AN ANALYTICAL STUDY ON ABUSE OF DOMINANT POSITION UNDER COMPETITION ACT, 2002

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ABSTRACT

This paper presents a comprehensive analysis of the concept of abuse of dominant position under the Indian Competition Act, 2002, with comparative references to international frameworks, especially the European Union's Article 102. The study delves into the statutory provisions, interpretative guidelines, and judicial pronouncements that have shaped the enforcement landscape in India. It identifies the criteria for determining dominance and the types of abusive conduct, such as predatory pricing, denial of market access, tie-in arrangements, and discriminatory practices. The role of the Competition Commission of India (CCI) in investigating and remedying anti-competitive conduct is critically examined, highlighting procedural nuances under Sections 19, 26, 27, and 28. Using landmark judgments like Belaire Owner's Association v. DLF Ltd. and CCI v. SAIL, the paper illustrates how the law balances market freedom and consumer protection. Additionally, it discusses exclusionary and exploitative abuses with detailed case insights. The study concludes by emphasizing the need for a nuanced approach that encourages innovation and competition while deterring anti-competitive behaviour. It contributes to the academic and policy discourse on fostering fair competition in India's evolving market economy.

Keywords: Abuse of dominance, Competition Act, CCI, predatory pricing, market access, anti-competitive practices, relevant market, dominant position.

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Introduction

Dominant means "more important, strong or noticeable than anything else of the same type"[1] In every market, certain enterprises enjoy a position of dominance due to technological advancements or economic advantages.

Once an enterprise enjoys a dominant position, there is a general presumption among the public, that such enterprise abuses its dominant position to suppress competition. However, under Competition Act, 2002, an enterprise enjoying a dominant position is not generally presumed to be involved in anti-competitive practice. It is only when an enterprise abuses its dominant position; it is considered to be anti-competitive.

In substance, 'dominant position' means the "position of strength" enjoyed by an enterprise that enables it to "act independently of competitive forces prevailing in the relevant market".[2] Such an enterprise will be in a position to disregard market forces and unilaterally impose trading conditions, fixing prices, etc. The abuse may result in the restriction of competition, or the elimination of effective competition. Some of the various forms of abuse are: price-fixing, imposing discriminatory pricing, predatory pricing, limiting supply of goods or services, denial of market access, etc

Section 4 in the Competition Act, 2002 deals with the "abuse of dominant position" in India. The previous law – The Monopolies and Restrictive Trade Practices Act, 1969 did not have any provision dealing with the abuse of dominance. This aspect is introduced for the first time through the Competition Act. The provision is similar to Article 102 of the European Union that deals with the "abuse of dominant position" within the internal market of the Union. The Indian law has taken into consideration the international practices.

List of provisions connected to "abuse of dominant position".

Serial No.	**Section**	**Title**
1.	Section 4	"Abuse of dominant position"

[1] Cambridge Advanced Learners' Dictionary (Third Edition), 2008
[2] Defined under Section 4 of Competition Act, 2002.

2.	Section 19	"Inquiry into certain agreements and dominant position of enterprise"
3.	Section 26	"Procedure for inquiry under Section 19"
4.	Section 27	"Orders by Commission after inquiry into agreements or abuse of dominant position"
5.	Section 28	"Division of enterprise enjoying dominant position"

Abuse of dominant position

Section 4 deals with the "abuse of dominant position". Section 4 has two sub sections. It contains some conditions, explanations and definitions of certain terms. Sub section 1 of section 4 prohibits abuse of dominant position in the following words: "no enterprise or group shall abuse its dominant position."

The word "enterprise" is defined in Section 2(h) as a person or a department of the Government that is involved in business activity. The definition doesn't cover the activities of the Government that fall under the sovereign functions of the Government. For instance, a public sector undertaking that is involved in some business activity is covered under this definition. But a department of the Government that deals with the atomic energy would not fall under this definition, since it comes under the sovereign function.

Sub section 2 of Section 4 lists out the situations in which abuse of dominant position happens for the purpose of sub section 1.

It lists out five major abuses and they are:

A. Unfair or discriminatory actions

The unfair or discriminatory condition may be imposed directly or indirectly. There are two types of unfair or discriminatory actions. First, an unfair or discriminatory condition in buying or selling of goods or services. Secondly, unfair or discriminatory pricing of goods or services. Such discriminatory pricing includes predatory price. The term "predatory price" is defined in the explanation. There is an explanation under this clause that exempts the discriminatory price or condition that is done to promote competition.

B. limits or restrictions

There are two types of limits mentioned here. First, limiting the production of goods or services. An example for such practice is, a cement manufacturing enterprise which has the capacity to manufacture 100 bags of cement every day, reducing the manufacturing to 50 bags in order to create more demand and price rise. Secondly, "limiting scientific or technical development relating to goods or services to the prejudice of consumers." Scientific and technological developments are usually beneficial to the public. Any restrictions on such developments are bad to the public and hence are scorned / frowned / discouraged by the law.

C. Denial of market access

A person who intends to start a business will have to do it in the market. For example, a farmer in a village will have to come to the nearest market to sell his produce. If the access is to the market is restricted, the farmer will be unable to sell his produce. If the market is far, it affects the profit margin. Access to the market is crucial to doing a business. If any enterprise uses indulges in practices that will lead to the denial of market access, it is considered as an abusive conduct.

D. Conditional contracts

Business transactions are carried out by entering into contracts. Contracts are entered by way of free consent. If an enterprise, "makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to the commercial usage, have no connection with the subject of such contracts" it is considered as an abuse.

E. Using dominant position for market entry

At times, an enterprise would be dominant in one market. It can use that dominant position to enter another market or to protect another market. This too is considered as an abuse under Section 4.

The explanation appended to Section 4 defines 3 terms:

a. Dominant position

b. Predatory price

c. Group

"Dominant position" is defined as the "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 dominant position should be proved in a relevant market.

"Predatory price" is the setting of price of goods or services at a level that reduces or eliminates competition. The level of price has to be below the cost of the goods or services. Calculation of the cost of goods or services is to be based on the regulations made by the Competition Commission of India from time to time. The meaning for the word "group" should be construed in the same way as mentioned in Section 5(b) of the Competition Act, 2002.

Determination of Cost

Section 64 of the Competition Act, 2002 gives power to the Competition Commission of India to make regulations for determining "cost" that is mentioned while defining "predatory pricing". In exercise of the powers conferred, the Commission has made a regulation titled "The Competition Commission of India (Determination of Cost of Production) Regulations, 2009.[3] The regulation defines "total cost" as "actual cost of production" and takes into consideration items like:

a. Cost of material consumed

b. Direct wages and salaries

c. Direct expenses

d. Work overheads

e. Quality control cost

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[3]Competition Commission of India, Notification No. L-3(5) Reg-Cost/2009-10/CCI, dated August 20, 2009, published in the Gazette of India, Extraordinary, Part III, Section 4, dated 20th August, 2009, pp. 3-4, No. 146.

f. Research and development cost

g. Packaging cost

h. Finance and administrative overheads

If an enterprise has dispute with the cost determined by the Commission, the enterprise may request the Commission to appoint experts to determine the cost.

Inquiry into anti-competitive agreements

Section 19 talks about the inquiry into anti-competitive agreements[4] and abuse of dominant position.[5] Clause 1 says that the Commission may initiate an inquiry based suo motu or it may start the inquiry on the receipt of complaint or information by consumers, trade associations, reference by State and Central Governments.

Clause 3 gives the guidelines for determining whether an agreement causes adverse effect on competition in India. Clause 4 gives the guidelines for determining the "dominant position" status for an enterprise. Clause 5 states that for the purposes of determining whether a market is a "relevant market" for determining the "abuse of

dominant position", due regard shall be given to "relevant geographic market" and "relevant product market". Clauses 6 and 7 give the criteria for determining the relevant geographic market and relevant product market.

Procedure for inquiry under Section 19

Section 26 gives the "procedure for inquiry under Section 19". Clause 1 states that on the receipt of information under Section 19, if the Commission feels that there is merit in the case, it can request the Director General to investigate into the matter. Clause 2 states that where the Commission finds that no case exists for the investigation, the Commission may pass on order closing the matter and send a copy to the parties who provided the information under Section 19. Whenever the Commission requests the Director General to undertake an investigation, it is the duty of the Director General to perform the investigation and submit

[4] Sec. 3 of Competition Act, 2002.
[5] Sec. 4 of Competition Act, 2002.

the report of findings to the Commission within a time limit as fixed by the Commission. The Commission, on receiving the report shall forward the report to the concerned parties.

If the Director General gives a report that there is no case for further action, the Commission should ask the concerned parties to file objections if any. After examining the objections, if the Commission feels that there is a need to hold further investigation, it can direct the Director General to hold further investigations. If the investigation reveals that there is violation of the Act, the commission shall initiate an inquiry.

Orders by Commission after inquiry

Section 27 deals with "orders by Commission after inquiry into agreements or abuse of dominant position". This provision provides types of actions that can be taken by the Commission after inquiry if it finds an enterprise violating Sec. 3 or Sec. 4 of the Act. The Commission may direct the enterprise that is involved in the abuse of dominant position to stop such abusing activities. The Commission can also direct the enterprises that are planning to enter into an anti-competitive agreement to stop the process.

The Commission may impose a penalty. The penalty will be imposed on each of the firm involved in the violation of Sec. 3 and Section 4. The penalty can be up to 10 % of the average turnover of the firm for the last three years. In cases where the enterprises continue to violate Section 3 repeatedly, the penalty can be three times of the annual profit. This is done to prevent the continuance of the violation by certain firms.

The Commission may direct the enterprises to modify the terms of the agreements so as to comply with the provisions of the Act. The Commission also has the power to ask the firms to pay the costs of the enquiry wherever violations are found. The Commission also has been given the power to pass "such other order or issue or such directions as it may deem fit". This is a wide power given to the Commission and the Commission has the discretion to pass such orders as it seems fit.

Division of enterprise enjoying dominant position.

Section 28 provides power to the Commission to divide an enterprise that enjoys a dominant

position. As per this provision, the Commission can take steps to divide an enterprise, so that it doesn't continue with the abusive practice. Division of enterprise is done only in rare circumstances. For the purpose of division of the enterprise, the Commission has the power to modify the contracts, modify the share holdings, winding up of a firm or creating a new firm. A person losing his position due to the division of an enterprise will not have the power to claim any compensation.

Steps for Determining Abuse of Dominance

The Competition Commission of India determines the abuse of dominant position by following the three broad steps:

Identification of relevant market

Determination of dominant position

Identification of abusive conduct

In the following part, the theory relating to the relevant market and dominant position are discussed. And then, the case laws from different sectors pertaining to dominant position and relevant market are analysed. Thereafter different types of abusive conducts are discussed with the help of cases.

Relevant Market

Determining the relevant market is the first step in determining the abuse of dominant position. It is required to determine two kinds of market here:

The market where the enterprise has a dominant position

The market where the enterprise wields its abusive / anti-competitive conduct

At times, both these markets may be same. For example, an enterprise which has a dominant position in the geographical territory of Karnataka can carry abusive conduct in the geographical territory of Tamil Nadu. A market can be defined as, "a place or institution in which buyers and sellers of a good or asset meet. A market can originally a physical location, and still is for some goods. For example, cattle or fish markets. In other cases, the market is

a network of dealers linked by telephone and computer, following common trading rules and conventions.” There are two types of market that are relevant for Section 4 – product market and geographical market. Section 2(r) declares that the relevant market can be decided by taking into consideration the product market or geographical market or with a combination of both the markets.

Geographical Market

“Relevant geographic market” is defined 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 homogenous and can be distinguished from the conditions prevailing in the neighbouring areas”[6]

Product Market

“Relevant product market” is defined 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 products or services, their prices and intended use.”[7]

Dominant Position

Dominant position is basically a “position of strength, enjoyed by an enterprise”[8] and this position of strength makes it possible for the enterprise to either –

operate independently of competitive forces; or

affect competitors or consumers in its favour.

When an enterprise operates independently of the competitive forces, it can set the price at a level it wants. It can make excessive profits. It can limit a product’s capability in a way to make more profits. For example: X is the lone TV manufacturing enterprise in a market. It can set any price it wants, because the consumers have no option but to purchase TV from this manufacturer. So, the enterprise takes decisions independently. If there are Y and Z who

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[6] Section 2(s) of Competition Act, 2002
[7] Section 2(t) of Competition Act, 2002
[8] Section 4(2)(a) of Competition Act, 2002.

enter as competitors in the TV market, they will sell their TVs with more features and for lesser price, in order to capture the market. In such a situation, the enterprise X cannot take its decision of pricing and features independently. It will have to take into consideration, the new competitors and will be forced to reduce the prices.

In *Belaire Owner's Association v. DLF Ltd.*[9], the Competition Commission has explained this "position of strength" as "this is a higher degree of strength where an enterprise may be freely able to adopt price or non-price strategy to overcome downward pressures on its profit from its competitors, or to capture or bind consumers or to create a market environment that would deter newer competition, both in terms of competing enterprises or rival products."

In *MCX Stock Exchange Ltd. v. National Stock Exchange of India*[10] the Commission opined that the position of strength, "is not some objective attribute that can be measured along a prescribed mathematical index or equation. Rather, it has to be a rational consideration of relevant facts, holistic interpretation of (at times) seemingly unconnected statistics or information and application of several aspects of the Indian economy. What has to be seen is whether a particular player in a relevant market has clear comparative advantages in terms of financial resources, technical capabilities, brand value, historical legacy etc. to be able to do things which would affect its competitors who, in turn, would be unable to do or would find it extremely difficult to do so on a sustained basis. The reason is that such an enterprise can force its competitors into taking a certain position in the market which would make the market and consumers respond or react in a certain manner which is beneficial to the dominant enterprise but detrimental to the competitors."

Abuse of dominant position depends on two factors:

a. Market Share and

b. Entry Conditions

In most of the countries, it is a practice to take into consideration, the market shares as well as other factors into consideration for determining the dominant position.

[9] 2011 Comp LR 239 (CCI).
[10] CCI Case No. 13 of 2009

However, in some countries, a market share triggering point is set, at which the dominant position of the enterprise is presumed.

Supreme Court views on Dominant Position

In the following part, some of the important cases decided by the Supreme Court of India that deal with Dominant Position and Relevant Market have been discussed. Since there are many cases decided by the Supreme Court of India, the researcher has chosen important cases. In the following case analysis, the focus is on the determination of dominant position and market share.

Brahm Dutt v. Union of India[11]

The Supreme Court in Brahm Dutt v. Union of India held that the Competition Commission of India is mainly a regulatory, not a judicial, body. The case of Brahm Dutt v. Union of India (2005) is a landmark judgment delivered by the Supreme Court of India concerning the constitutional validity of the appointment process for the Chairperson and Members of the Competition Commission of India (CCI).

The petitioner , Brahm Dutt, a practicing advocate, challenged the constitutional validity of Rule 3 of the Competition Act 2002.

The Supreme Court declined to strike down the appointment process under Rule 3 of the Rules. The Court accepted the government's argument that the Competition Commission was primarily a regulatory body rather than a judicial body. The Court observed that the Commission performed several adjudicatory.

Competition Commission of India v. Steel Authority of India Ltd.[12]

The case of Competition Commission of India v. Steel Authority of India Ltd. is a landmark judgment that clarified the procedural and substantive aspects of the Competition Act, 2002, particularly concerning the powers of the Competition Commission of India (CCI) and the Competition Appellate Tribunal.

[11] AIR 2005 SC 730
[12] (2010) 10 SCC 744

Jindal Steel and Power Ltd. (Informant) filed information under Section 19 of the Competition Act, 2002 before the Competition Commission of India (CCI), alleging that Steel Authority of India Ltd. (SAIL) had entered into an exclusive supply agreement with the Indian Railways for the supply of rails.

Legal Principles Established

- A direction to investigate under Section 26(1) is an administrative order and not subject to appeal.
- The right to appeal is statutory and cannot be assumed in the absence of express provisions.
- The Commission is required to provide reasons even for an administrative order.
- The Commission is not a necessary party in appeals under Section 53A.
- Interim orders should be passed within a reasonable time and with procedural fairness.

Mahindra Electric Mobility Limited v. Competition Commission of India[13]

The case of Mahindra Electric Mobility Limited v. Competition Commission of India involved a constitutional challenge to various provisions of the Competition Act, 2002 ("the Act"). The petitioners, which included prominent automobile manufacturers, filed writ petitions under Article 226 of the Constitution of India before the Delhi High Court, contesting the constitutionality of certain sections of the Act and specific regulations framed under it.

The case stemmed from a complaint filed under Section 19(1)(a) of the Act, alleging anti-competitive behaviour by major car manufacturers in the spare parts and after-market services sector. The CCI's decision to penalize the manufacturers led to the challenge on the grounds of violating Articles 14 and 21 of the Constitution, lack of procedural safeguards, and inconsistency with principles of natural justice.

The court upheld the constitutional validity of most provisions of the Competition Act, except for Section 22(3) and Section 53E (prior to amendment). It ruled that the CCI's procedure complied with constitutional requirements, and procedural safeguards were sufficient to ensure

[13] 2019 Online Del 8032

fairness. The petitioners' challenge to the penalty procedure and lack of guidelines under Section 27(b) was rejected.

Competition Commission of India (CCI) v. Co-ordination Committee of Artists and Technicians of W.B. Film and Television[14]

In the case of Competition Commission of India (CCI) v. Co-ordination Committee of Artists and Technicians of W.B. Film and Television, addressed a significant issue concerning the scope of the Competition Commission of India's jurisdiction under Section 3 of the Competition Act, 2002. The central question was whether acts of trade associations that restrain the telecast of dubbed television content could be considered anti-competitive agreements affecting competition in the relevant market.

The Supreme Court's ruling is a landmark in understanding how trade union-like entities, when acting in concert with industry players, may fall within the ambit of anti-competitive practices under the Competition Act.

The Supreme Court upheld the original finding of the CCI that the Co-ordination Committee's actions constituted an anti-competitive agreement under Section 3(3)(b) of the Competition Act. The judgment clarified that, Trade associations or collectives of economic actors, even if operating under a trade union structure, cannot shield themselves from competition scrutiny when they affect market dynamics. The notion of relevant market must consider the wider economic effect, not just the immediate act (such as a TV telecast). Concerted action that limits supply, restricts new content, or threatens economic retaliation is anti-competitive under the Act. he appeal was allowed, and the Coordination Committee's actions were declared in violation of the Competition Act, 2002.

Builders Association of India v. Cement Manufacturers Association & Ors.[15]

In one of the most significant cartelisation cases in India, the Builders Association of India (BAI) filed information under Section 19(1)(a) of the Competition Act, 2002 against the Cement Manufacturers' Association (CMA) and 11 leading cement manufacturers, alleging

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[14] AIR 2017 SC 1449; (2017) 5 SCC 17

[15] CCI case No. 29 of 2010

anti-competitive practices in contravention of sections 3 and 4 of the Act.

The case Builders Association of India v. Cement Manufacturers Association & Ors. , originated with a 2009 information filed by the BAI against CMA (OP-1) and major cement companies including ACC, Ambuja, UltraTech, India Cements, JK Cement, and others (OP-2 to OP-12). The Commission, after investigation, passed an order on 20.06.2012, holding the parties guilty of cartelisation under Section 3(3) and directed them to cease from anti-competitive practices. However, this decision was set aside by the Competition Appellate Tribunal (COMPAT) in December 2015, which remanded the matter back to the Commission for reconsideration and fresh adjudication following the law.

The Commission adopted a proportionate penalty approach, imposing 0.5 times the net profits of FY 2009-10 (from 20.05.2009) and FY 2010-11 for each cement company. CMA was fined ₹0.73 crore, being 10% of its average turnover.

Rajasthan Cylinders and Containers Ltd. v. Union of India & Anr.[16]

The Rajasthan Cylinders and Containers Ltd. v. Union of India & Anr. case revolved around allegations of cartelisation and bid rigging by manufacturers of 14.2 kg LPG cylinders in a tender floated by Indian Oil Corporation Ltd. (IOCL). The Supreme Court was called to determine the correctness of findings by the Competition Commission of India (CCI) and the Competition Appellate Tribunal (COMPAT) that 45 LPG cylinder manufacturers had violated Section 3(3)(d) of the Competition Act, 2002.

The appellants in the case, including Rajasthan Cylinders and Containers Ltd., were among 47 companies investigated by the CCI in response to allegations of bid rigging. All these companies were manufacturers of 14.2 kg LPG cylinders supplied to public sector undertakings (IOCL, BPCL, and HPCL). IOCL, holding 48% of the market share, issued a tender for the supply of 105 lakh cylinders for the year 2010–11.

The Supreme Court dismissed the appeals by the LPG cylinder manufacturers and upheld the COMPAT order. It ruled that The appellants had indeed engaged in collusive bidding. The CCI's investigation and findings were sound and based on cogent evidence. The reduced

[16] Civil Appeal No. 3546 of 2014 (SC)

penalties imposed by the COMPAT were appropriate and need not be disturbed.

Samir Agrawal v. Competition Commission of India[17]

The Supreme Court's decision in Samir Agrawal v. Competition Commission of Indiaaddressed pivotal issues under the Competition Act, 2002—primarily concerning the locus standi of informants and the legality of algorithmic pricing by app-based taxi services like Ola and Uber.

The appellant, Samir Agrawal, an independent legal practitioner, filed an information under Section 19(1)(a) of the Competition Act, 2002 before the Competition Commission of India (CCI) in August 2018. He alleged that, ANI Technologies Pvt. Ltd. (Ola) and Uber India Systems Pvt. Ltd., Uber B.V., and Uber Technologies Inc. (Uber) were operating through a pricing algorithm that fixed fares for rides.

These algorithms restricted drivers and riders from negotiating prices, and thereby removed competition.This practice amounted to price-fixing under Section 3(1) read with Section 3(3)(a) and resale price maintenance under **Section 3(4)(e)** of the Act. The algorithmic pricing created a hub-and-spoke cartel, where Ola and Uber acted as hubs, facilitating coordinated pricing among independent drivers (the spokes).

The Supreme Court allowed the appeal on the question of locus standi, holding that, Any person, including Samir Agrawal, had the right to inform the CCI and appeal a rejection. The NCLAT erred in limiting the right to only those with a personal grievance. However, on the merits, the Court dismissed the appeal, agreeing with the CCI and NCLAT that, there was no contravention of Section 3 of the Competition Act. Ola and Uber did not facilitate a cartel, and algorithmic pricing alone does not prove collusion.

Abusive Conducts

There are two types of abusive conduct in the "abuse of dominant position" –

Exclusionary abuses

[17] Civil Appeal No. 3100 of 2020 (SC)

Exploitative abuses

Exclusionary abuses are usually directed towards the competitors. Through exclusionary abuses, the dominant player drives out the competitor from the market. The dominant player may also prevent the new players from entering the market, thereby strengthening the dominant position further. Some of the examples of exclusionary abuses are –

a. refusal to deal;

b. limiting and restricting market access;

c. predatory pricing;

d. loyalty discounts; and

e. tie-ins and leveraging.

Exploitative abuses are usually directed towards the consumers. By using the dominant position in a market, the dominant player tries to exploit the consumers. For example, if there is a single player in the market, the buyer will be forced to buy the product at the price set by the single player. The two types of exploitative abuses found in the market are:-

a. charging excessive prices; and

b. unfair / discriminatory conditions.

Although exploitative abuses are directed towards the consumers, such abuse may affect the competitors adversely. The different types of abusive practices are discussed below with the help of the cases decided by the Competition Commission of India.

Denial of Market Access – Refusal to Deal

Law recognises that every person has certain individual rights. Hence, every person has a right to do the business the way she desires without breaking the law. Law cannot impose an obligation on any person to deal with another person. It would amount to coercion. This is the reason - the very basis of the Law of Contract is that - “each individual has the freedom

to contract".[18]

"Refusal to deal" with another person is generally not illegal. But, exceptions to this rule show us the complexities involved here. There are two types of refusal to deal:

Refusal to deal with customers; and

Refusal to deal with the competitors.

A market player may refuse to deal with certain customers. In the field of economics, refusal to deal with customers is not considered as a wrong practice. There is an assumed reason for this. Usually, when in a market there are several competitors, if one player refuses to deal with a customer, the customer has a choice of going to any of the other market players. It is also assumed that the market forces to "self correct" this issue.

Every market player is in the market for business and would always be ready to deal. This is the reason, the sellers do not discriminate the customers usually. They keep their products open for sale and whoever is having the capacity to pay for a product, they are ready to deal. We have seen in real life, when a seller does not treat a customer well, the customer usually says, "you are not the only seller in this city, I will go to another shop and purchase the same product."

As per the Indian Competition Law, there is no specific mention of "refusal to deal". It is covered under the expression "denial of market access" which is used in Section 4(2)(c) of the Competition Act, 2002. Refusal to deal also gets covered under Section 4(2)(b)(i).[19]

The Indian Competition Law also doesn't make any distinction between "refusal to deal with customers" and "refusal to deal with competitors". Both "refusal to deal with customers" as well as "refusal to deal with competitors" are illegal as per Section 4. Below, three cases on "refusal to deal" are discussed.

In these discussions, the ambit of relevant market and basis for dominance will not be given importance. Rather, emphasis will be on analysing the nature of abusive act.

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[18] Anson and Beatson, *Anson's Law of Contract* (Oxford University Press 2010) 4.
[19] "limits or restricts production of goods or provision of services or market therefor"

Predatory Pricing

In any market, it is a common practice for the sellers to give discounts to attract the customers. During the end of a season, the sellers offer discounts, so that they can clear all the old stock. When a new player enters the market, then also, some discount or special offers are given. Sometimes, market players offer such huge discounts that are below the cost price and are aimed at driving out the competitors from the market. Such practice is known as "predatory pricing". A predator is an animal which kills and eats the prey. In predatory pricing, the practice is aimed at killing the competitors. A firm may offer huge discounts at a scale that the other firms are unable to offer. The customers naturally shift to the firm that offers the lowest price. The competitors will exit the market due to the losses.

In India, predatory pricing is a sub-set of "unfair pricing" under Section 4(2)(a)(ii). This provision makes predatory pricing illegal. Even selective predatory pricing is illegal as per the Indian Law. Predatory pricing can be better understood through a case.

Discounts and Rebates

It is common for the traders to offer discounts to attract the customers. When the discounts are below cost price, they may come under predatory pricing. But, when a firm offers discounts selectively to its customers, with a view of stifling competition, it may have to be examined for being illegal. There are different types of discounts in the market. The type of discount offered depends on the nature of the business. Many firms offer discounts to loyal customers. At times, discounts are also offered for a set quantity of purchase. For instance, a trader selling onions may announce a discount of 20% for those who buy more than 50 kilograms of onions. Discounts may also be offered on select quality of the products.

It is a common practice in the markets that the sellers publicise the discounts they offer openly. If a discount is given to one buyer, the other buyers immediately question the seller to offer same type of discount to them also. The seller has to treat all customers equally. The only defence the seller can have is that, he can offer different levels of discounts for different volume of purchase.

Tie-ins and Bundling

Tie-in is the scheme of selling a product on a condition that another product should also be

bought. A vegetable vendor may put a condition that carrots will be sold only if the customer is ready to buy beans along with it. But the vendor wouldn't decide the quantity. This situation is called as "tie-ins".

Bundling is another scheme of selling where two or more products are packaged as one product. In tie-ins, the quantity of the second product is not pre-decided. Whereas, in bundling, the quantity of products is fixed. For example, toothpaste and a toothbrush may be packaged (bundled) together as one product. The quantity is fixed and packed.

Tie-ins and bundling are illegal as per Section 4(2)(d) if the contract puts conditions that are not normal in the usual commercial usage. For example, if a wholesale firm sells books and puts a condition that they wouldn't sell the books to a retailer unless stationery items are also bought from them, it becomes a case of tie-in which is illegal.

In the *Microsoft Antitrust Case*[20], the Microsoft company put several conditions to the vendors which were against the spirit of competition. Computer business consists of trading of computer hardware and computer software. Hardware is the physical component of the computer. A computer system will not work in the absence of a software. A software when produced for commercial purposes becomes the intellectual property of the respective firm. Anyone wanting to use that software will have to obtain a license from the software manufacturer. The computer hardware vendors purchase software licenses in bulk and install them on the computer hardware they sell. The bulk purchase of software license ensures that they get the license for a discounted price.

Microsoft is the company that manufactures that famous computer operating system "Windows" and famous softwares like "Microsoft Word". An operating system is the platform on which all softwares run.

Microsoft's operating system Windows runs on most computers and most users are conversant in using Microsoft's Windows operating system. Misusing this advantage, Microsoft Company forced the computer hardware vendors to pay them license fees even for the units which did not have Microsoft's software. So, if a hardware vendor sold 200 units of computers, and he had installed Windows to only 100 units, the vendor had to still pay the

[20] U.S. v. Microsoft (Competing Impact Statement) Civil Action No. 94-1564, 27 July 1994.

license fees for all the 200 units sold. Unless this condition was satisfied, Microsoft refused to give license for even 100 units. This forced the vendors to simply add Windows softwares on all the computers they sold. This led to a "tie-in" type of situation. The antitrust authorities held that this was a violation of the antitrust laws.

Leveraging

Leveraging is defined as the "power to influence people and get the results you want"[45]. When a firm has a dominant position in one market, it may try to use that power to take unfair advantage in another market.

Leveraging can be done in many ways – by employing superior technology, by fixing prices that are predatory, by making predatory investment and by refusing to supply goods.

Charging Excessive Prices

Fixing prices in the market is not the work of the Government, at least not in capitalist and mixed economic systems. In the Communist Russia, the Government could fix the price every commodity. In India, the price for certain products is regulated by the Government. Other than these limited number of products, for the rest of the products, the price is fixed by the firms themselves based on market forces. In a market, the prices are decided by the market forces, based on demand-supply and several other factors. Basically, the price of a product depends on its cost and over that, the extent of profit to be made depends on the extent of competition.

Charging excessive prices is considered to be an exploitative abuse against the customers. It is a sub-set of "unfair pricing". In a market, the issue of excessive price is said to be "self correcting", but at times, the excessive price doesn't get rationalized if the firm is powerful and wants to exploit the customers. If a firm sells a product that is an important necessity for the people and when there are no alternatives, the firm would continue charging excessive prices. The pharmaceutical companies tend to charge excessive prices, because they know that they hold the monopoly patent rights and people would buy the drugs due to medical emergency. Such issues are tackled by the Government by issuing compulsory license.

In *Indian Sugar Mills Association v. Indian Jute Mills Association*[21] the informants – Indian Sugar Manufacturers alleged that the Indian Jute Mills Association (IJMA) and Gunny Trade Association (GTA) were involved in fixing unfair and excessive prices of the jute bags. The jute industry was going through a bad phase, hence the Government had enacted "Jute Packaging Materials (Compulsory Use in Packaging Commodities) Act, 1987" and made it mandatory for fertilizers, cement and sugar industry to compulsorily use jute bags for packaging. Subsequently, cement and fertilizer industry were exempted from this Act. Due to this rule, the IJMA and GTA held a dominant position in the market. Abusing the existing situation, IJMA and GTA were issuing a "daily price bulletin" (DPB). The sugar manufacturers had no other way, but buy jute bags for packaging in order to comply with the law. The result was that the sugar manufacturers couldn't explore or innovate any other materials for packaging their sugar. The Commission after investigating the issue held that the actions of IJMA and GTA amounted to limiting technical development and hence violated Section 4(2) of the Competition Act, 2002.

Unfair or Discriminatory Conditions

Under Section 4(2)(a)(i), imposing unfair or discriminatory conditions during the course of trade. The case *Belaire Owner's Association v. DLF Ltd*[22] the informants are the apartment buyer's association and the opposite party is the apartment property developer. The Commission held that the opposite party DLF was having a dominant position in the relevant market. While answering whether there was an abuse of dominant position, the Commission referred to the "Apartment Buyers Agreement" and examined the terms and found 16 terms that were unfair for the buyers. Some of them are:

1. The default by the buyers would result in penalty being imposed on the buyers. But for the default done by the seller, the penalty was "insignificant".

2. The agreement gave the power to the developer to make any type of change to the properties without the consent of the owners of the property.

3. The developer had the full authority to decide the power supply source and to fix the power

[21] 2014 Comp LR 225 (CCI).
[22] Case No. 19 of 2010, decided on 12 August, 2011

tariff.

4. The developer had earmarked areas as “commercial” and “residential” in its plan. The agreement stated that it had the sole authority to change these areas without consulting the buyers.

Despite these conditions being unfair, the buyers had agreed to these terms because they had no other option. This was also an indication, that DLF enjoyed a dominant position in the relevant market.

Findings and Conclusion

The traditional view was that monopolies are dangerous to the economy and the people. However, the new approach is that “dominant position” (as it is called in Indian Law) and “monopoly power” (as it is referred in the US Law) are not in themselves dangerous if they are done to promote innovation and competition. The provisions relating to monopoly power in India and USA are almost similar and also have slight differences, which have been analyzed in this chapter in detail.

When we examine the trend in USA, there are many instances where the Government took steps to break up the monopoly companies and were challenged before the courts. The antitrust authorities in India have been cautious and till now, not recommended the breaking up of companies. The Indian provisions relating to the abuse of dominant position lists many abusive conducts, which are based on the abusive conducts as identified by the courts of USA.