

**AFTERMARKET ABUSE OF DOMINANCE IN THE REAL ESTATE SECTOR: ITS ANALYSIS  
AND NEGATIVE IMPACT ON CONSUMER INTERESTS**

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**ABSTRACT**

India is developing at a pace like never before, both economically and sadly in population. More and more people every year are migrating to metropolitans in search of jobs and consequently for places to live. Thus a vast market for residential real estate has been created in urban India. This need has been gravely exploited by the players in the real estate market. This exploitation takes place when a buyer executes an agreement for purchase with a builder and is then locked- in due to high switching costs in the name of "token money" being charged by the builder, thereby making the buyer vulnerable to any abuse that the builder might throw at him. This vulnerability of the buyer invariably awards the builder, dominance in this market over the consumer. Whatever the intention maybe, such lock- in of consumers and lock- out of competitors in the aftermarket that is created once a consumer executes the agreement for purchase; and the exploitation therein, also stands in contravention of the prohibition of the abuse of one's dominance as prescribed within the Competition Act of India, 2002. Further, since it is this abuse of dominant position that ultimately adversely affects the consumers, this paper seeks to propose that it should be the penalties available within the competition laws which should be used as forerunners to first curb such anti-competitive activities and further safeguard the rights and the welfare of the consumers, who in this case are the buyers.

**INTRODUCTION**

A firm enjoys a dominant position if it has the ability to sway the consumers and the competitors in its favour or if it stays unaffected from the prevalent competitive trends of the market. A firm enjoying a dominant position abuses it when the same indulges in any of the activities that have been enumerated under Section 4 of the Competition Act, 2002 (*hereinafter* "the Act"). An aftermarket is a secondary market for products periphery to the primary product. Such a market can be dominated and subsequently abused when an attempt is made at restricting the entry of competitors and consequently trapping the consumers within the market. This is achieved by imposing high "switching costs" i.e. penalties upon the consumers, which may be in the form of forfeiture of investment already made or as an

amount to be paid over the investment made, in order for them to switch to another competitor in the market or by not voluntarily providing the necessary information to the consumer so as to analyse the drawbacks of making the concerned investment, playing upon the incompetence of the consumers in comprehending complex legal jargon thus creating an "information asymmetry" in its favour. The collective result of these factors is that in an aftermarket, an ill informed consumer is left to fend for itself prone to be abused by the firm with no other alternative available considering the high switching costs. Thus, even if a firm may not be dominant in the primary market, it attains dominance upon such trapped consumers in the aftermarket.

In the real estate market, execution of a buyers' agreement is the inception point of the aftermarket. The forfeiture clause for the money so far submitted in case of switching and the information asymmetry in favour of the builder act as barriers restricting competitors on one side and consumers on the other. Therefore, after the execution of the instant agreement, the builder becomes dominant over the prospective buyer who in turn is locked in. This provides ground for the builder to abuse the vulnerable consumer. Thus, in order to safeguard the rights of such a trapped consumer, it is incumbent upon the Competition Commission of India (*hereinafter* "CCI") to realise the fact that a builder in the aftermarket is always dominant over the prospective buyers. Such realisation is in turn necessary in order to realise the basic objective of the Act, i.e. protection and preservation of consumer interests.

#### **THE AFTERMARKET ABUSE OF DOMINANT POSITION AND THE "LOCK-IN" OF CONSUMERS AND THE "LOCK-OUT" OF COMPETITORS**

##### What is aftermarket abuse?

The doctrine of aftermarket abuse along with the theory of "lock-in" of consumers were enunciated by the U.S. Supreme Court (*hereinafter* "U.S.S.C.") in the case of *Eastman Kodak Company v Image Technical Services Inc.*<sup>134</sup>. In essence, "*aftermarkets comprise markets for products (secondary) that are complements to other products (primary) to which they relate. Common examples may be found in markets for durable goods (e.g., repair parts and services for automobiles) as well as consumables (e.g., ink cartridges for printers and*

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<sup>134</sup> 504 U.S. 451 (1992).

*photocopiers*).<sup>135</sup> An aftermarket may either comprise of an intrasystem market, i.e. when suppliers compete for the sale of goods of the same brand or an intersystem market where suppliers compete against each other for the sale and purchase of multi brand goods. U.S.S.C. in the instant case also deviated from the settled position clarifying that one cannot simply infer an absence of market power/dominance in the aftermarket due to the existence of a competitive equipment (primary) market. In such cases, the essential fact is whether the accused firm enjoys a dominant position in the aftermarket or not and this is to be determined pursuant to the factors as enumerated under Section 19(4) of the Act. In the case of *Shri Shamsher Kataria v HONDA Sael cars and Ors.*<sup>136</sup>, the CCI had held 14 automobile companies dominant and subsequently abusive in their respective aftermarkets of spare parts and maintenance services irrespective of the market power that they possessed in the primary market of sale of automobiles.

#### "Lock-in" of consumers and the "lock-out" of competitors

The "lock-in" effect provides leverage to the firms to stifle competition and exploit the consumers in the aftermarket. This occurs when due to certain factors the consumers are trapped in their respective aftermarkets by firms in order to then exploit them by abusing their dominant position over these consumers.

*"A 'lock-in', as described in Kodak, is also known as 'installed based opportunism'—the ability of primary market competitors to charge supra-competitive prices for their aftermarket parts or services. Antitrust concerns arise in this context because consumers become 'locked in' to paying higher than competitive prices for aftermarket goods or services by virtue of their original investment in the primary market. Consumers who are unable to switch to other primary competitors are generally forced to pay higher aftermarket prices because of their sunk investment in the primary market."*<sup>137</sup>

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<sup>135</sup> Gregory T. Gundlach and Albert A. Foer, *The future of aftermarkets in systems competition: an overview of the American Antitrust Institute's invitational symposium* (2007) 52 (1) Antitrust Bull. 1.

<sup>136</sup> (2014) Comp L.R. 001 (C.C.I.).

<sup>137</sup> David A.J. Goldfine and Kenneth M. Vorrasi, *The fall of the Kodak aftermarket doctrine: dying a slow death in the lower courts* (2005) 72 Antitrust L.J. 209, 212.

"The manufacturer's ability to charge above-competitive prices for its aftermarket service product depends largely on the availability of substitutes to the customer."<sup>138</sup> Therefore, a consumer could be "locked-in" by simply restricting the availability of such substitutes. Such restriction can be achieved by various factors which have found prominence over the years. For instance, in the *Kodak* case<sup>139</sup>, these factors as identified by U.S.S.C. included high switching costs and the information asymmetry that existed with regard to the primary product and its aftermarket. In India too, factors such as switching costs and information asymmetry have been considered as resulting in a consumer "lock-in" whereby, the consumer becomes vulnerable to subsequent abuse<sup>140</sup>.

#### Concurrence between Aftermarket abuse and the "lock-in" effect

CCI has tried to import these theories in a number of claims and in varied spheres of the market. However, in most cases the same stayed limited to only dissenting opinions. For instance, in the case of *Surinder Bhakoo v HDFC Bank Ltd.*<sup>141</sup>, where levying of pre-payment penalties on an automobile loan was considered to be an abusive practice which was being carried out by the bank. This opinion had its precedence embedded in a previous case(dissenting), that of *Neeraj Malhotra v Deutsche Post Bank home Finance Ltd.*<sup>142</sup> where levying penalties on pre-payment of housing loans was considered to be anti- competitive in nature. CCI firstly, specified that banks were dominant in the aftermarket which was created once a customer loaned an amount from that bank. Such dominance was achieved by imposing high switching costs in the form of "pre- payment penalties" on the customer which restricted them from switching to other banks (by acquiring a loan from some other bank to pay-off the loan due, prior to the date due for its payment), thereby locking them in this market and obstructing the new entrants in the markets from attracting customers, since the customers could not opt for them unless they agreed to pay such high switching costs, thereby

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<sup>138</sup> Severin Borenstein and others, *The Economics of Customer Lock-In and Market Power in Services* (Kluwer Academic Press, 1994).

<sup>139</sup> *Supra* note 1.

<sup>140</sup> *Belaire Owner's Association v. DLF Ltd, Haryana Urban Development Authority, Dept of Town and Country Planning, State of Haryana* (2011) Comp L.R. 239 (C.C.I.).

<sup>141</sup> [2011] C.C.I. 10.

<sup>142</sup> [2011] 106 S.C.L. 108 (C.C.I.).

creating entry barriers for them. Interestingly, in another case<sup>143</sup> with similar issues, CCI had specified that:

*"if one looks at clause (g) of Section 19(4) of the Act, this dominant position can be acquired either through the statute or being a Government company or being a public sector company or 'otherwise'. In this particular case the banks got the dominant position by virtue of the agreement which the consumers signed with the bank at the time of taking the home loan. Thereafter the banks were in a position to affect their consumers in their favour. Thus banks were in a position of dominance as far as their consumers are concerned as they were tied to them for a period of time (locked -in)."*

In an entirely different sphere of market i.e. of stock market exchange, in the case of *MCX Stock Exchange Ltd. v National Stock Exchange of India Ltd.*<sup>144</sup>, CCI had found NSE to be in contravention of Section 4(2)(b)(i) and (ii), 4(2)(c) and (d) of the Act, in the aftermarket of software for trading on NSE. MCX already had its software for trading in NSE CD (currency derivatives) segment titled "ODIN" in place, NSE through its subsidiary introduced another software titled "NOW", as the primary competitor against ODIN in this aftermarket. However, NSE soon denied APIC (Application Programme Interface Code) for interface between its own software NOW and ODIN for CD segment trade on NSE and thereby disabled the users from connecting to the NSE CD segment trading platform through their preferred mode. Therefore, as far as the aftermarket for trading software was concerned, NSE had locked in the customers with NOW, since if these customers wanted to trade on NSE they could only do so by using NOW, thus NSE extinguished any chances for ODIN of competing in this market. In another case<sup>145</sup>, CCI had held a multiplex owner ILL(INOX Leisure Pvt. Ltd.) liable for being in contravention of Section 4(2)(a) and (c) of the Act. The relevant market was established to be the sale of bottled water and cold drinks in the closed market inside the premises of multiplexes owned by ILL. ILL had also executed an agreement with HCCBPL whereby HCCBPL was the sole provider of the same to ILL and neither the suppliers of the similar products were allowed within the premises of the multiplexes owned by ILL nor the customers were allowed to bring beverages purchased

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<sup>143</sup> *Gulshan Kumar Gupta v. ICICI Bank Ltd.* [2011] C.C.I. 43.

<sup>144</sup> [2011] C.C.I. 52.

<sup>145</sup> *Cine Prakashakula Viniyoga Darula Sangham v. Hindustan Coca Cola Beverages Pvt. Ltd.* [2011] C.C.I. 26.

from outside within the premises of the multiplex citing security issues, this provided ILL with an upper hand as compared to the customers, since they were forced to purchase whatever ILL was offering and at whatever price it was offering the same thereby barring the other competitors from entering the said market. Once again an aftermarket was created comprising of bottled water and other beverages and once a customer chose ILL over other multiplexes the customer was "locked-in" the said aftermarket, where ILL was dominant. The issue at hand was packaged beverages being sold at prices which were more than double of what was being charged for the same quantity, quality of the same product outside the premises of the multiplex. CCI thus held that, "*in the present case what ILL is doing is that first it captures the customers in the name of security and then fleece those locked-in customers by not offering them any choice and charging discriminatory price*". Thus in most of the cases where the theory of aftermarket abuse has been implemented, the same has usually been coupled with the locking-in of the customers within such aftermarket.

#### **ASSESSING AFTERMARKET ABUSE OF DOMINANCE IN THE REAL ESTATE SECTOR**

Abuse refers to practices of undertaking which may directly affect the market and are detrimental to production or sales, to purchasers or consumers. The same is prohibited under Section 4(1) and various instances of the same are enumerated under Section 4(2)(a to e) of the Act. "*It can be both exploitative or anti-competitive. It is 'exploitative', if the behavior imposes unfair and discriminatory prices and conditions on customers or consumers, or limits or restricts production of goods or provision of services. It is 'anti-competitive', if it excludes competitors, actual or potential, from the market.*"<sup>146</sup>

#### Relevant market

"*A dominant position is always with reference to a relevant market, both the relevant product and the relevant geographic markets.*"<sup>147</sup> Relevant product and geographic market are characterised by the smallest set of substitutable or interchangeable products available in the market and distinct homogenous features of the market and the same are to be assessed pursuant to Section 19(7) and (6) of the Act respectively. In the U.S. courts, much debate has accrued with regard to acceptance of an aftermarket as a relevant market especially in an

<sup>146</sup> D P Mittal, *Competition Law & Practice* (3<sup>rd</sup> edn, Taxmann Publications 2011) 284.

<sup>147</sup> T. Ramappa, *Competition Law in India: Policy, issues and Developments* (2<sup>nd</sup> edn, O.U.P. 2009) 147.

intra-system market, "because market power is often inferred from market share, market definition generally determines the result of the case"<sup>148</sup>. Therefore the U.S.S.C. in *Kodak* specified that in any antitrust litigation the fundamental question is that "whether competition in the equipment market will significantly restrain power in the service and parts market".<sup>149</sup> This was pursuant to an assumption forwarded by Kodak which sailed on the economic theory of "cross-elasticity of demand" that exists between the primary and the aftermarket goods. In another case<sup>150</sup> where a *Kodak* type claim was filed alleging the inclusion of a three-year warranty with the defendant manufactured computer systems to be in violation of Section 2 of the Sherman Act, 1890 a circuit[first] court further explained the above mentioned as follows:

*"[A] litigant who envisions the aftermarket as the relevant market must advance hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market...Put another way, a court may conclude that the aftermarket is the relevant market for antitrust analysis only if the evidence supports an inference of monopoly power in the aftermarket that competition in the primary market appears unable to check."*

Thus, as far as "the lock-in issue is characterized as one of relevant market, a single-brand aftermarket becomes distinct from the primary market when switching and information costs are sufficiently high to expose a number of consumers to exploitation. In that event, the aftermarket is the relevant market for the antitrust enquiry."<sup>151</sup>

In India, in most of the cases involving lock-in and subsequent exploitation of consumers by real estate players, CCI has shied away from incorporating this theory in its complete flavour and more often than not the same has been restricted to minority judgements. Therefore, not much analysis has been put into whether an aftermarket in itself could be a relevant market or not. However, if these judgements are put in perspective of the aforementioned analysis, it may be deduced that CCI has not had a problem in accepting either the fore market or the aftermarket as the relevant market. In these cases, the first market[fore market] is where a

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<sup>148</sup> *Supra* note 1 at 470(n 15).

<sup>149</sup> *Id.*

<sup>150</sup> *SMS Systems Maintenance Services, Inc. v. Digital Equipment Corp.* 188 F.3d 11 ( 1st Cir. 1999)

<sup>151</sup> *Supra* note 4 at 226.

consumer enters into an agreement with the builder and the second market is the aftermarket created after he has entered into an agreement with the builder. In the DLF cases<sup>152</sup>, where DLF was found guilty of imposing unfair conditions upon the apartment buyers which included charging exorbitant "token money" and its subsequent forfeiture pursuant to a cancellation on the side of the buyers, reserving unrestricted liberty to alter the projects pursuant to personal will and also not specifying any date in the "Apartment Buyer's Apartment" pursuant to which the apartments were to be transferred to the respective buyers and also mandating a meager penalty upon itself in case the apartments weren't delivered in the stipulated time whereas a rather stringent penalty upon the buyers in case they defaulted on any of their payments, the market for services of developer/builder in respect of high- end residential accommodation in Gurgaon was considered to be the fore market and the market created subsequent to the execution of the instant buyers' agreement to be the aftermarket. CCI (dissenting) had, while acknowledging the aftermarket consumer lock-in and further abuse, delineated the fore market itself as the relevant market. In another case<sup>153</sup>, where once again DLF was in the crosshair for abusing its dominance, the fore market i.e. "*provision of services for the development and sale of residential flats in Old Mahabalipuram area near Chennai*", itself was once again specified as the relevant market.

There have also been an almost equal number of cases where CCI while acknowledging aftermarket abuse of dominance had identified the aftermarket itself as the relevant market citing exorbitant switching costs which resulted in a consumer lock-in and subsequently exposed them to abuse. Case in point being, *Mr. Jagmohan Chhabra v M/s. Unitech Ltd.*<sup>154</sup>, the facts being similar to the DLF cases the majority opinion did not find Unitech dominant since DLF had already been identified as the most dominant firm in the same relevant market[fore market] i.e. the market of the services provided by the developers for providing residential apartments to the customers in geographical area of Gurgaon. However, in the minority opinion, the most limited scope for interchangeability between the flats subsequent

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<sup>152</sup> *Belaire Owner's Association v. DLF Ltd., Haryana Urban Development Authority, Dept of Town and Country Planning, State of Haryana* (2011) Comp L.R. 239 (C.C.I.); *DLF Park Place RWA v. DLF Limited HUDA Dept. of Town and Country Planning* (2011) Comp L.R. 490 (C.C.I.); *Shri Kaushal K. Rana v. DLF Commercial Complexes Ltd.* [2013] 117 S.C.L. 512 (C.C.I.).

<sup>153</sup> *DGCOM Buyers and Owners Association, Chennai v. M/s. DLF Ltd., New Delhi and M/s. DLF Southern Homes Pvt. Ltd., Chennai* (2012) Comp L.R. 1164 (C.C.I.).

<sup>154</sup> (2012) Comp L.R. 31 (C.C.I.).



to the execution of the buyers' agreement was considered to be between the flats which were being offered by Unitech in that specific location and acknowledging the same, the aftermarket, i.e. market created subsequent to the execution of the buyers' agreement was delineated as the relevant market. Further, in another case<sup>155</sup> with similar facts as DLF, the residential project itself i.e. the aftermarket was considered to be the relevant market, the dissenting member clarifying that "*there is nothing in the Act which prohibits that the project itself cannot be taken as the relevant geographic area by one service provider and this provision of service is not available in the neighbouring areas.*" In yet another case<sup>156</sup> (dissenting), the market for providing maintenance services within the project itself which was created pursuant to the transfer of possession of the residential spaces to the buyers, was considered to be the aftermarket and subsequently was delineated as the relevant market since, "*the laws of the state forbid the buyers to take the services of agencies other than builder for the initial five years after the possession. The services required are related to the respective project only. This is sufficient to establish that the relevant geographic market is project itself.*"

### Dominant Position

"A dominant position is a market controlling position, capable of driving competing business from the market and also of dictating price. It is a power of controlling prices or unreasonably restricting competition."<sup>157</sup> The same has been defined under the second explanation to Section 4 of the Act, the main constituting elements being: (i) a position of strength; (ii) that position being enjoyed in a relevant market in India (both product and geographical markets) (iii) and such a position that gives the enterprise the power to operate independently of competitive forces in the relevant market.<sup>158</sup> In an aftermarket, acquisition of a dominant position by a firm is an invariable outcome that immediately follows the lock-in of consumers. Since, once the consumer has been locked in, it is at the mercy of the firm causing such lock-in. Therefore, it follows that if a firm intends to acquire dominance in an aftermarket, the same may do so by causing a lock-in of the consumers in such market. Such

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<sup>155</sup> *Mr. George Kuruvilla v. Hiranandani Palace Gardens Pvt. Ltd.* (2012) Comp L.R. 797 (C.C.I.).

<sup>156</sup> *Shri Ram Niwas Gupta v. M/s Omaxe Ltd., New Delhi* (2012) Comp L.R. 1132 (C.C.I.).

<sup>157</sup> *Supra* note 13 at 286-287.

<sup>158</sup> *Supra* note 14 at 140.

lock-in may take place on account of various factors, chiefly recognised by the courts of U.S. being high switching costs and information asymmetry, some courts have even rooted for a post- sale change in policy or indulging in some opportunistic behavior in order to exploit the consumers as a necessary condition, however, the indispensability of such a condition has been highly contentious and various courts have opted otherwise<sup>159</sup> and instead of citing "post sale policy change" as a pre- requisite for lock-in, have stated lock-in to be the cause for inciting firms to indulge in "post- sale" policy change. Switching costs and information asymmetry however, have been concretely settled to be essential factors in deciphering an aftermarket lock-in and the dominant character of the firm causing such lock-in both in U.S. as well as in India. As far as India is concerned, Section 19(4) of the Act enumerates certain factors based on which the dominance of a firm can be adjudged but this enumeration is not exhaustive; pursuant to Section 19(4)(g) and 19(4)(m), discretion has been provided to CCI to consider any factor which it may find relevant in determining the dominant position of the firm, this particular provision is the route through which CCI has successfully imported the factors such as higher switching costs and information asymmetry into the Indian jurisprudence while establishing the dominant nature of firms in various cases, primary being the *Belair* case<sup>160</sup> where CCI (dissenting) had explained that:

*"the word 'otherwise' mentioned in Section 19(4)(g) is very pertinent. In this particular case, dominance is acquired through the agreement. Further, provisions of the Section 19(4) defines factors which CCI has to consider in its order. The Section is inclusive and therefore has to be given wide interpretation. In fact Section 19(4)(m) talks of any other factor which CCI may consider relevant for the inquiry. Therefore while determining abuse of dominance CCI is entitled to consider any other factor which shows that the enterprise is in a dominant position to affect its competitors or consumers or the relevant market in its favour....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.S.C. in the case of Eastman Kodak has been incorporated in the explanation to Section 4 read with Section 19(4) of the Act."*

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<sup>159</sup> *Red Lion Med. Safety, Inc. v. Ohmeda, Inc.* 63 F. Supp. 2d 1218 (E.D. Cal. 1999).

<sup>160</sup> *Supra* note 7.

Thus, based on any of these factors once the dominance is established and any act in contravention of Section 4 of the Act associated with such dominance takes place, there is a sufficient ground to impose liability under the same.

### Abuse

"The concept of abuse of dominant position of market power refers to anti-competitive business practices in which a dominant enterprise may engage into maintain or increase its position in the market."<sup>161</sup> The abuse may result in the restriction of competition, or the elimination of effective competition. Further, Section 4(2)(a to e) has enumerated certain specific abuses of a dominant position and an explanation attached to the instant provision specifies that these conditions are neither unfair nor abusive when their imposition is a legitimate competition need. These provisions provide ample room for abuse to manifest itself in various ways. For instance, tying of services with purchase of spare parts in the spare part market<sup>162</sup> or forfeiture of "token" amount on account of cancellation of an apartment booking<sup>163</sup> or simply not specifying completion date for the project in the buyers' agreement are manifestations of abuse as imposition of "unfair conditions" upon the purchaser, the same being prohibited under Section 4(2)(a). These factors are also responsible for restricting the entry of other competitors into the market, thereby violating Section 4(2)(c) of the Act. Abuse can only be established once the dominance of the accused firm within the relevant market is proved. Criticisms have been raised against delineating the aftermarket itself as the relevant market, since dominance in such a market shall always be an "*almost inevitable by-product of innovation or attempts to create product differentiation: some key components will have been specially engineered, may be protected by intellectual property rights, and are therefore not produced by anyone else*"<sup>164</sup>. The incorporation of the doctrine of aftermarket abuse in the Indian real estate sector has received similar criticisms, whereby it has been erroneously assumed that if this doctrine be incorporated by CCI in determining liability of real estate firms, then every case against such a firm which comes before the CCI will be decided against it. In such a scenario, every firm in India will be held to be abusing his dominant

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<sup>161</sup> *Supra* note 13 at 290.

<sup>162</sup> *Supra* note 1.

<sup>163</sup> *Supra* note at 7.

<sup>164</sup> Daniel M. Wall, 'Aftermarket Monopoly Five years After Kodak' 11 Antitrust (1996-1997), 32-33.

position. However, it is pertinent to clarify that even if the said is true, i.e. a real estate firm shall always be invariably dominant in the aftermarket created once the buyers' agreement is executed, this is no criticism at all, since, "*acquiring a dominant position is not prohibited, only its abuse is prohibited.*"<sup>165</sup> Simply put, merely because a firm is deemed dominant in the aftermarket, the same is not automatically liable for abuse, it is only when such a firm indulges in any subsequent anti- competitive activities, that it shall be made liable under the Act.

**NECESSITY TO ACKNOWLEDGE THE DOMINANT POSITION OF THE REAL ESTATE PLAYERS IN THE AFTERMARKET- ESSENTIAL FOR CONSUMER WELFARE**

*"When competition occurs in a market, firms strive to attract business by meeting the needs of consumers more effectively than their competitors. This is mutually beneficial to consumers and firms. Competition provides consumers with low prices, high quality, wide variety, and innovative products. Firms are rewarded with more business and higher profits, presuming they provide better goods and services than their rivals."*<sup>166</sup>

This simply implies that the consumers in a way provide the greatest incentive for encouraging the existence of a healthy competition in the market. Therefore, preserving consumer welfare is one of the objectives behind implementing competition laws and same has been enumerated as one in the Preamble to the Act. In light of the above, incorporation of the theory of aftermarket abuse in the Indian competition jurisprudence would enable CCI to acknowledge the ground realities that prevail in the Indian markets, i.e. how a common man fights a battle everyday to secure a shelter for himself and his family against profit making corporate giants and also the fact that yes, even if these real estate agents may not be dominant in their respective markets, they are dominant over consumers who are depending upon them for their houses and investing their hard earned salaries with them. It is not a question of why competition law remedies when consumer protection remedies are in place, rather it is simply the task of abiding by what the legislature felt is an important asset of competition law i.e., protection of consumer welfare. As has already been stated, aftermarkets are characterised by locked-in, vulnerable consumers, if not the competition law, then the

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<sup>165</sup> *Supra* note 14 at 143.

<sup>166</sup> Luke Garrod and others, '*Competition Remedies in Consumer Markets*' 21 *Loy. Consumer L. Rev.* 439 (2008-2009).

only recourse available to these consumers is the Consumer Protection Act, 1986; however, such a *recourse is only curative and is not adequate to address all the concerns of the buyers and promoters in that sector*<sup>167</sup>. Simply put, a consumer law remedy shall only cause a ripple in the market that shall stay restricted to the person seeking the relief, whereas, if the same be scrutinised under competition laws, the outcome would cause a considerable impact upon the entire market i.e. ensuring safe guards and remedies for all the consumers in that market in general. Exploitative manifestation of abuse of dominance whereby abuse is directed at exploiting the consumers has already been recognised<sup>168</sup> and acknowledging aftermarket abuse simply corroborates such recognition. These are not just buyers' agreement violations, rather are instances of abuse by a firm dominant over consumers in the relevant market and therefore must attract the prohibitions under Section 4 and the subsequent penalties enumerated in the Act.

### CONCLUSION

Aftermarket abuse has already been recognised in various jurisdictions as manifesting itself in varied fields of the market. It has established itself as an effective tool for realisation of consumer grievances accruing out of anti-competitive tendencies of corporate giants. The underlining reasoning behind the functioning of this theory is that every real estate player is, from the perspective of a prospective buyer in a rather dominant position, irrespective of its position in the market and such prospective buyer is in a rather submissive position given to acute shortage of housing options available in India coupled with the exorbitant real estate rates. Incorporating this theory is the rightful acceptance of the fact that if a consumer is locked-in with respect to his investments, the firm so locking in the consumer is by default dominant over such a consumer and the consumer prone to abuse by such firm. Therefore, it is of immense importance that this theory be accepted in full force in order to limit and prevent further exploitation of consumers in such markets.

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<sup>167</sup> *Shri Jyoti Swaroop Arora v. Tulip Infratech Ltd. and Ors.* (2015) Comp L.R. 109 (C.C.I.).

<sup>168</sup> *Supra* note 13 at 284.