



# Competition Law Recent Developments and Challenges



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# Foreword



The Competition Act, 2002 remained in cold storage for more than six years despite receiving the assent of the President on 13th January 2003. On 20.05.2009, the first step was taken in introducing a new competition regime to the Indian market place when Sections 3 (anti-competitive agreements), 4 (abuse of dominance) and host of other supplementary and incidental provisions were brought into force.

During the first two years after the substantive provisions of the Competition Act was brought into force, the Competition Commission of India (CCI) was building its capacity to address key issues that are faced by competitors in the market. Then the CCI passed orders imposing penalty on the industry which made the industry and the markets look up and take notice of the arrival of an effective CCI. The Competition Law is now being looked upon as an important piece of legislation that regulates the way Indian industry should function in the market. There was no looking back from there. Competition Law has come to stay in India as an effective piece of legislation ensuring fair competition in the Indian market.

The subsequent imposition of penalties on cartels including the cement cartel case has 'cemented' the place of Competition Act in the Indian regulatory landscape. The stringent enforcement of the provisions of the Competition Act, 2002 by the CCI and the huge penalties that can be imposed on the enterprises by the CCI for the contravention of the provisions of the Competition Act, 2002 has brought about a desideratum of awareness and knowledge.

The present handbook seeks to achieve that twin objective in identifying broadly the key legal and business issues that would be faced by enterprises in the light of jurisprudence that has been developed and synthesised in the story of competition law thus far in India. The purpose of this booklet would be to enable the enterprises and the business community to understand what kind of practices are prohibited under the Competition Act and what is the outer limit of competitive action by giving a panoramic view of the interpretation of the provisions of the Competition Act, 2002. At the same time,

this booklet seeks to bring out finer points from the interpretation that has been accorded to the provisions of the Competition Act along with recent developments and its impact on the business and industry.

I hope that the present booklet, covering the topics of Anti-Competitive Agreements and Abuse of Dominant Position, would provide useful insight in understanding the broad issues under the Competition Act, 2002 and in spreading the necessary awareness about the Competition Act, 2002.

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# Objective of Competition Law

Interestingly the term ‘competition’ has not been defined in the Competition Act. The purpose of the Competition Act, 2002 is to prevent activities and practices that chill competition. In the alternative, the Competition Act, 2002 seeks to protect competition by prohibiting practices or activities that may adversely affect competition in the market place. For achieving this end, the Competition Act has three main instruments that seek to protect competition from competition that is unfair – Prohibition of Anticompetitive Agreements (Section 3), Prohibition of an abuse of dominant position (Section 4) and Regulation of Combinations that may have an appreciable adverse effect on competition (Section 5 & 6).

In this background where ‘competition’ has not been defined but where the Competition Act seeks to preserve ‘competition’ in the market by trying to eliminate practices impacting competition, the objective of the enactment plays a vital role in understanding the ‘means’ and ‘ends’ of this legislation. The stated objective of Competition Act is to

- Prevent practices having an adverse effect on competition
- To promote and sustain competition in the markets
- To protect the interests of consumers; and
- To ensure freedom of trade carried on by other participants in the markets

This has not only been echoed in the preamble to the Act but also under Section 18 of the Competition Act, where the aforementioned objectives have been identified as a duty of the Commission. Pertinently, one of the key objectives is ‘protection of the interest of the consumers’. In normal competition parlance, protection of the interest of the consumers refers to a consumers surplus. Consumer surplus is the difference between the price a consumer is willing to pay for a product and the actual market price that the consumer pays for a product. Integral to this aspect of consumer surplus is the role that is played by the efficiencies – allocative (which ensures effective allocation of resources), productive (which ensures that cost of production is kept at a minimum) and dynamic efficiency (which promotes innovative practices). These efficiencies play an important aspect in determining the price of the products and ensure that enterprises or the participants in the market are able to ‘compete’ with each other and pass on the benefit to the ultimate consumers. This aspect has also been affirmed by the Hon’ble Supreme Court of India in the case of **CCI v SAIL and another** (2010) 10 SCC 744:

“As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the **common objectives of competition law**. The main objective of competition law is to **promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer**

**preferences.** The advantages of perfect competition are threefold: **allocative efficiency**, which ensures the effective allocation of resources, **productive efficiency**, which ensures that costs of production are kept at a minimum and **dynamic efficiency**, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.”

Efficiency has also been considered in other provisions under the Competition Act, 2002 as a factor mitigating appreciable adverse effect on competition in the market.<sup>1</sup> Therefore, the key aspect to be borne in mind is the competition law analysis is the impact on the consumer or whether an action accrues any benefit to a consumer.

### Practitioner’s Comment:

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Although one of the foremost aspects of competition law is to protect the interest of consumer, interestingly the Competition Act, 2002 defines a consumer to include a commercial consumer and not only the ultimate consumer. So, therefore, it will be interesting to note how the interest of commercial consumers vis-a-vis interests of ultimate consumer would be analysed and whose interest that would be given predominance.

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<sup>1</sup> See Section 19 (3) (e) and (f) of the Competition Act, 2002



# Scope and Extent of the Competition Act

Although broadly the Competition Act covers anti-competitive agreements, abuse of dominant position and regulation of combinations, the extent to which the CCI exercises jurisdiction over them is a question that the present section seeks to answer.

## Enterprises under the Competition Act, 2002

### (a) Engaged in Any Activity

The Competition Act, 2002 under Section 3 prohibits anticompetitive agreements between persons and /or enterprises and under Section 6 it regulates persons or enterprises from entering into combinations which causes an appreciable adverse effect on competition within the relevant market. However, under Section 4, only enterprises (or group which is again defined in terms of an enterprise) shall not abuse its dominant position.

Section 4 conspicuously omits the reference to 'person' and the provision is only attracted when the entity falls within the definition of an 'enterprise'. The term 'enterprise' has been defined to mean any person or a department of a government who or which is or has been engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind. Therefore, the emphasis is upon the term 'engaged in any activity' in relation to '*production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services*'. Therefore, entities that are not engaged in the specific activities may not fall within the purview of the Section 4 of Competition Act, 2002. The CCI has held in the case of *Reliance Big Entertainment v Karnataka Film Chamber of Commerce and others* that the **Film Chamber Associations** are not engaged in the kind of activity as identified in the definition of the term enterprise and that the Film Chamber Associations are as such not engaged in any economic activity on their own and would not come within the purview of the term 'enterprise'.<sup>2</sup>

### (b) Sovereign Function

The definition of the term 'enterprise' also excludes from its purview activity of the Government relating to the sovereign functions of the Government. Sovereign

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<sup>2</sup> *Reliance Big Entertainment Limited v Karnataka Film Chamber of Commerce and others*, Case No. 25/2010 decided by the CCI on 16.02.2010

functions of the Government would be the inalienable primary functions of the Government like law making, judicial functions etc. In case the activity of a government is a primary inalienable function of the Government that would remain outside the purview of the definition of enterprise. However, it will be interesting to note that the Hon'ble CCI has in the case of **Royal Energy Ltd v IOCL and others, MRTD Case No. 1/28**, decided on May 9, 2012 observed that *even if an anti-competitive conduct flows from any policy of the Government, the Commission will still have jurisdiction to examine the conduct and in case of any violation suitable orders can be passed*. Policy decision of the Government (say for e.g. FDI related etc) can at times have the effect of distorting the market as it would have the effect of discriminating between entities in a market. Although the Hon'ble CCI did not intervene in the **Royal Energy Case**, it would be interesting to see if the Hon'ble CCI based upon the dicta in **Royal Energy Case** would interfere in the domain of policy making.

### Practitioner's Comment:

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The Hon'ble CCI held that it had the jurisdiction to review cases where the Ministry of Railways had allegedly distorted the level playing field through circulars by prohibiting commodities for carriage and fixing unfair haulage charges. Although it was argued that the circulars were traceable to the powers under the Railways Act, the Hon'ble CCI held that it could intervene. This order has been upheld by a single judge of the Hon'ble Delhi High Court (AIR 2012 Del 66) and is now pending before a division bench of the Delhi High Court (LPA 169/2012)

## Extra Territorial Application

Under section 32 of the Competition Act, 2002 the CCI has been empowered with extra-territorial reach to look beyond the shores of India for alleged anticompetitive actions. Therefore, even if a combination takes place outside India and any party to an agreement is based outside India the CCI will have the jurisdiction to inquire into such a combination or an arrangement.

The benchmark for the CCI to exercise its jurisdiction in relation to an extra-territorial anti-competitive agreement (or abuse of dominant position or combination) is that it should have an appreciable adverse effect on competition in the relevant market in India. It would be interesting to see what would be the threshold for an 'appreciable adverse effect on competition' for an extra-territorial action. A similar provision in the European Treaty of meeting the jurisdictional requirement of effect of trade between member states has been interpreted in an expansive manner so that even the impact one city in Europe has been held to be having an effect on trade between member states.

## Practitioner's Comment:

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The Hon'ble Supreme Court has held that prima facie orders directing the DG to investigate are not appealable orders because such orders are not specifically provided as appealable orders. However, orders under Section 32 are appealable. Therefore, when prima facie determinations are made for directing the DG to investigate in relation to an extra-territorial action, it would be a moot question to see if such orders would be appealable?

## Actions and Agreements Prior to May 20, 2009

Although the Competition Act, 2002 was given the assent of the President in 2003, the act remained largely on paper till May 20, 2009. The provisions of Sections 3 and 4 have been brought into force only from May 20, 2009 and not retrospectively. Hence, actions that have been undertaken prior to May 20, 2009 would not be scrutinised under the provisions of the Act. However, the Bombay High Court in the judgment of **Kingfisher Airline Limited and another v CCI and others** has held that agreements prior to May 20, 2009 that are sought to be acted upon or performed pursuant to such agreements would be scrutinised under the scanner of the Act. This has also been followed by the CCI in the case of **Belaire Owners Association v DLF Limited**.

## Safety Consideration

In an obiter in the **Arshiya Rail Case**, the Hon'ble CCI held that where the considerations in a market are governed or influenced by the grounds of safety it will not be a competition issue and therefore would be outside the purview of competition law. It would be interesting to see how this defence is accepted in subsequent cases as in a large number of technical matters, safety and security form key considerations for business decisions but which at the same time may have market distorting effects.

# Section 3: Anticompetitive Agreements

Section 3 of the Competition Act, 2002 prohibits certain kinds of agreements that causes or is likely to cause an appreciable adverse effect on competition within India. ‘Agreements’ entered into between persons or enterprises or association of persons or association that causes or is likely to cause an appreciable adverse effect on competition within India is void. Agreements are broadly covered into two kinds – horizontal agreements between competitors or persons at the same level of trade and vertical agreements between persons at different stages or levels of the production chain in different markets.

## ‘Agreement’

The term agreement for the purposes of Section 3 not only refers to the conventional meaning of an agreement under Contract Act. The term ‘agreement’ has a wider connotation for the purposes of Competition Act and includes ‘any arrangement’ or ‘understanding’ or ‘action in concert’ whether or not in writing or whether or not it is intended to be enforceable by legal proceedings.

Therefore, the understanding between two persons to do or not to do a certain thing is the agreement that Section 3 is concerned with. At the bottom line there has to be a consensus ad id between two persons. For instance, the Hon’ble CCI held in the ***Multiplex Association case***<sup>3</sup> that the *collective decision* by the movie producers not to release films in multiplexes unless new revenue sharing terms are accepted along with the stand taken by the association body of the movie producers through the medium of letters etc to the members not to release movies in multiplexes clearly reflected an agreement amongst the movie producers to jointly fix prices and limit the production and distribution of films. Therefore, there was no formal arrangement between the parties. However, the CCI was able to arrive at an inherent understanding that was existing amongst the enterprises to undertake a common objective. In this way the agreement need not be formal or in writing but can also be inferred from the conduct of the parties.

***In Travel Agents Association case***,<sup>4</sup> the collective boycott by the travel agents association of the sale of Singapore Airlines tickets manifested through the emails to the constituent members, circulars issued by the associations and expulsions from membership were found by the CCI to be a group boycott or an arrangement amongst all the members. The Hon’ble CCI

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<sup>3</sup> FICCI – Multiplex Association of India v United Producers Distributors Forum and others, Case No. 1 of 2009 decided on 25.05.2011

<sup>4</sup> Uniglobe Mod Travels Pvt Ltd v Travel Agents Federation of India and others

even went further to hold that other associations by not denying their support or participation in the boycott call would arraign the other associations also. Thereby the CCI has placed a heavy onus on the parties who do not wish to be considered as part of an arrangement to necessarily show that they do not agree to part of an arrangement or understanding. Thereby an express action has been mandated by the CCI to determine that there is no arrangement or understanding.

### Practitioner's Comment:

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It is axiomatic that an 'agreement' requires at least two parties and that for the purposes of Section 3 at least two persons are required. Therefore, if two departments within an enterprise take a decision or agree upon an action, it will not amount to an understanding or an agreement because it is a unilateral action undertaken by one enterprise. This has been extended in Europe to even distinct legal parent-subsidiary undertakings where the subsidiary does not enjoy any economic independence or the parent company and subsidiary form an economic unit where the subsidiary does not determine its own course of action but carries out the instructions issued by the parent company.<sup>5</sup> This is called the Single Economic Entity Doctrine. Such conduct is considered as a unilateral conduct as opposed to an understanding between two separate undertakings and is kept outside the purview of the anti-competitive agreement analysis.

This Doctrine has been applied in India in a recent order of the Hon'ble CCI wherein the extent of the doctrine has been expanded even further by the CCI. The Commission was inquiring into the termination of a dealership agreement for import and sale of Super Sports Cars. The Hon'ble CCI has held that an agreement between a company and its group company cannot be considered as an agreement for the purposes of Section 3. This it was held to be in accord with the principle of Single Economic Entity Doctrine. The CCI held that as long as two parties form part of one single group they will be considered as a single economic entity.<sup>6</sup> This interpretation has expanded the scope of the single economic entity doctrine to a very wide extent.

## Horizontal Agreements

Horizontal Agreements are agreements that are entered into persons or enterprises who are engaged in identical or similar trade of goods or provision of services. Agreements amongst direct competitors or entities that can exert a competitive influence are covered under horizontal agreement. Under Section 3 (3) of the Competition Act, 2002 certain horizontal

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<sup>5</sup> Case C-73/95 P, *Viho Europe BV v Commission* [1996] ECR I-5457; [1997] 4 CMLR 419

<sup>6</sup> *Exclusive Motors Pvt Ltd v Automobili Lamborghini S.P.A* Case No. 52/2012 decided on 06.11.2012

agreements are presumed to have an appreciable adverse effect on competition within India. These are agreements where the persons (a) directly or indirectly determine prices (b) limit or control production, supply markets, etc (c) share the markets or divide markets (d) directly or indirectly indulge in bid rigging or collusive bidding.

In these kinds of agreements, there is a presumption that the agreements will have an appreciable adverse effect on competition within India. The onus of proof shifts on to the opposite party against whom the information / complaint has been filed to disprove that the arrangement does not have any appreciable adverse effect.

Cases of cartel that are considered the worst form of anticompetitive conduct also fall under Section 3 (3). Normally direct evidence in the form of a specific agreement in terms of fixing of prices etc would not be available. Therefore, the authorities rely upon circumstantial and indirect evidence to come to a conclusion on the existence of an agreement between parties. In the **Cement Cartel Case**, the Hon'ble CCI has held that existence of an agreement can be inferred from the intention and conduct of the parties and that the parallel behaviour in price is indicative of a coordinated behaviour amongst the participants in the market.

Furthermore, the Hon'ble CCI has identified a '**but for**' test in the **Cement Cartel Case** wherein it held that 'but for' some anticompetitive conduct between the parties the action and conduct of the parties cannot be explained. More specifically the CCI, inter alia, held that the price parallelism amongst the prices of cement across the country was not reflective of the oligopolistic market and in light of the fact that the details relating to the cement companies was facilitated through the association, the price parallelism was indicative of a coordinated behaviour under Section 3 (3).

However, it should be noted that mere price parallelism itself cannot fall foul of the provisions of the Competition Act, 2002. The Hon'ble CCI has subsequently clarified in the case of **In re: All India Tyre Dealers Federation case** that price parallelism is not per se anticompetitive but it is necessary to analyze the 'plus factors' and thereafter analyzed the data relating to production, capacity utilization, sales realization etc to determine whether there existed a cartel and which in the instant case was held not to be present.

## Vertical Agreements

Vertical agreements are agreements that are entered amongst enterprises or persons at different stages of the production chain say for e.g. an agreement between an input supplier and a manufacturer of a product using the input or agreement between principals and dealers etc. These are agreements that operate at different levels of trade.

Unlike horizontal agreements, vertical agreements are not per se considered to be having anticompetitive effects. Under section 3 (4) of the Competition Act, 2002 the onus of proof is

on the party alleging the anti-competitive nature of the vertical agreements to demonstrate that the agreement is having an appreciable adverse effect on competition in the market. The Act even identifies few of these vertical agreements like exclusive supply agreement, exclusive distribution agreement, tie-in arrangement etc. These agreements would have to be analyzed to see if they are anti-competitive in nature on the basis of the parameters

## Appreciable Adverse Effect on Competition

For either dispelling the presumption under Section 3 (3) or for satisfying the anti-competitive nature of a vertical agreement under Section 3 (4), it is necessary to establish that the agreement has an appreciable adverse effect on competition. The Competition Act, 2002 has identified the parameters on the basis of which agreements will be considered to be anticompetitive under Section 19 (3). These parameters can be broadly classified under two heads:

### A. Anticompetitive Factors

- creation of barriers to new entrants in the market
- driving existing competitors out of the market
- foreclosure of competition by hindering entry into the market

### B. Pro-competitive Factors

- accrual of benefits to consumers
- improvements in production or distribution of goods or provision of services
- promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services

The analysis under Section 19 (3) would be a weighing balance approach wherein the pro-competitive factors and the anti-competitive factors would be weighted and judged to see the overall impact of the agreement.

## Practitioner's Comment

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To better understand this process a recent case study of the application of Section 19 (3) by the CCI in the **Ajay Devgn Films v Yash Raj Films Case** is identified herein below:

The informant, Ajay Devgn Films, alleged that the Respondents had released its mega starrer Ek Tha Tiger on August 15th 2012 in theatres across India, including Single Screen Theatres. At the time of its release, the informant alleged that the Respondents imposed a condition on the Single Screen Theatres that they would get the right to exhibit Ek Tha Tiger **only** if they also simultaneously agree to exhibit Jab Tak Jai Jaan on Diwali. It was alleged that some theatres entered into this arrangement

and some did not. It was alleged by the Informant that such an arrangement was a *'tie-in arrangement'* opposed to Section 3 (4) (a) of the Competition Act, 2002. The Hon'ble Competition Commission of India held that a tie-in arrangement under Section 3 (4) is not per se illegal but it has to be demonstrated that the agreement / arrangement has to have an appreciable adverse effect on competition in India in the light of the factors enumerated in Section 19 (3).

While analysing the Appreciable Adverse Effect on Competition, the following reasoning was given by the Commission:

- (a) The decision taken by the Single Screen Theatres was a **legitimate commercial decision** taken in their own interest as the Single Screen Theatres were aware at the time of entering into the arrangement with the Respondents that other films would be released in Diwali and yet decided to screen only the films of the Respondents; and
- (b) Other single screen theatres which did not enter into this arrangement with the Respondents were free to screen any film of their choice including that of the Informant; and
- (c) Only 35% of the revenues in films comes from Single Screen Theatres while 65% of the revenues comes from the multiplexes and the right of the Informant to exhibit his film on the multiplexes was not prohibited; and
- (d) The distributors could pre-pone and postpone the release of a movie based on the availability of the screens.

Therefore, in the light of Section 19 (3) no entry barriers were created nor were existing competitors driven out of the market and nor was there any appreciable effect on the benefits accruing to the ultimate consumers (viz. viewers). Hence, there was no appreciable adverse effect on competition within India for the purposes of Section 3 (4) of the Competition Act.

In this manner a complete analysis is undertaken of the pro-competitive justifications and the anti-competitive allegations and thereafter a conclusion is drawn on the impact of the agreement. At the cost of repetition it may be pointed out that the accrual of benefit to the consumer is an important consideration that will be taken into consideration at this stage.

The Hon'ble CCI always takes into account the ultimate benefit that will accrue to the ultimate consumer and this is borne out in many of the orders passed by the CCI. In the case of **Mehrotra v Jet Airways and Kingfisher Airlines**, the Commission observed that the Interline Traffic Agreement between the airlines which facilitates passenger travel and handling of the baggage of the passengers would benefit the ultimate consumers / passengers and therefore it was found that it was not anti-competitive in nature under Section 3 (3) of the Competition Act, 2002.



## Appreciability Test

In addition to the factors under Section 19 (3), another very important factor is the ‘appreciability’ test under Section 3 of the Competition Act, 2002. For any agreement to be considered to be anti-competitive it should have an ‘appreciable’ adverse effect on competition. Section 19 (3) states that while determining whether an agreement has an appreciable adverse effect on competition it shall have regard to the 6 factors enumerated in the earlier section. However, there is no parameter provided for appreciable factor under Section 3. In other jurisdictions, the insignificant market share of an undertaking has been held to be a factor that would revolt against the appreciability test. In India too it seems that the CCI has taken the same stand.<sup>7</sup>

## Intellectual Property Rights

The area of intellectual property rights and competition law has always been a vexed area. The IPRs granted under different statutes confer a monopoly right for a particular period in appreciation and as a justification of the intellectual effort of the creator of the intellectual property. Under the Competition Act an exception has been created for IPRs under Section 3 (5) whereby if any restriction has been imposed to restrain the infringement of, or to impose reasonable conditions for protecting any of the rights conferred under Copyright Act, 1957 or the Patents Act, 1970 or the Trade Marks Act, 1999 or the Geographical Indications of Goods (Registration and Protection) Act, 1999 or the Designs Act, 2000 or the Semi-Conductor Integrated Circuits Layout-Design Act, 2000, such restriction would be valid in the eyes of law.

Section 3 (5) provides that if a right holder under any of the aforementioned legislations acts in a way to restrain the infringement of his right or imposes reasonable conditions for protecting such rights, it would be a valid exercise of his right.

### Practitioner’s Comment:

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The difficulty faced in most cases involving the interplay of competition law and IPR is the valid exercise of an Intellectual Property Right and the alleged distortion that it creates. In days to come, this would involve reconciling the specific right granted by the statute and the right of preserving competition. Harmoniously the statutes would have to be interpreted to ensure that neither of the rights are made subservient to the other.

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<sup>7</sup> In the Ajay Devgn Films case, the CCI has observed that *non-significant position* held by the single screen theatres will not have any adverse effect on competition

# Section 4: Abuse of Dominance by an Enterprise or Group

Section 4 of the Act describes dominant position in terms of the position of strength enjoyed by an enterprise or group, in the relevant market in India, which enables it to:

- Operate independently of the competitive forces prevailing in the relevant market;
- Favourably affect its competitors or consumers or the relevant market.

Therefore in an enquiry under Section 4, it is necessary to identify a position of strength; ability to operate independently of the market forces; and most of all, casual link between the position of strength and the ability to operate independently of the market forces.

In order to determine dominance for the purpose of section 4 of the Act, it is necessary to determine the existence of dominance in a particular relevant market. Further, to ascertain the existence of dominance, first and foremost, a detailed market analysis has to be undertaken. In other words, determining the relevant market for ascertaining existence of dominance is a pre-requisite. Dominance of an enterprise or group is to be assessed in that market. Pertinently, it is only once the relevant market and existence of dominance therein has been identified, that an enquiry into abuse of dominance by an enterprise or group can be initiated.

## Relevant Market

Since, existence of dominant position is applicable only in the relevant market, identifying the relevant market assumes significant importance in a section 4 enquiry. In fact, determination of the relevant market is the most crucial element and its importance cannot but be underlined as the result of any enquiry under section 4 hinges on market effect determination. Relevant Market means the market that may be determined with reference to the relevant product market or the relevant geographic market or with reference to both. The Act lists the various factors which ought to be considered while determining the relevant market.

Briefly, the relevant product market is identified / determined in terms of substitutability i.e. products (goods and services) which are considered substitutable among themselves by consumers on account of price or intended use. Relevant geographic market is determined in terms of 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.

## Relevant Geographic and Product Market

Factors that may be considered by the Hon'ble CCI while determining the relevant geographic market can be summarised as under:

- Regulatory trade barriers;
- Local specification requirements;
- National procurement policies;
- Adequate distribution facilities;
- Transport costs;
- Language;
- Consumer preferences;
- Need for secure or regular supplies or rapid after-sales services

Factors that may be considered by the Hon'ble CCI while determining the relevant product market can be summarised as under:

- Physical characteristics or end use of the goods;
- Price of goods or services;
- Consumer preferences;
- Exclusion of in-house production;
- Existence of specialised producers;
- Classification of industrial products;

### Practitioner's Comment:

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The Hon'ble CCI has in the case of **Ajay Devgn Films v Yash Raj Films Pvt Ltd and others** in Case No. 66 of 2012 vide order dated 05.11.2012 inter-alia held that to determine abuse of dominance under Section 4 of the Competition Act, 2002 it was necessary to determine the relevant market. Importantly, the Hon'ble CCI also held that temporal markets cannot be considered as a market. It held that a temporal market like Diwali or Eid Release of film cannot form the market and the entire year should be considered as the market.

Further, it also held that dominance has to be determined on the basis of the factors under Section 19 (4) and as no data of market share or economic strength was demonstrated in the instant case, dominance cannot be established merely on the basis of a big name or banner. Furthermore, since the Respondents only produced 2 to 4 movies in a year out of close to 100 films each year in Bollywood, it could not be said that the Respondents were dominant in the Bollywood industry leave alone the Film Industry in India.

## Determining Dominant Position of an Enterprise

In determining whether, an enterprise enjoys dominant position in the relevant market (geographic, product or both) the Hon'ble CCI shall have regard to several factors. Predominant amongst these factors is the market share, economic power, size and resources of the enterprise, including commercial advantages over competitors. Some of the other factors which play a significant role in determining the influence of an enterprise or a group of enterprises in the market include:

- Size and importance of competitors;
- Market structure and size of market;
- Vertical integration of the enterprises or sale or service network of such enterprises;
- Dependence of consumers on the enterprise;
- Entry barriers, including barriers such as regulatory barriers, financial risk, high capital cost of entry etc;
- Social obligations and social costs;
- Any other factor which the Hon'ble CCI may consider relevant for the enquiry

### Practitioner's Comment

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The Hon'ble CCI has in the case of **Belaire Owners Association vs. DLF Ltd. & HUDA vide order dated 12.08.2011, *inter-alia***, held that dominant position is established by the position of strength enjoyed by an enterprise to “operate independently of competitive forces prevailing in the relevant market” or to “affect its competitors or consumers or the relevant market in its favour.

More importantly, it was held that the evaluation of this “strength” is to be done not merely on the basis of the market share of the enterprise in the relevant market but on the basis of a host of stipulated factors such as size and importance of competitors, economic power of the enterprise, entry barriers etc. as mentioned in Section 19 (4) of the Act.

The wide spectrum of factors provided in the section indicates that the Hon'ble CCI is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry.

The Hon'ble CCI further held that while it is conceivable that the “dominant position” may be acquired due to several factors outside the “relevant market” but for the purpose of section 4, the “position of strength” must give the enterprise ability to operate independently of competitive forces” in the relevant market or ability to “affect its competitors or consumers or the relevant market in its favour. Thus, strengths derived from other markets, if they give an enterprise such abilities in the relevant market, would render the enterprise as “dominant” in the relevant market.

## Abuse of Dominance

As would be evident, while existence of dominant position is a necessary concomitant for an enquiry under section 4, such position of dominance taken on its own is not per se bad, its abuse or misuse is. When an enterprise or group uses its dominant position in the relevant market in an exclusionary or exploitative manner, abuse would be established. It is important to remember that unlike an enquiry under Section 3, no appreciable adverse effect on competition is necessary in determining abuse of dominant position.

Abuse of dominant position would arise, when an enterprise imposes “unfair” or “discriminatory” conditions of price (including predatory pricing); limits or restricts production of goods or provision of services or markets; limits or restricts technical or scientific development to the prejudice of consumers; creates barriers to entry or denies market access in any manner; makes contracts subject to acceptance of supplementary obligations which by their nature or according to commercial usage have no connection with the contract in issue; uses its dominant position in one market to enter into, or protect, some other relevant market.

## Abuse of dominant position by a group

Abuse of dominant position may also be exercised by a “group” of enterprises. The Act, assigns the same meaning to the term ‘group’ for ascertaining abuse of dominance as is assigned under explanation (b) to Section 5 of the Act.

Explanation (b) to Section 5 describes a ‘group’ to mean two or more enterprises which, directly or indirectly, are in a position to –

- Exercise twenty – six per cent or more of the voting rights in the other enterprise;
- Appoint more than fifty per cent of the members of the board of directors in the other enterprise; or
- Control the management or affairs of the other enterprise.

In terms of the provisions of the Act, if an enterprise is in a position to participate, directly or indirectly, in the management or affairs of the other enterprise or exercises 26 per cent or more voting rights in other enterprise or appoint more than fifty per cent of the members of the board of directors in the other enterprise, the enterprises would constitute a group.

The expression ‘**controlled directly or indirectly**’ is crucial and must be read **as envisaging both *de jure* and *de facto* control**. The former being a legal control as against *de facto* control i.e. the right of control attached to ownership of such number of shares as to entitle the holder to elect a majority of the board of directors. *De jure* control may be achieved directly, by ownership of shares or indirectly, through ownership

of shares of one or more corporations, which themselves hold shares of the enterprise in question. Additionally, two or more enterprises would normally be considered part of a group if they are operating in the same relevant market.

In view of the above, in order to establish abuse of dominant position by a 'group', joint and coordinated action between its constituents for mutual benefit and advantage is paramount. In other words, a joint dominant position would exist in a 'group', if they are able to, because of factors giving rise to a connection between them, adopt a common policy on the market and act to a considerable extent, independently of their competitors, their customers, and ultimately the consumers.

### Practitioner's Comment

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The Hon'ble CCI has in the case of **Arshiya Rail Infrastructure Ltd (ARIL) v. Ministry of Railways (MOR) and Container Corporation of India Ltd (CONCOR), Case No. 64/2010 along with Case No. & 12 / 2011; & Case No. 02/2011, vide order dated 14.08.2012**, inter-alia, held that MOR and CONCOR are not a Group. It was held that MOR does not operate in the relevant market of transportation of containers through rail and road in the entire country. Therefore, there was no question of abuse of dominance by MOR. Therefore, there was no question of abuse of dominance by Ministry of Railways. Similarly, in the relevant market for transportation of containers, the Hon'ble CCI held that CONCOR did not enjoy any dominant position in the relevant market as it did not have the strength to influence the competitors or the market in its favour. Therefore, it was found that CONCOR was not dominant in the relevant market.

## Intellectual Property Rights (IPRs) and Essential Facilities Doctrine

### IPRs and Abuse of Dominance

Although the exemption contemplated with reasonable use of IPRs under Section 3 of the Act in relation to anti-competitive agreements is not expressly available under Section 4. Considerable foreign jurisprudence would suggest that reasonable use of IP rights and exclusivity associated to it, by an IP right holder would not amount to abuse of dominant position. This is however subject to the fact that the rigours of Section 4 would apply, if such use of IP rights amounts to an abuse of dominant position. The interplay of IPR and abuse of dominance has been seen from the conspectus of the essential facilities doctrine. Therefore, this section would address some important cases on essential facilities to better understand the scope of the doctrine.

In the landmark judgment of *Magill*<sup>8</sup> the TV broadcasters obtained an injunction against Magill TV Guide Ltd from publishing comprehensive TV weekly guides. The actions of the TV broadcasters in refusing to grant licenses for weekly TV listings was successfully challenged by Magill as an abuse of a dominant position. The European Court of Justice held that the TV broadcasters were the *only sources of the basic information* which was *indispensable* for the emergence of the new product (weekly TV Guide) for which there was consumer demand. Furthermore, the Court found that there was no substitute for the said product, no justification for the refusal by the TV broadcasters and by doing so the TV broadcasters were reserving the entire secondary market of weekly TV guides to themselves. Furthermore, it will be significant to note that the Court relied upon the earlier cases on refusal to deal relating to downstream markets<sup>9</sup> to hold that the competition in the downstream market for weekly TV Guides was reserved to themselves. Therefore, in this way this case identified the parameter for essentiality as well as the identified the circumstance when the doctrine is to be applied. Therefore, the parameter under which access to IPR is granted is under very limited and restricted circumstances.

Next, in the *Oscar Bronner case*<sup>10</sup> decided by the ECJ the challenge pertained to the denial by Mediaprint to allow Oscar Bronner to be part of its home delivery system for distribution of newspapers as it argued that access to the nationwide system for distribution was *essential* for sale of its newspaper.<sup>11</sup> The Court observed that the refusal to supply raw materials or services (*which were indispensable to carry on the rival's business*) to an undertaking competing with the dominant undertaking was previously held abusive by the ECJ in the context where the conduct was *likely to eliminate all competition* on that part of the undertaking. Further referring to the *Magill Case*, the Court observed that even if the *Magill test* was to be applied, other modes for distributing newspaper though less advantageous existed and were used by other newspaper publishers<sup>12</sup> and there were not technical, legal or economic obstacle for the newspaper publishers to develop their own nationwide home delivery scheme.<sup>13</sup> Finally the Court held that for the test to demonstrate that developing a potential alternative distribution system was not viable it was necessary to demonstrate that it is not economically viable to create a second home-delivery scheme for the distribution of daily newspapers with a circulation comparable to that of the daily newspapers distributed by the existing scheme<sup>14</sup> as opposed to it not being economically viable as a result of the small circulation of the newspapers to be circulated.<sup>15</sup> In this background, it was held that the refusal by the dominant undertaking to access its home delivery system was not an abuse of a dominant position.

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<sup>8</sup> Cases C-241/-1/91, P, RTE & ITP v Commission [1995] 4 CMLR 718

<sup>9</sup> Joined Cases 6/73 and 7/73 Commercial Solvents v Commission [1974] ECR 223, Para 25

<sup>10</sup> Case C-7/97, Oscar Bronner GmbH & Co KG v Mediaprint [1999] 4 CMLR 112

<sup>11</sup> Id at Para 37

<sup>12</sup> Id at Para 43

<sup>13</sup> Id at Para 44

<sup>14</sup> Id at Para 46

<sup>15</sup> Id at Para 45

Finally, in the recent judgment of the Microsoft case<sup>16</sup> the Court of First Instance had to decide the case related to the non-disclosure by Microsoft of interoperable information. While addressing the degree of interoperability (indispensability requirement) that was required the Court held that the standard that has to be used is with reference to what is necessary to *remain viably on the market*.<sup>17</sup> The CFI justified this on the interpretation that Article 82 deals with *conduct that hinders the maintenance of effective competition on the market* and furthermore the EC jurisprudence imposed a *special responsibility on the dominant undertakings* not to impair genuine undistorted competition in the market.<sup>18</sup> The CFI then found that the finding of the Commission that the ‘interoperability with the client PC operating system is of *significant competitive importance* in the market for work group server operating systems’ was correct.<sup>19</sup> Microsoft also argued that the test applied by the Commission was incorrect<sup>20</sup> in the light of the earlier cases pertaining to abuse of dominance, where the refusal should have been likely to eliminate all competition or in other words there is a high probability that the conduct will have such a result.<sup>21</sup> The CFI held that this was only a matter of terminology<sup>22</sup> and that the objective of Article 82 would not be served if the Commission were to wait till there is no competition in the market. Furthermore, the CFI held that the standard that needs to be demonstrated is the refusal is likely to eliminate ‘all effective competition’ on the market.<sup>23</sup> Finally the Court observed that such practice of not granting interoperable information would amount to an abuse of a dominant position. Therefore, this is the background in which essential facilities doctrine has been applied in Europe where it has been successfully applied by the Commission and approved by the Higher Courts. However, it should be borne in mind that the basis for the application of the doctrine lies in certain principles that are fundamental to the European Jurisprudence and are alien to Indian jurisprudence.

Furthermore, the applicability of essential facilities doctrine with respect to IPR would be a very interesting question as the US Supreme Court has already felt the need not to recognise the doctrine and has identified the uncertain virtues in forced sharing.<sup>24</sup>

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<sup>16</sup> Case T-201/04, Microsoft v Commission [2007] ECR II-2601

<sup>17</sup> Id at Para 229

<sup>18</sup> Ibid

<sup>19</sup> Id at Para 381

<sup>20</sup> The Commission used the test whether the refusal gave risk of elimination of competition

<sup>21</sup> Id at Para 560

<sup>22</sup> Id at Para 561

<sup>23</sup> Id at Para 563

<sup>24</sup> Verizon Communications Inc v. Law Offices of Curtis v Trinko LLP 540 US 398; Philip Areeda has commented in his famous article that no case provides a consistent rationale for essential facilities or explores the social costs and benefit of requiring a creator to share with a rival, 58 Antitrust LJ 841



## Practitioner's Comment:

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Although there has not been a case where enterprises have been mandated to share access to IPR, the doctrine of essential facilities has been referred to in an obiter in the **Arshiya Rail Infrastructure** case of the CCI. The CCI held that Container Corporation of India (CONCOR) was not dominant in the relevant market but as an obiter on the issue of access of terminals of CONCOR held that essential facilities doctrine can only be invoked in certain circumstances (a) technical feasibility to provide access; (b) possibility of replicating the facility in a reasonable period of time, distinct possibility of lack of effective competition if such access is denied and possibility of providing access on reasonable terms. Although the parameters are much wider than the parameters that have been provided in Europe in the case at hand in CONCOR it was held that since there were no technical, legal or economic reasons why the other Container Train Operators should not invest. It will be interesting to see if the same parameters would be adopted for future cases or it would only be seen as an obiter.

## Consequences of Abuse of Dominance

Under Section 27 of the Act, the Hon'ble CCI may direct an enterprise with dominant position to discontinue the abuse of its position and may also impose penalty not exceeding ten percent of the average turnover of last three financial years.

Further if found that the dominant enterprise has indulged in practices resulting in denial of market access by controlling an infrastructure or a facility necessary for accessing the market, the Hon'ble CCI may pass remedial orders under which the dominant enterprise may have to share an essential facility with its competitors in the downstream market at a reasonable cost. The Hon'ble CCI is also empowered under Section 28 to direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

In addition, the Hon'ble Competition Appellate Tribunal can be approached for award of compensation to be paid by a dominant enterprise for any loss, damage shown to have been suffered by applicant as a result of any contravention of section 4 by such enterprise, if established by the Hon'ble CCI.

# Recent Developments - Competition (Amendment) Bill, 2012

The enforcement of the Competition Act, 2002 over the past few years have also thrown up the wind to areas where there is a need for amendment in the provisions of the Act. In this background, a bill has been introduced in Parliament seeking to amend the provisions of the Competition Act, 2002.

Few of the important changes that would be relevant from the perspective of Section 3 and 4 are addressed herein:

## Regulatory Interface

The amendment bill seeks to make a level playing field between the Sectoral Regulators / Authorities and the CCI by making it mandatory to make references to each other. At present, there is no mandate that either the Authority or the CCI should make a reference under Section 21 or 21A respectively. Sections 21 and 21A use the phrase ‘the authority may make a reference’ or ‘the Commission may make a reference’. The Amendment substitutes the words ‘may’ with ‘shall’ and thereby will make it mandatory for the Statutory Authority and CCI to necessarily make a reference to take an opinion.

## Practitioner’s Comment

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The Hon’ble Madras High Court in WP No. 25304/2012 and 25669/2012 has specifically denied a mandamus to direct the Designated Authority, Director General of Anti-Dumping and Allied Duties to make a reference to CCI on the basis that Section 21 of the Competition Act, 2002 only uses the word ‘may’ and is therefore discretionary and not mandatory on the Authority to refer the matter to the CCI.

## Collective / Joint Abuse of Dominant Position

The CCI has in the past held that in the light of the specific definition of ‘group’. Initially the un-amended section 4 only provided that no enterprise shall abuse its dominant position and post the 2007 amendment the term ‘group’ was specifically introduced. The definition of group is restricted to entities under the same management or control. Therefore, collection of enterprises that do not form part of group was not considered by legislature to come within the purview of Section 4.

Collective Dominance as accepted in Europe is a case where a group of unrelated entities that are united by economic links collectively hold a dominant position in a market.<sup>25</sup> As a result of few decisions of CCI wherein it has rejected the applicability of the Collective Abuse of Dominant Position as a result of the language of Section 4, the Amendment bill has now sought to introduce collective abuse of dominant position by amending Section 4 (1) as ‘No enterprise or group *jointly or singly* shall abuse its dominant position.’

### Practitioner’s Comment

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Under Section 13 of the General Clauses Act, 1897, it is a fundamental rule of statutory interpretation that a singular word would also include a plural. Therefore, it is permissible to argue that the term ‘enterprise’ also includes ‘enterprises’ and hence the concept of Collective Dominance was already present under Section 4 of the Competition Act, 2002 and the Amendment Bill only clarifies this position. In this background, it will be interesting to see how collective dominance is applied post the amendment.

## Appellate Jurisdiction of COMPAT

The Hon’ble Supreme Court in the case of CCI v SAIL and another has held that the appeals will lie to COMPAT only from decisions, orders or directions of CCI specifically mentioned under Section 53A (1) (a) of the Act. Interestingly decisions, orders or directions of CCI under Section 26 (7) and (8) have been omitted from Section 53A (1) (a). Section 26 (8) contemplates a scenario where the DG finds in its report that there is a contravention of Sections 3 and / or 4 and thereafter the CCI inquires into the matter in accordance with the provisions of the Act. In this circumstance, the CCI may either come to a conclusion that there is a contravention of Sections 3 or 4; or come to conclusion that there is no contravention of the provisions of the Act. In the event the CCI agrees with the recommendation of the DG, it may thereon pass necessary orders or directions under Section 27 or 28 and which would be appealable before the Hon’ble COMPAT. However, in the event the CCI comes to a conclusion that there is no contravention, then Sections 27 and 28 will not be applicable as they would apply only when there is a contravention of Sections 3 or 4 and similarly the other provisions under Section 53A will not be applicable. Therefore, as a result of the judgment passed by the Hon’ble Supreme Court, in a case where the DG holds that there is a contravention in terms of Section 26 (8) and the CCI thereon holds that there is no contravention and closes the case therewith, no appeal will lie against such an order of the CCI.

The Legislature in its wisdom wanted to cure this situation and has sought to make orders, directions or decisions under Section 26 (7) and (8) appealable to the CCI.

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<sup>25</sup> Case T-68, 77 and 78/89, Societa Italiana Vetra SpA v Commission [1992] 5 CMLR 302, Para 358

## Practitioner's Comment

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Appeals on the maintainability of orders under Section 26 (8) have been heard before the Hon'ble COMPAT and have been reserved for judgment.

## Search and Seizure Powers

The Proposed Amendment seeks to provide search and seizure powers to the Director General, wherein the Director General feels that information has been withheld or the information would be destroyed in the course of an investigation. Under the proposed amendment, the Director General with the authorization of the Chairperson of the CCI may enter premises, search and seize documents and record statements on oath. This would equip the DG and the CCI to obtain further evidence which may not have been accessible to the CCI previously.

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## About the firm

Lakshmikumaran & Sridharan (L&S) is a full service Indian law firm specializing in the areas of Taxation, Intellectual Property, Corporate and International Trade laws. Founded by V. Lakshmikumaran and V. Sridharan in 1985, the firm serves clients globally, through its 31 Partners and 230 attorneys, from seven offices located in India. The firm is well-known for its high ethical standards, quality work and transparency in all its business dealings.

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The Commercial Litigation team in this Division has vast experience of litigating a variety of matters across several judicial fora in India and abroad. In particular, the attorneys of L&S are actively involved in providing advisory and litigation support under competition law and anti-trust matters. The Corporate Division of Lakshmikumaran & Sridharan provides a comprehensive range of services essential for setting up and operating a corporate business entity in India. The team provides assistance in drafting commercial documents and agreements, seeking regulatory approvals, permissions and sanctions from various authorities and conducting due diligence.

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Lakshmikumaran & Sridharan is recognized as an established IP firm in India. The IPR Division has domain experts drawn from different fields like biotechnology, molecular biology, chemistry, pharmacology, software and engineering and a highly effective team of patent agents and lawyers who ensure end-to end services to IP clients.

The team undertakes drafting, filing, prosecution and opposition effectively handling issues like patent pre-grant and post-grant proceedings, pre and post-registration formalities for Plant Variety Protection (PVP), design searches for trademarks or search and analyses in respect of geographical indication. The team is well-experienced in conducting intellectual property due diligence, conducting freedom-to-operate opinions, valuing IP for transactions, interpreting and drafting licence agreement and other M&A related IP services. The IP team also formulates strategy for clients and helps in its implementation.

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The International Trade Division of Lakshmikumaran & Sridharan caters to WTO and International Trade disputes. The Division has handled more than 200 anti-dumping actions and investigations initiated by EU, USA, Korea, Indonesia, China, South Africa and Turkey. Apart from anti-dumping actions, professionals in the International Trade Division also handle matters pertaining to Free Trade Agreements, subsidy and countervailing measures, safeguards, market access and national treatment.

This Division represents the trade before investigating authorities and also in appellate proceedings conducted before Indian Tribunals, High Courts and the Supreme Court. It also represents exporters from other countries before investigating authorities in different countries. It represents governments before Dispute Settlement Body of WTO.



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