical to competition law, and in the case of an abuse of dominance investigation, sets the parameters for the determination of ‘dominance’.

The relevant market is determined on the basis of relevant product or service market and relevant geographic market. The relevant product market is defined as all those products or services which are regarded as interchangeable or substitutable by the consumer, on the basis of product characteristics, prices and end-use. Apart from such demand-side factors, the CCI considers supply-side factors such as switching costs for producers, etc, in defining the

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

³504 U.S. 451 (1992).

⁴371 F.3d 1275.

⁵351 U.S. 377 (1956).

⁶June 25, 1962. 370 U.S. 294.

⁷Section 4 (e) of the Australian Trade Practices Act (The year of the Act?).

⁸Section 4 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

relevant product or service market. The relevant geographic market is defined as a market comprising the area in which there exists distinct homogenous competitive conditions in terms of demand and supply of goods or services, which can be distinguished from the conditions prevailing in neighboring areas.

As such, the breadth of the relevant market definition is an important factor in establishing whether an enterprise is dominant or not. A classic example is the case of real-estate major, *DLF Limited in Belaire Owners' Association v DLF Limited* ('**DLF case**').⁹ The CCI defined the relevant market extremely narrowly to be the market for 'high-end residential apartments in the city of Gurgaon'. By restricting the product scope and the geography of the relevant market to a particular suburb, the CCI's decision that DLF was dominant in the relevant market was but a given. In contrast, in the Coca-Cola cases, (which dealt with the alleged abuse of dominance in relation to the sale of its aerated drinks and bottled water at high prices by Coca-Cola in multiplex theatres), the CCI held that Coca-Cola was not dominant, by defining the market to be all multiplex theatres in India, as opposed to any single multiplex theatre, which would no doubt have led to the obvious conclusion that Coca-Cola was dominant.¹⁰

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

4. Abuse of dominant position.-

(1) No enterprise shall abuse its dominant position.

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

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

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

⁹Case No. 19/2010

¹⁰*Consumers Guidance Society v. Hindustan Coca-Cola Beverages Private Limited*, (UTPE 99/2009) ;*M/s Cine Prekshakula Viniyoga Darula Sangh v. Hindustan Coca-Cola Beverages Private Limited*, (RTPE 16/2009).

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

(b) limits or restricts—

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

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

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

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

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market. Explanation —For the purposes of this section, the expression—

(a) -dominant position¹¹ means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

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

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

(b) -predatory price¹² means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors

The CCI has also considered several natural monopoly sectors, such as the coal sector as well as the sports sector. As discussed in greater detail below, the CCI seems to have departed from its usual standards in its assessment of sports federations as a natural

monopoly, as is demonstrated from the contradictory holdings in *Surinder Singh Barmi v Board of Control for Cricket in India*¹¹ and *Dhanraj Pillai v Hockey India*.¹²

B. ASSESSMENT OF DOMINANCE

Dominance is defined as the ability of an enterprise to operate independently of market forces and enables it to affect competitors or consumers or the relevant market in its favor.¹³ Under section 19(4) of the Act, the CCI is required to assess dominance on the basis of the following factors:

- market share;
- size and resources of the enterprise;
- market share of competitors;
- economic power of the enterprise, including commercial advantages over competitors;
- vertical integration of the enterprises or sale or service network of such enterprises;
- dependence of consumers on the enterprise;
- legal monopoly or dominant position;
- entry barriers, including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high switching costs;
- countervailing buyer power;
- market structure and size of the market;
- social obligations and social costs;
- relative advantage, by way of the contribution to the economic development, by the dominant enterprise; or
- any other factor that the CCI may consider relevant for the inquiry.¹⁴

Section 19 of Competition Act states the following. Section 19 in the Competition Act, 2002

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

¹¹ Competition Commission of India, Case No. 61 of 2010

¹² Competition Commission of India, Case No. 73/ 2011

¹³ Explanation (a) of Section 4 (2) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

¹⁴ Section 19 (4) of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

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

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

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

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

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

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

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

- (e) vertical integration of the enterprises or sale or service network of such enterprises;
- (f) dependence of consumers on the enterprise;
- (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
- (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
- (i) countervailing buying power;
- (j) market structure and size of market;
- (k) social obligations and social costs;
- (l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition;
- (m) any other factor which the Commission may consider relevant for the inquiry.

(5) For determining whether a market constitutes a -relevant market^{ll} for the purposes of this Act, the Commission shall have due regard to the -relevant geographic market^{ll} and -relevant product market^{ll}.

(6) The Commission shall, while determining the -relevant geographic market^{ll}, have due regard to all or any of the following factors, namely:—

- (a) regulatory trade barriers;
- (b) local specification requirements;
- (c) national procurement policies;
- (d) adequate distribution facilities;
- (e) transport costs;

- (f) language;
- (g) consumer preferences;
- (h) need for secure or regular supplies or rapid after-sales services.

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

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

Thus, there is no bright line market share test, unlike as with other jurisdictions, for the determination of dominance under the Act, even though market share is treated as an important indicator. The CCI has considered market share in most cases of abuse of dominance it has reviewed, but has also considered subjective factors such as vertical integration, countervailing buyer power, economic power of the enterprise, entry barriers, statements in the public domain, etc. This is evident from two important orders passed by the CCI relating to abuse of dominance: the *MCX Stock Exchange v National Stock Exchange of India Limited (the NSE case)*¹⁵ and the DLF case.

C. DETERMINATION OF DOMINANT POSITION

Dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by according it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. This has been stated in the case *United Brands Company v.*

¹⁵Case No. 13 / 2009.

*Commission of the European Communities*¹⁶. Let us now examine the interpretation of 'dominant' position in various jurisdictions.

European Commission - The European Commission treaty does not contain a specific definition of 'dominant position'. However, the European Court of Justice has, in some decisions defined 'dominant position'.

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

United States of America - Under the antitrust law of the United States, the term corresponding to 'dominant position' is 'monopoly'. 'Monopoly Power' is defined as the power of the concerned entity to control prices or to restrict or exclude competition. It is reiterated in the case of *United States v. E.L. du Pont de Neumours and Co* *United States v. du Pont de Neumours and Co.*¹⁷

India - The Indian Competition Act contains a definition of dominant position that takes into account whether the concerned enterprise is in such a position of economic strength that it can operate independently of competitive forces or can affect the relevant market in its favour. Explanation (a) to Section 4 of the Indian Competition Act 2002 defines dominant position as 'dominant position means a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to- operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour.'

The Competition Act, 2002 displays a marked shift from the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP) as regards the definition of dominance or dominant position goes. Under the MRTP Act, a dominant undertaking was defined as one which supplied, produced or controlled not less than one fourth of the total supply of that good or service in India.

¹⁶ [1978] ECR 207

¹⁷ 351 US 377 (1956)

D. PREDATORY PRICING

Predatory Pricing has not been mentioned specifically in the competition laws of most of the jurisdictions studied as amounting to –an abuse of dominance. However, under the Indian Competition Act, –directly or indirectly imposing unfair or discriminatory price in the purchase or sale (including predatory pricing) of goods or services has been specified as amounting to an abuse of dominance if engaged in by a dominant enterprise.¹⁸

European Commission - Article 82 of the EC Treaty is the relevant provision in the EC, concerning predatory pricing. It prohibits a firm's conduct that abuses a dominant position within the Community and may affect trade between Member States as mentioned in the case of *AKZO Chemie BV*.

United States of America - Section 2 of the Sherman Act condemns monopolisation or the attempt to monopolise any part of commerce among US States. In the United States, the Clayton Act prohibits predatory pricing and price discrimination.

In India, in reality, on which the Competition Act, 2002 is based on, the supply of a product is more often than not, limited to the hands of a single market player, who, using his dominance has grown so powerful because of the low production cost he has, for the simple reason that his economies of scale are huge and research and development facilities better than most, he can determine the price without considering the fixed price, thereby misallocating efficiency.

As per Explanation (b) at the end of Section (4), ‘predatory price’ means the sale of goods or provision of services at a price below cost with the subject to reduce competition or eliminate competitors.¹⁹

Although, India’s theoretical law is based on the UK model, but a careful study of the practical reality shows that the Indian judges have followed the US model.

One of the most important things that the Indian Supreme Court had to decide on was whether or not selling at a lower price is illegal per se. Prima facie, the section has been divided into two parts and so both the parts/conditions need to be fulfilled, and therefore,

¹⁸Section 4 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

¹⁹Section 4 (b) of the Competition Act, 2002, as amended by the Competition (Amendment) Act 20 07

only when the goods are priced below the cost with an intention of driving out the competitors, it can be said to be illegal and termed predatory pricing.

Moreover, as per the Competition Act, 2002 even dominant position in itself is not an abuse or a restrictive trade practice. This is also the position under Section 2 of the Sherman Act, 1860 and under Article 82 of the EC Competition Law.

E. ABUSE OF DOMINANCE IN INDIA

Under the Indian Competition Act, and the competition laws of different jurisdictions, relevant determination is the first step in the context of fact finding and examination of abuse of dominance and anti-competitive activity.²⁰ As per Section 2 (s) of the Competition Act, India, relevant geographic market includes a market comprising of the area in which the conditions of competition for supply of goods or provision of services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring area.

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

Different jurisdictions define relevant markets in their own ways. In determination of the relevant market it is common to use certain economic tools. One such tool is the SSNIP test (Small, but Significant, Non-transitory Increase in Price). It is also called the Hypothetical monopolist test.

The question asked is that if the price of the product is increased by a factor of around 5 to 10 per cent, which other products would the customer switch to, all such products being covered by the relevant product market. ²¹ In Malaysia, the relevant market is defined as a smallest group of products (in a geographical area) that the hypothetical monopolist controlling that product group (in that area) could profitably sustain a price above the competitive price.

Relevant Product and Geographical Market in India

²⁰ Relevant Product Market and Relevant Geographical Market is defined under section 2 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

²¹²¹ *United States v. E.I. Du Pont de Nemours and Co .*, 118 F Supp 41 (D Del 1953). In USA, inspite of the failure of the SSNIP test, many cases had been decided on the basis of relevant product market being determined by using SSNIP.

Relevant product market and geographical market is defined in the following way in India:

Relevant product market – In addition to the definition u/s 19 (7), India had specified criteria like physical characteristics or end uses, consumer preferences, price of goods or services, etc.

Relevant geographic market – India had specified criteria u/s 19 (6) like regulatory trade barriers, transport costs, language, consumer preferences, etc. Physical characteristics or end- uses have huge relevance across the globe. In the *Aerospatiale-Alenia/de Havilland* case, ²² the European Competition Commission decided that commuter turboprop aircraft with more than 20 seats occupied three distinct markets: aircraft with 20-39 seats; with 40-59 seats and with 60 or more seats.²³ The differences in the seating capacities were fundamental to definition of separate markets because this determined the type of routes on which these aircrafts could be used.

F. IMPORTANCE OF DLF CASE IN INDIA IN THE CONTEXT OF ABUSE OF DOMINANCE

The DLF Case is the most landmark case in India in the context of the success of the Competition Commission of India in addressing abuse of dominance. ²⁴ Unilateral changes can be made by the builder without the buyers' consent. DLF unilaterally decided to increase the size of the building from 19 floors to 29. The builder enjoys unilateral right to increase or decrease the super area at his sole discretion without consulting allottees, who, nevertheless are bound to pay additional amounts or accept a reduction in the area.

Allottees have no exit option except when builder fails to deliver possession within the agreed time, but even in that case, they get refunds without interest, and that too only after the apartment is sold. Punitive penalties can be imposed if you default, but not if the builder defaults. DLF took crores of rupees from the allottees, even before the first brick was laid. CCI found all the 16 conditions to be unfair and abusive.

In this connection, it is necessary to examine the concept of after market abuse²⁵ as explained by the U.S. Supreme Court in the case of *Eastman Kodak Co. v. Image Tech.*²⁵ In this case, Kodak was the seller of photocopying machines. In the market of photocopying machines,

²² 91/619 [1992] 1 CEC 2,034

²³ 91/ 619 [1992] 1 CEC 2,034.

²⁴ *Belaire Owner's Association versus DLF Limited*, Case No. 19 of 2010.

²⁵ SVCS504 U.S. 451(1992).

Kodak was not a dominant player. As far as the services and the repair market for the photocopiers was concerned, Kodak was initially selling the spares to various dealers who used to service the photocopiers and use the spares supplied by Kodak. Kodak found that some of these service dealers started developing their own spares to service the photocopiers and some of them used to give better service than Kodak itself. Kodak therefore changed its business model and asked the equipment manufacturers to supply the equipment to it only.

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

The Supreme Court considered the facts of the case. In the opinion of the Supreme Court there were two markets: the market of photocopiers where Kodak was not a second market and was described by the Supreme Court as an aftermarket and consisted of service after sales. In this after market, there was a tie in scenario as spares would be given with the service. The Supreme Court then relied on its own decisions on market power. In the case of *Jefferson Parish*²⁶, the Supreme Court had held that market power is power -to force a purchaser to do something that he I would not do in a competitive market.

In another case *U.S. v. E.I. du Point de Nemours & Co.*,²⁷ the Supreme Court had defined market power as -the ability of a single seller to raise price and restrict output. The existence of such power is ordinarily inferred from the seller's possession of a predominant share in the market.²⁸ The Supreme Court then held that in the aftermarket, Kodak enjoyed monopoly power. The Supreme Court also held that a customer is -locked in after the purchase of the equipment, as the switching costs are high. The customer can then be subjected to abuse. The Supreme Court also held that it is a question of fact as to whether information costs and

²⁶ 466 US at 14.9

²⁷ 351 U.S. 377, 391(1956)

²⁸ Jefferson Parish 466 US 17.1.

switching costs foil the assumption that the equipment and service market act as a pure complement to each other. On these facts, the Supreme Court held that the behaviour of Kodak was anti-competitive.

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

In fact Section 19(4)(m) talks of –any other factor which the Commission may consider relevant for the inquiry. Therefore, while determining the abuse of dominance, the Commission is entitled to consider any other one factor which shows that the enterprise is in a dominant position to affect its competitors or consumers or the relevant market in its favour. In this particular case, the informant became a captured consumer and he could be discriminated and abused. Therefore, in this case, in the aftermarket, as there existed high switching costs and information asymmetry, the abuse of dominance is established. In fact the decision of the U.S. Supreme Court in the case of *Eastman Kodak* has been incorporated in the explanation to Section 4 read with Section 19(4) of the Act.

Acting on a complaint filed by the Owners' Association of one of the DLF building –Belaire in Gurgaon, in the case of *Belaire Owners Association ("Informant") v. DLF Limited & Ors. ("Opposite Parties")*,²⁹ the CCI pronounced DLF Limited (–DLF) guilty for grossly abusing its dominant market position in the concerned relevant market and imposing unfair conditions in the sale of flats/apartments to home buyers/consumers. The CCI imposed a penalty of INR 6,300 million (USD 140 million), at the rate of 7% of the average turnover of DLF for the last three financial years and issued a –cease and desist' order against DLF from imposing such unfair conditions in its agreements with buyers for residential buildings to be constructed in Gurgaon.

²⁹ Competition Commission Of India, Case No.19/ 2010

The relevant product market included services by developer/builder in respect of ‘high-end’ residential building in Gurgaon and the CCI held that although there can be no hard and fast rule to determine what constitutes ‘high-end’, the same needs to be determined on the basis of facts and circumstances of each case.

‘High-end’ is not a function of size alone but includes a complex mix of factors such as size, reputation of location, characteristics of neighbours, quality of construction and actual customers and their capacity to pay.

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

The CCI’s scope was limited to the extent of the purchasing power of average citizens and small increase in prices was immaterial in such cases. The CCI relied on the CMIE data which said DLF had the highest market share (45%), *vis-a-vis* the market share of the nearest competitor (19%) which was more than twice of its competitor, leading to hardly any competitive constraints.³⁰

G. AJAY DEVGN CASE

The question of relevant market again was examined by the CCI in the Ajay Devgn Case. *Ajay Devgan v. Yash Raj Productions*.³¹ It was alleged that Yash Raj Films had put a condition to single screen owners that if they wanted to exhibit movie A (bound to be a blockbuster) at the time of Eid, they would have to simultaneously agree to exhibit movie B at the time of Diwali.

Any single screen theatre who did not agree to booking of his theatre for both the films would not get the right to exhibit the single film. Out of 1407 single screens, 821 agreed to show A (Ek Tha Tiger), and B (Jab Tak Hai Jaan).

The informant however failed to substantiate how ‘film industry in India’ was the relevant market and how YRF was dominant in this relevant market. As per the information available in the public domain, in Bollywood itself, 107 and 95 films were released in 2011 and 2012

³⁰ CMIE includes Center for Monitoring Indian Economy.

³¹ Case No. 66 of 2012.

respectively. Out of this, YRF produced only 2-4 films each year. This cannot be said to amount to dominance even in the Bollywood industry.

In the scheme of the Competition Act, tie-in arrangements per se are not violative of Section 3(4)(a) of the Act. Whether such an agreement is prohibited under the Act depends upon its actual or likely appreciable adverse effect on the competition in India.

The Commission took the view that the agreement has neither created entry barriers for new entrants nor has driven existing competitors out of the market, nor is there any appreciable effect on the benefits accruing to the ultimate consumer viz. the viewers. Single screens contributed to 35% of revenue while multi-screen theatres contributed to 65% of revenue. Ajay Devgan appealed in Comp. Appellate Tribunal, for stay of JTHJ, but COMPAT rejected the stay petition.

H. RECOMMENDATIONS

After analysing the DLF Case in India, the following recommendations can be made:

In the determination of relevant market, just like in case of abuse of dominance, the CCI should also look into sub- markets in the cases of the anti-competitive agreements.

In the determination of relevant geographic market in cases of anti-competitive agreements, India should consider the relevant geographic area rather than entire India.

India should give importance to -intent in the determination of abuse of dominance and anti-competitive agreements like Competition agencies of Japan, UK, and if the intent is to exclude competitors in the relevant market the alleged party should be prevented from continuing the activity.

II. CONCLUSION

In conclusion, it can be said that determination of dominance is the most complicated task of the competition agency in any jurisdiction. India has the relevant provisions in place. According to Section 19(1) of the Indian Competition Act 2002, the Competition Commission of India may inquire into any alleged contravention of Section 4(1) *i.e.* abuse of

dominant position by an enterprise on its own motion or by receipt of a complaint, or a reference made to it by the Central Government, State Government or a statutory authority.

Section 27 of the Act lays down the orders that can be passed by the Commission upon finding that the action of an enterprise in a dominant position is in contravention of Section 4.

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