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I. INTRODUCTION

On December 9, 2013, the Competition Commission of India ("CCI") imposed a penalty of approximately INR 17 billion on Coal India Limited for abusing its dominance under the Competition Act, 2002 ("Competition Act");[2] this is the maximum penalty as yet imposed on a company. This case was yet another instance of the increasing rigor with which competition law is being enforced in India.

Since coming into force in 2009, CCI—the antitrust regulatory body in India—has effectively asserted the importance of the Competition Act in the Indian economy. The architecture of the Competition Act is premised on standard antitrust legislation prevalent in most jurisdictions: it regulates anticompetitive agreements, abuse of dominance, and combinations. Notwithstanding this similarity in legislative text, as can be expected in developing jurisdictions India has substantially diverged in the enforcement of competition law. Particular to this divergence is its enforcement of abuse of dominance. As revealed through the CCI's decisions, a unique position regarding abuse of dominance has evolved in India.

This article attempts to shed some light on the law and subsequent developments and trends relating to abuse of dominance under the Competition Act.

II. ABUSE OF DOMINANCE UNDER THE COMPETITION ACT

Section 4 of the Competition Act proscribes any enterprise or group from abusing its dominant position. The language of Section 4 of the Competition Act is very similar to Article 102 of the Treaty for European Union ("TFEU") with one major difference—this provision does not cover the concept of collective dominance.

Assessment of a conduct, as an abuse of dominance, hinges upon three basic components:

1. definition of a relevant market;
2. establishing dominance of the enterprise or the group in the relevant market; and
3. determination of abusive conduct in the relevant market.

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[2] *M/s Maharashtra State Power Generation Company Ltd. v. M/s Mahanadi Coalfields Ltd. & Ors.,* 03/2012; *M/s Maharashtra State Power Generation Company Ltd. v. M/s Western Coalfields Ltd. & Ors.,* 11/2012; and *M/s Gujarat State Electricity Corporation Limited v. M/s South Eastern Coalfields Ltd. & Ors,* 59/2012, December 9, 2013.

A. Relevant Market

"Relevant market" under the Competition Act is defined as either the relevant product market or the relevant geographic market or both.[3] The Competition Act also provides for an illustrative list of factors to be taken into consideration when delineating the relevant product and the relevant geographic markets.[4] The CCI has construed the term "relevant market" to mean both a relevant product and a relevant geographic market.[5]

Like most jurisdictions, the CCI has primarily concentrated on the *end-use* of the product in its delineation of the relevant product market.[6] By contrast, CCI's take on the relevant geographic market seems to be surprisingly circumscribed. While the Competition Act gives extraterritorial jurisdiction to the CCI—therefore empowering it to look at a landscape beyond India—it invariably seems to limit its assessment to be within India.[7] The primary reason for this emanates from the definition of dominance under Section 4 of the Competition Act, which requires a dominant position to be established in India. Within India, however, the CCI has adhered to the general principle of delineating the relevant geographical market as the area within which the conditions of competition are homogenous.[8]

Specific to the definition of relevant market is the CCI's reluctance to use economic tools. Specifically, the CCI has so far avoided the use of economic tools such as the generally accepted hypothetical monopolist test SSNIP test ("SSNIP") in relation to the delineation of the relevant product market. For instance, in the *NSE* case[9] the CCI categorically rejected the SSNIP. In most of its current decisions, the CCI seems to have maintained this stance; however, in the *BCCI* case[10] it did fleetingly refer to the SSNIP test when determining the relevant market. This line of thought, unfortunately, does not seem have been carried over to CCI's general conceptualization of the relevant market. [11]

B. Establishing Dominance

Predictably, determination of dominance is another necessary precursor to any assessment of a conduct as an abuse of dominance. The definition of dominance under the Competition Act is fairly universal: it is defined as the ability to act independently of competitive forces, or to affect competitors or consumers in one's favor.[12]

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[3] Section 2(r) of the Competition Act

[4] Section 19(6) and 19(7) of the Competition Act.

[5] *Belaire Owners' Association v. DLF Limited, HUDA & Ors.*, 19/2010, August 12, 2011.

[6] Section 2(t) of the Competition Act.

[7] *See,* Coal India case, *supra* n. 2.

[8] *See,* DLF case, *supra* n. 5.

[9] *MCX Stock Exchange Ltd. & Ors. v. National Stock Exchange of India Ltd. & Ors*., 13/2009, June 23, 2011.

[10] *Sh. Surinder Singh Barmi v. Board for Control of Cricket in India (BCCI),* 61/2010, February 8, 2013.

[11] For instance s*ee, M/s ESYS Information Technologies Pvt. Ltd .v. Intel Corporation (Intel Inc.) & Ors.,* 48/2011, January 16, 2014; *South City Group Housing Apartment Owners Association v. Larsen &Tuobro (L&T) & Ors*., 49/2011, October 23, 2013; *M/s HNG Float Glass Ltd v. M/s Saint Gobain Glass India Ltd.,* 51/2011, October 24, 2014, etc. The CCI refrained from using the SSNIP test in these cases.

[12] Explanation to Section 4 of the Competition Act.

The Competition Act also provides for a detailed list of factors to be considered when determining dominance.[13] In this range of factors, the most important—at least for a preliminary assessment—seems to be the market share of an enterprise. However, the CCI has, of late, steered away from relying on market share as the primary indicator of dominance,[14] indicating a desire for a more comprehensive assessment of the market position.

C. Determining Abuse of Dominance—A Form-based Approach

Section 4(2) of the Competition Act provides an exhaustive list of conducts that are considered abusive. Incidentally, the legislative text of Section 4 is very similar to Article 102 of TFEU. Notwithstanding this similarity in the language, the CCI's recent actions indicate a preference for a form-based approach—as opposed to the effects-based assessment prevailing in the European Union ("EU").

CCI's approach to date suggests that, in the event the conduct of the dominant enterprise falls within the list of conducts provided by way of Section 4(2), that conduct amounts to an abuse of dominance—the CCI is not likely to look go into the assessment of subsequent competitive impact.[15] Further, abuse of dominance, as prohibited under the Competition Act, includes both exploitative and exclusionary abuses.[16]

D. Penalties and Consequences

Since the Competition Act belongs to the civil enforcement regime, the primary consequence for infringing the provisions of the Competition Act is a monetary penalty. In the event the CCI concludes an enterprise to have abused its dominance, the maximum penalty that can be imposed is up to 10 percent of the average turnover for the preceding three years.[17] Further, if the defaulting enterprise belongs to a group, the entire group is culpable under the Competition Act and the CCI is empowered to take an action against the entire group.[18]

In addition to imposing fines, the CCI can also pass an order imposing any or all of the following behavioral remedies on an enterprise abusing its dominance:

a) an order to cease and desist the anticompetitive conduct;[19]

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[13] Section 19(4) of the Competition Act.

[14] *See,* HNG Float Glass case, *supra* n. 11.

[15] *See,* NSE case, *supra* n. 9.

[16] In DLF case, *supra* n. 5, the CCI held that monopolization by the developer—by imposing unfair terms and conditions on the consumers—illegal under Section 4. The conduct considered anticompetitive in this case was an exploitative conduct.

On the other hand, in *Kapoor Glass Private Limited v. Schott Glass India Private Limited*, 22/2010, March 29, 2012, the CCI was of the view that the conduct by the dominant firm (Schott Group)—of favoring its own subsidiary to the exclusion of the latter's competitors—amounted to abuse of dominance.

[17] Section 27 (b) of the Competition Act. In the DLF case, *supra* n. 5, DLF—for abusing its dominance—was fined with a penalty of approximately INR 6300 Million—7 percent of the average of the turnover for the last three preceding financial years.

[18] Proviso to Section 27 of the Competition Act. *Also see,* Coal India case, *supra* n. 2, the CCI imposed a fine on the entire group, *viz.,* Coal India Limited.

[19] Section 27 (a) of the Competition Act. *Also see* DLF case, *supra* n. 5, the CCI ordered DLF to cease and desist its anticompetitive practices.

b) an order to modify agreements to the manner specified by the CCI;[20]

c) an order to divide a dominant enterprise to ensure that it does not abuse its dominance in the future;[21]and

d) any other order it deems fit.[22]

III. JURISPRUDENTIAL DEVELOPMENTS

Central to understanding the CCI's approach to abuse of dominance are these recent developments:

A. The Role of Plausible Business Justification—The Inverted Assessment

Notwithstanding the form-based approach discussed above, the CCI has recently recognized the concept of plausible business justifications in its assessment of a conduct, looking into the objectives and the rationale of a conduct.

For instance, in *Dhanraj Pillay and Others v. Hockey India*,[23] the CCI, when assessing abuse of dominance allegations by Hockey India, applied the inherent proportionality test. After applying this test, the CCI held that the conduct of Hockey India did not amount to any of the conducts enumerated in Section 4(2) of the Competition Act and was therefore not abusive.

Again, in *All Odisha Steel Federation v. Odisha Mining Corporation Limited*,[24] a case relating to excessive and differential pricing, the CCI took into account the market conditions and the nature of supply and demand in the relevant market. Subsequently, the CCI held that the pricing, though not determined by the market forces, was neither unfair nor excessive and therefore did not violate Section 4(2) of the Competition Act.

Interestingly, this plausible business justification defense is used to preclude the conduct from falling within the ambit of Section 4(2) rather than amounting to a justification to show a lack of harm to competition in the market—formulating an inverse assessment of the conduct.

Also, it should be noted that the CCI has expressly observed the exceptional nature of these justifications[25]—indicating a rather limited tolerance towards such defenses.

B. Role of an Enterprise—Differentiated Treatment

Another peculiar development is recognizing the importance of the role of an enterprise in the Indian economy. The CCI has taken a rather cautionary approach when assessing the conduct of a public sector undertaking as opposed to a profit-making enterprise.

This approach is reflected not only in CCI's decisional practices, but also in the legislative provisions. For instance, one of the factors for assessing dominance is social obligations

[20] Section 27(d) of the Competition Act. *Also see,* DLF case, *supra* n. 5; and Coal India, *supra* n. 2, the CCI ordered the agreements to be modified in order to comply with the provisions of the Competition Act.

[21] Section 28 of the Competition Act.

[22] Section 27 of the Competition Act

[23] 73/2011, May 31, 2013.

[24]12/2012, September 19, 2013.

[25] *See supra* n. 23, ¶ 10.6.5.

undertaken by the enterprise.[26] Interestingly, this factor has played an important role in assessing the conduct of a public sector undertaking when establishing dominance of such an enterprise. In numerous cases, the CCI has held various public sector undertakings to be dominant; however, its decisions regarding the conduct of these undertakings suggests a comparatively lenient treatment—[27]a contradiction with its assessment in cases where the enterprise under scrutiny is one with profit maximization as its primary objective.

Nevertheless, in a recent case the CCI took a contrary view. In the case against Coal India Limited[28]—a public sector undertaking—the CCI held that the company had abused its dominance in the market by imposing unfair conditions in fuel supply agreements. It observed that social obligations and social costs are no longer a primary consideration for the CCI when assessing a conduct.[29] Nevertheless, the CCI did take into account the company's objectives and functions as a mitigating factor when arriving at a penalty of 3 percent of the average turnover.[30] This indicates a gradual but definitive shift in CCI's approach towards such differentiated treatment.

C. Importance of Consumers

As discussed above, the CCI regards abusive conduct as including both exploitative and exclusionary conducts. Arguably, the main reason can be attributed to the consumer-centric priorities of the CCI. In a plethora of cases, the CCI has categorically acknowledged protection of consumer interest as one of the primary objectives of the Competition Act.[31]

Interestingly, while these priorities resonate of the Chicago School, the approach taken by the CCI seems to concentrate on directly protecting consumer interest—as opposed to consumer interests being a necessary corollary of unbridled competition in the market. Consequently, this consumer-centric approach has produced numerous complaints filed by consumers, rather than competitors, in abuse of dominance cases.[32]

D. Competition Law in an Indian Context—The Divergence In Enforcement

Arguably, the most striking feature illustrated from recent case law developments is the manner of enforcement by the CCI.

Competition law in India seems to rely heavily on EU law, particularly in abuse of dominance cases. This reliance is evident in the replication of the legislative provisions relating to abuse of dominance. Additionally, the CCI—in numerous cases—has relied on EU jurisprudence

[26] Section 19(4)(k) of the Competition Act.

[27] For instance, in the Odisha steel case, *supra* n. 24, the CCI acknowledged that since the dominant enterprise operates independent of the market forces, the practices cannot be looked assessed through the perspective of market forces, ¶ 13.9.

[28] *See,* Coal India case, *supra* n. 2.

[29] *Id.,*¶128.

[30] *Id.,*¶261.

[31] *See,* DLF case, *supra* n. 5.

[32] *See,* DLF case, *supra* n. 5; *Dinesh Trehan v. M/s DLF Ltd.*, 46/2012, July 1, 2013; *DLF Park Place Residents v. DLF Limited,* 18,24,30,31,32,33,34 and 35/2010, January 10, 2013 etc.

while deliberating specific cases.[33] In fact, in November 2013 and January 2014, the CCI directed a detailed investigation into alleged abuse of dominance by Ericsson on the ground that it violated its FRAND commitments in relation to the standard essential patent ("SEP") it held.[34] The crux of this case seems to be rooted in EU law since there is no concept of SEP and related FRAND commitments in India.

Notwithstanding this similarity in legislative text, however, the CCI's has largely diluted the thrust of EU law in Indian competition jurisprudence. The CCI has, time and again, pointed out the need to apply competition law in an Indian context, taking into account the situation prevalent in the economy.[35] In particular, the CCI has propounded somewhat peculiar parameters for assessing abuse of dominance cases—creating substantial divergence from enforcement in developed jurisdictions.

Perhaps germane to understanding this divergence is the long-standing heritage in India of excessive regulations. De-regularization and the subsequent opening of the economy has been a very recent phase for the Indian economy. As a result, Indian tradition is more inclined towards an interventionist approach—consequently preferring a form-based assessment—than the "less-is-more" sentiment present in more developed jurisdictions.

Further, as described above, an important enforcement priority for the CCI—which has further perpetuated the idea of an India-specific enforcement approach—is the protection of consumer interest. The CCI views direct consumer harm analogous with harm to competition. This approach requires the regulation of exploitative as well as exclusionary conducts under the Competition Act.

IV. CONCLUSION

It is interesting to note is that while CCI's priorities—inclined towards an interventionist approach—seem to be suggestive of a robust enforcement in abuse of dominance cases, it has surprisingly taken a rather deferred approach in these cases. Of a total of 98 cases relating to anticompetitive practices investigated to date, 44 were investigated for possible abuse of dominance. However, the CCI concluded an abuse of dominance in only 11 cases.[36] It can be argued that these trends demonstrate a gradual maturity in how to assess cases relating to abuse of dominance, rather than these cases being a low priority for the CCI.

Given this current position as regards to abuse of dominance cases, it is safe to say that competition law in India is still at a relatively nascent stage and is likely to be subject to legislative developments. For example, on December 10, 2012, the Competition (Amendment) Bill, 2012 was introduced in the parliament to amend Section 4 by introducing the concept of collective dominance into the law. However, developments in the Indian competition law are more likely

[33] *Arshiya Rail Infrastructure Ltd. (ARIL) v. Ministry of Railway (MoR) & Ors.*, 64/2010, 12/2011 & 02/2011, August 14, 2012.

[34] *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)*, 50/2013, November 12, 2013; and *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson*, 76/2013, January 16, 2014.

[35] *See,* NSE case, *supra* n. 9, ¶ 10.80.

[36] The data is based on the information available on the CCI website as on March 20, 2014.

to be primarily a result of judicial construction, making the CCI's decisional practices as important, if not more important, than legislative activity.