

ABUSE OF DOMINANCE UNDER THE COMPETITION ACT:**The Need for a Competitive Effects Test**

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ABSTRACT:

On a plain reading, the business practices listed in Section 4 of India's Competition Act are condemned as abusive per se, without the need to prove their anti-competitive effects. This note argues that even though the Competition Commission of India ["CCI"]) has intermittently applied a test for anti-competitive effects in its decisional practice, the Competition Act, 2002 ["the Act"] needs to be amended so as to mandate it. The wording of Section 4 creates confusion by not distinguishing between exclusionary abuses that harm competition, and exploitative abuses that might be objectionable even if competition is not impaired. I show how there are alternative remedies for exploitative abuse, while several of the practices listed in Section 4 need not be exclusionary, and even if they are, there may be offsetting efficiency benefits or objective justifications for them. I also draw attention to the possible complications that may arise in the implementation of Section 4 in conjunction with other sections of the Act. I conclude with a suggestion for a minimal amendment that will not impose an excessive enforcement burden on the CCI.

I. INTRODUCTION: EXCLUSIONARY VS EXPLOITATIVE ABUSE

This short note provides a much more elaborate version of the arguments I made in my dissenting 'Observations' as a member of the Competition Law Review Committee.¹²² I would like to restate and reinforce them here in the hope of stimulating a debate while the Competition (Amendment) Bill, 2022 ["the Bill"], is before Parliament. Even if the following suggestions are not implemented, I hope that this note will clear the air on the possible misapplication of the crucial Section 4 of the Act, which deals with 'abuse of a dominant position'. Commentators have opined that once dominance of the enterprise is established, Section 4 as it stands condemns the practices listed in Section 4(2)(a) to (e) as abusive *per se*.¹²³ This amounts to a 'form-based' assessment of market conduct, which has given way in

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¹²² Government of India, Ministry of Corporate Affairs, *Report of the Competition Law Review Committee*, July 2019, p.191.

¹²³ This was first pointed out, before the Act came into force, in Subhadip Ghosh and Thomas Ross, 'India's New Competition Law: A Canadian Perspective' (2008) 23 Canadian Competition Record 23. It was restated,

most jurisdictions to an ‘effects-based’ assessment based on the rule of reason. The latter would require an evaluation of the effects of the impugned conduct on competition, including offsetting gains in efficiency. In its decisional practice, the CCI has inconsistently applied both form and effects-based approaches.¹²⁴

The problem with Section 4 of the Act is that it tries to cover two types of abuse of a dominant position without recognizing the distinction between them. The focus of a competition law should be on ‘exclusionary abuse’, that is, business practices that prevent or reduce competition by excluding existing or potential competitors. But unlike Sections 3 and 6, which deal with anti-competitive agreements and combinations, Section 4 does not require the CCI to establish that the dominant enterprise’s conduct has created, or is likely to create, an Appreciable Adverse Effect on Competition [“AAEC”]. The likely reason for the omission of an ‘effects test’ in this section was that the drafters wanted the same section to cover ‘exploitative abuse’, that is, business practices that harm consumers through high prices, poor quality, or unfair contractual conditions, *without* necessarily harming competition. Competition law is usually not the appropriate remedy for such abuses. If entry into the market is feasible, the market mechanism itself provides the remedy. The dominant firm’s high profits should attract fresh entrants, who can take its customers away by offering the product or service with lower prices, better quality or more balanced contractual terms. If this is not happening, then it is possible that the incumbent producer is discouraging entry in ways that could be regarded as exclusionary abuse.

II. ALTERNATIVE REMEDIES FOR EXPLOITATIVE ABUSE

On the other hand, the relevant product market may be characterized by inherent features that discourage entry, such as high setup costs, network effects, or licensing restrictions. In such cases, remedies should be available in the form of sector-specific regulations that specify entry conditions, prices, interconnectivity, quality, and terms of service. Matters become more complicated if entry is prevented because the dominant firm possesses legally-recognized intellectual property rights, which it might ‘abuse’ without the threat of competition. There is then a trade-off between incentives for innovation versus consumer

with some additional arguments, in Aditya Bhattacharjea, ‘India’s New Competition Law: A Comparative Assessment’ (2008) 4 J Competition Law and Econ 609, 630-31, reprinted in Eleanor Fox and Abel Mateus (eds), *Economic Development: The Critical Role of Competition Law and Politics*, (Edward Elgar, 2011).

¹²⁴ See Payal Malik et al, ‘Legal Treatment of Abuse of Dominance in Indian Competition Law: Adopting an Effects-Based Approach’ (2019) 54 Rev Industrial Organization 435. This article noted a gradual movement in CCI jurisprudence towards an effects-based approach, but the more recent cases cited below suggest that the form-based approach is still decisive in some cases.

welfare. A full discussion of this trade-off would be beyond the scope of this note, but even for such cases, remedies such as price controls, manufacturing standards, parallel imports, or compulsory licensing can be considered. Competition law is usually not fit for purpose, and should be resorted to only if there are institutional gaps in the country's regulatory architecture that preclude such remedies.¹²⁵

One such gap that has been identified in many jurisdictions is the dominance of giant digital platform intermediaries, whose advantages in terms of two-sided network effects, amassed user data, and consumer switching costs, make it almost impossible for fresh entrants to break into their markets and earn profits. The CCI has a few decisions and several pending enquiries against platforms for Section 4 offences, but until these matters attain finality after going through the protracted appeals process, there will be no decisive insight about the efficacy of competition law remedies. In bringing out a market study that flagged the issues, the CCI seemed to be encouraging e-commerce firms to regulate their own behaviour.¹²⁶ Meanwhile, other regulators started intervening in competition issues in this space.¹²⁷ However, a Parliamentary committee recently recommended that a new Digital Markets Division in the CCI should co-ordinate the different regulatory bodies governing e-commerce; the CCI should issue guidelines on different standards it would apply to abuse of dominance, and formulate a regulatory code of conduct, containing ex ante prohibitions for enterprises in the sector.¹²⁸ This follows on the heels of the growing shift in advanced economies towards ex-ante regulation (as in the European Union's Digital Markets Act) rather than the ex-post, case by case approach of competition law enforcement, whose timelines are far too long as compared to the rapid changes in technologies, business models, and market structures in the new economy. The regulatory architecture is still evolving in many jurisdictions, as apprehension grows about the power of the giant platforms. The rest of

¹²⁵ For example, in the absence of a regulator for the real estate sector, the CCI imposed one of its largest-ever fines on a property developer for forcing one-sided contracts on buyers—a case of exploitative abuse—in the case of *Belaire Owners' Association v. DLF Limited & Ors*, Case No. 19 of 2010 (Competition Commission of India, August 12, 2011). Presumably, with the passage of the Real Estate (Regulation and Development) Act, 2016, this particular regulatory void has been filled, so the CCI has not ventured to make similar orders in recent years.

¹²⁶ Competition Commission of India, *Market Study on E-Commerce in India: Key Findings and Observations*, January 2020. <https://www.cci.gov.in/economics-research/market-studies>.

¹²⁷ For a survey of developments in different jurisdictions, and initiatives by different Indian government departments, see Vedika Mittal Kumar and Manjushree R.M., *Fair and Competitive E-marketplaces (F.A.C.E.): The Business Users' Narrative*, Working Paper, Vidhi Centre for Legal Policy (2021).

¹²⁸ See Parliament of India, Standing Committee on Commerce, *Rajya Sabha Secretariat, Report No. 172, Promotion and Regulation of E-Commerce in India*, June 2022, especially paras 7.8, 8.3 and 9.7.

this note, therefore, is limited to the application of Section 4 of the Act to firms that are dominant in sectors of the ‘old economy’.

III. ABUSE OF DOMINANCE IN SECTION 4 OF THE ACT, AND THE CCI’S DECISIONAL PRACTICE

Let us begin by examining in more detail how abuse of a dominant position is treated in Section 4.¹²⁹ Section 4(1) simply states that “*No enterprise or group shall abuse its dominant position*”. Section 4(2) then declares that “*There shall be an abuse of [a] dominant position under subsection (1) if...*” (emphasis added), and goes on to specify, in five clauses, various kinds of behaviour that constitute abuse. The concatenation of these two subsections gave rise to the supposition that those five types of conduct would be regarded as abusive *per se*, without any test for an AAEC.

The five types constitute a mixed bag. Each of the clauses describes business behaviour that could be exploitative or exclusionary or both, but not necessarily harmful. Section 4(2)(a) deals with unfair or discriminatory conditions or prices, explicitly including predatory prices. Elementary economics tells us that price discrimination is not necessarily harmful, and can even be beneficial by allowing an enterprise to reap economies of scale, or to serve low-income consumers who might be unable to afford a uniform non-discriminatory price. Even attempts at predatory pricing will benefit consumers, without necessarily driving out competitors. Discriminatory conditions or supplementary obligations in a contract (the latter are covered by Section 4(2)(d)) can also be objectively justified, for example to protect the dominant firm’s reputation or intellectual property.

The CCI heard, but did not accept, economic arguments justifying price discrimination in recent cases that involved Grasim, the dominant producer of Viscose Staple Fibre [“VSF”]. Grasim’s discriminatory discounts on sales of VSF to yarn spinners, for whom it was a non-substitutable input, were held to contravene Section 4(2)(a), while its imposition of contracts on the spinners, requiring them to provide data on their production and sales, was held to violate Section 4(2)(d). Several passages in the CCI orders suggest that the CCI viewed any discrimination by a dominant firm as necessarily anti-competitive, even though the adverse effect on competition, if any, would have been among the spinners in their downstream market for yarn (so-called ‘secondary line injury’). But the CCI failed to develop a theory of

¹²⁹ In most cases, establishing that the enterprise is dominant in the relevant market is a condition precedent to finding that it has abused its dominance. However, in this note I do not discuss how a dominant position is defined in the Act, or how the CCI has operationalized this problematic definition in its decisional practice.

harm. Strangely, while Grasim acknowledged that price discrimination was a profit-maximizing strategy, the CCI held it to be “irrational”.¹³⁰ Grasim’s practices may well have caused a competitive injury further down the supply chain leading from VSF to yarn to cloth to garments and finally to consumers, especially since it seemed to be discriminating in favour of spinners who exported their product, possibly at the cost of those who sold it in the domestic market. But no such competition analysis was undertaken by the CCI, even though a much earlier verdict by the erstwhile Competition Appellate Tribunal seemed to require it in a very similar case of discriminatory pricing.¹³¹

Before proceeding any further, the similarities and differences between the wording of these two clauses of Section 4(2) and the corresponding clauses of Article 102 of the Treaty on the Functioning of the European Union [“TFEU”] are worth noting. Section 4(2)(d) is taken verbatim from Article 102(d). But Section 4(2)(a) clubs together the prohibitions of *unfair prices or trading conditions* in Article 102(a) with the 102(c) prohibition of “*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*”. Thus, discrimination is treated as a violation under European competition law only if it affects competition, but there is no such statutory restraint in Indian law. (Although it must be acknowledged that the decisional practice of both the CCI and the European Commission has not always adhered to the scheme of their respective governing statutes.)

Moving on to Section 4(2)(b), this is a close paraphrase of Article 102(b) TFEU, but it cannot be easily classified. It covers acts that limit or restrict “*production of goods or provision of services or market therefore ..., or technical or scientific development relating to goods or services to the prejudice of consumers*”. If the conduct of the dominant firm limits or restricts supply or innovation by existing or potential competitors, it is clearly exclusionary. On the other hand, if it restricts its own supply or innovation (as a monopolist would), it might be

¹³⁰ In Re: XYZ and Association of Man Made Fibre Industry of India and Ors. (Case No. 62 of 2016, Competition Commission of India, 16 March 2020). See especially para 104 on Grasim’s justification, and paras 112-117 for the CCI’s reasoning on entirely different grounds. Grasim’s price discrimination and contractual clauses were again held to contravene ss 4(2)(a) and (d) in *Informant v Grasim Industries Ltd.* (Case Nos. 51, 54 and 56, Competition Commission of India, 6 August 2021). See especially para 33, which declared that “...a dominant entity, manufacturing and supplying an indispensable input/raw material to downstream domestic spinners, is entrusted with a special responsibility not to discriminate amongst its buyers”. The problematic doctrine of the “special responsibility” of a dominant firm, followed in European Union cases since the 1980s, has been inconsistently applied by the CCI. See Bhawna Gulati and Ikleen Kaur, ‘How ‘Special’ is the ‘Responsibility’ of Dominant Enterprises?’ [2020] 5 ICLR 1.

¹³¹ *Schott Glass India Pvt. Ltd. v Competition Commission of India* (Appeal No. 91/2012, Competition Appellate Tribunal, 2 April 2014). An appeal by the CCI against this order is pending in the Supreme Court.

regarded as exploitative, but the remedy should be sought in domains other than competition law, as specified above.

Section 4(2)(c) covers “*practices resulting in denial of market access in any manner*”, which seems to cover clearly exclusionary conduct. But in the absence of a competitive effects test, it can easily be misapplied. In the second case involving Grasim discussed above, denial of any discount on VSF to a particular spinner was held to violate this clause because it rendered the spinner uncompetitive in its downstream market. The CCI equated this with ‘refusal to deal’, which it regarded as an exclusionary abuse, once again because of the “special responsibility” of the dominant supplier. The CCI did not conduct any assessment of competition in the downstream market with one less producer, and disregarded Grasim’s argument that it was involved in a commercial dispute with that particular buyer.

In a notable judgment in a different case, the Supreme Court took a more nuanced view of Section 4(2)(c). A group of multi-system operators [“**MSOs**”] that dominated the cable TV market in Punjab and Chandigarh had terminated its agreement to carry a particular news channel, on the grounds that the latter’s TRP ratings were extremely low. The CCI had held that this was a denial of market access and imposed a stiff monetary penalty. The Appellate Tribunal set aside this order on the grounds that the cable operators were not in competition with the news channel, so there could be no contravention of either Sections 3 or 4. The CCI appealed to the Supreme Court, which held that “once a dominant position is made out on facts, whether a broadcaster is in competition with MSOs is a factor that is irrelevant for the purpose of application of Section 4(2)(c)”.¹³² The Court upheld the CCI’s finding of a contravention of Section 4(2)(c), but went on to accept the respondent MSOs’ argument that the TV channel was dropped because its low ratings, and set aside the monetary penalty. If the wording of Section 4 had required an AAEC test from the start, this protracted litigation and its awkward outcome could have been avoided.

Finally, Section 4(2)(e) covers the misuse of a “*dominant position in one relevant market to enter into, or protect, other relevant market*”. This is a form of business conduct which is called ‘leveraging’ in economics. A standard example of leveraging is tying the sale of a product in which the firm is dominant to another product in which it faces competition. This practice may be exclusionary, but cannot be routinely condemned as abusive; there may be

¹³² Civil Appeal No.7215 of 2014, *Competition Commission of India v M/s Fast Way Transmission Pvt. Ltd. & Ors.*, (2018) 4 SCC 316, para 11.

objective justifications such as quality assurance, customer convenience, or cost savings in joint production and sales, so the rule of reason should be applied on a case-by-case basis.

IV. OTHER PROBLEMATIC SECTIONS OF THE ACT

The open-ended wording of Section 4 has thus allowed for inconsistent and erroneous interpretations. Greater clarity, in the form of a mandatory AAEC test, is therefore desirable. This is all the more important because Section 28 of the Act empowers the CCI to break up an enterprise to ensure that it does not abuse its dominant position—without requiring any evidence that it has actually done so. Fortunately, the CCI has never used this section, but there is no guarantee that it will not be abused in the future. In the author's opinion, Section 28 should remain on the books, but be very sparingly used when competition is seriously threatened, and no other remedy is feasible.

Yet another reason for incorporating an AAEC test into Section 4 is that the section as it stands is inconsistent with Section 32, which extends the jurisdiction of the CCI to cover "*Acts taking place outside India but having an effect on competition in India*". The text of the section further makes it explicit that it covers abuse of a dominant position "*if it has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India*". This means that an AAEC test is required to prove abuse of a dominant position by an enterprise which is based abroad, but not required for similar conduct by an enterprise which is based in India. This puts domestic firms at a disadvantage, by leaving their conduct open to condemnation as abusive *per se*, while identical conduct by foreign-based firms will be adjudged under the rule of reason.

V. SOME SUGGESTIONS

Incorporation of an AAEC test into Section 4 is therefore necessary on multiple grounds. Two possible objections to this might be that, firstly, it will put an excessively high burden of proof on the CCI to establish an AAEC; and secondly, it will prevent the CCI from taking up cases of exploitative abuse which cannot be addressed by other means. In order to avoid the first problem, the specific types of conduct listed in Section 4 can be treated as *presumptively* anti-competitive, like the specific types of agreements listed in Section 3(3). This puts the burden of proof on the Opposite Party to rebut the presumption, or provide an objective justification for the practice. As in cases involving agreements, the CCI can evaluate this rebuttal/justification with reference to the factors already specified in Section 19(3). Only a

few words will need to be inserted into Sections 4(2) and 19(3) to enable this. As for the second problem, there is a proposal in Section 14(b)(ii) of the Amendment Bill, which is now before Parliament, to amend Section 19(3)(d) of the principal Act so that the Commission can have due regard to “benefits *or harm* to consumers” (emphasis added). This would cover exploitative as well as exclusionary abuses, if it is not feasible to rewrite Section 4 completely so as to disentangle them, with an AAEC test for the latter.

VI. CONCLUSIONS

The modest amendments suggested in this note would reduce the chances of ‘false positives’, while enhancing legal certainty and the Ease of Doing Business, without imposing an unnecessary burden on the CCI. By bringing the Act into line with international norms, it would provide a familiar template to foreign firms in assessing regulatory risks associated with setting up business in India, while levelling the playing field which at present is tilted against domestic firms, thanks to Section 32 of the Act.

Postscript (26 December, 2022)

The original version of this note was submitted to this journal on 18th October 2022. Thereafter, on 4th November, the author was invited to appear as an independent witness before the Parliamentary Standing Committee on Finance, where he gave his views on several aspects of the Competition (Amendment) Bill. In its report, presented to Parliament on 13th December 2022, the Committee has recommended amendment of Sections 4 and 19(3) along the lines suggested above.¹³³ It remains to be seen whether the Ministry of Corporate Affairs includes these amendments in a revised version of the Bill, and whether they are passed by Parliament.

¹³³ Parliament of India, Standing Committee on Finance, Seventeenth Lok Sabha, 52nd Report, Lok Sabha Secretariat, *The Competition (Amendment) Bill, 2022*, para 3.80.