"AN ANALOGICAL STUDY TO DETERMINE THE PARAMETERS OF ABUSE OF DOMINANT POSITION IN INDIAN JURISDICTION"

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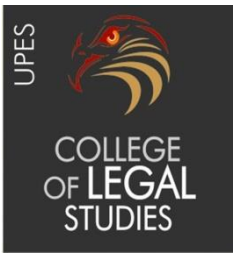
This dissertation is submitted in partial fulfillment of the degree of B.B.A., LL.B. (Hons.)



College of Legal Studies

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DECLARATION

I declare that the dissertation entitled **"An Analogical Study to Determine the Parameters of Abuse of Dominant Position in Indian Jurisdiction"** is the outcome of my own work conducted under the supervision of **Mr. Krishna Deo Singh Chauhan**, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

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CERTIFICATE

This is to certify that the research work entitled **"An Analogical Study to Determine the Parameters of Abuse of Dominant Position in Indian Jurisdiction"** is the work done by **Mr. Karan Chawla** under my guidance and supervision for the partial fulfilment of the requirement of B.B.A., LL.B. (Hons.) at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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ABSTRACT

The objective of competition law regime in any state is the promotion of competition and ensuring fair-play in the market. With greater competition in the market, enterprises face the challenge to protect their market share. While this applies to the majority of the players in the market; for those enjoying market power it is not so difficult. The perk of being dominant in the market for any enterprise is the control it enjoys over the market. It is this control over the market that can prove detrimental to the business of the competitors and mar consumer interest. Preventing abuse of dominant position is therefore, one of the major concerns of competition law in any jurisdiction.

When patrolling abuse of dominant position by an enterprise, the first task with competition regulators is to determine their dominance in the relevant market. Various economic factors are taken into account to evaluate whether an undertaking is in a dominant position. The paper analyses the parameters adopted to determine abuse of dominant position in India. In addition, it will examine the approach towards the issue in foreign jurisdictions, especially the US and the EU and compare them with that in India.

Keywords: Dominance, Relevant Market, Abuse of Dominant Position.

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SYNOPSIS

STATEMENT OF THE PROBLEM:

The objective of competition law regime in any state is the promotion of competition and ensuring fair-play in the market. With greater competition in the market, enterprises face the challenge to protect their market share. While this applies to the majority of the players in the market; for those enjoying market power it is not so difficult. The perk of being dominant in the market for any enterprise is the control it enjoys over the market. It is this control over the market that can prove detrimental to the business of the competitors and mar consumer interest. Preventing abuse of dominant position is therefore, one of the major concerns of competition law in any jurisdiction.

When patrolling abuse of dominant position by an enterprise, the first task with competition regulators is to determine their dominance in the relevant market. There is no fixed criterion to assess the dominance of an enterprise. Various economic factors are taken into account to evaluate whether an undertaking is in a dominant position. The study analyses the parameters adopted to determine abuse of dominant position in India. In addition, it will examine the approach towards the issue in foreign jurisdictions, especially the US and the EU and compare them with that in India.

OBJECTIVE OF RESEARCH:

The objective of the study is to assess the provisions on the subject of abuse of dominance in India and analyse if there are clear legal parameters to determine the conduct of an entity in dominant position as abuse or not. For the same, parallels are drawn with provisions in the EU and the US; and the similarities and differences in these jurisdictions with respect to abuse of dominance are studied. The objective of the research also includes analysing the sufficiency of the parameters.

SCOPE OF THE RESEARCH:

This research paper shall deal with the Competition/Antitrust laws of India, US and the EU. The provisions specifically dealing with "Abuse of Dominant Position" shall be deliberated. The researcher shall also lay down the leading case laws in each of these jurisdictions relating to abuse dominant position. It will be discussed as to how these cases essentially modelled the amendments in the laws, and also gave a new method of interpretation to the existing laws. The areas of research will widen as the research will extend to various issues. At many points, the research will be limited to the particular area and at others it shall widen its scope and move to the various other issues which this dissertation shall deal in.

IDENTIFICATION OF ISSUES:

The research paper would be dealing with various aspects related to abuse of dominant position. The issues which shall be highlighted in the dissertation shall be as follows-

1. What are the parameters to evaluate abuse of dominant position in India?
2. Whether such parameters are sufficient in regulating the abuse of dominant position in India?
3. How is abuse of dominant position established in foreign jurisdiction such as the US and the EU?

What are the similarities and differences in the regulatory framework of India in comparison with US and the EU?

HYPOTHESIS:

Clear legal parameters for determination of conduct of an entity in dominant position as abuse or otherwise are absent under Indian jurisdiction and the same need to be judicially determined.

RESEARCH METHADOLOGY:

The methodology for research for the completion of the research paper would be doctrinal, comparative and analytical. The research methodology for this paper requires gathering relevant data from the specified documents and compiling databases in order to analyse and compare the material. Also, important divergences in other legal systems is taken into account with the help of various statutes, norms, regulations, scholarly articles of different authors, journals and books.

REVIEW OF LITERATURE:

Articles, Research Papers and White Papers

1. **OECD, Policy Roundtables, Abuse of Dominance and Monopolization (1996)**

   The paper comprises proceedings of a roundtable on Abuse of Dominance which was held by the Committee on Competition Law and Policy in February 1996. It includes how observed conduct, notably exclusionary conduct, interacts with finding whether a firm has a dominant position; economic dependency; abusive conduct; whether abuse of dominance can give rise to market access problems; and appropriate relief.

2. **DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005)**

   The discussion paper sets out principles for the Commission's application of Article 82 of the Treaty to exclusionary abuses. The paper, among other things, describes the principles used by the Commission for finding a dominant position.

3. **Eric van Damme, Pierre Larouche and Wieland Müller, *ABUSE OF A DOMINANT POSITION: CASES AND EXPERIMENTS,* TILEC Discussion Paper, 2006 (ISSN 1572-4042)**

The paper studies Article 82 of the EC Treaty through various case laws decided in the EU. The position in the US is also referred to examine the similarities and differences in the two legal systems.

4. **Hovenkamp, Herbert J., T*he Legal Periphery of Dominant Firm Conduct,* (June 24, 2010). U Iowa Legal Studies Research Paper No. 07-21.**

   The author in this paper studies the approach of US antitrust law and EU competition law on two different but related problems. The first is the offense of "attempt" to monopolize, which concerns anticompetitive acts of a firm that is not yet dominant but that threaten dominance. The second is the offense of monopoly or dominant firm "leveraging," which occurs when a firm uses its dominant position in one market to cause some kind of harm in a different market where it also does business.

5. **Revised Chapter IV, Model Law on Competition, UNCTAD Series on Issues in Competition Law and Policy (2015)**

   The document lays down the model provisions on abuse of dominance. It outlines general criteria for identifying the existence of dominance. It also provides a non-exclusive list of acts that may be considered anticompetitive.

Books

1. **T. RAMAPPA, COMPETITION LAW IN INDIA POLICY, ISSUES, AND DEVELOPMENTS, Oxford University Press, (3rd Ed 2014)**

   The relevant parts for the research are chapters which contain the provisions regarding laws upon abuse of dominant position contained in section 4 of the Act. The factors that are to be taken into consideration in determining whether an enterprise holds a dominant position are set out in section 19(4). Some forms of abuse discussed are price fixing, imposing discriminatory prices, 'predatory' prices, denial of market access, etc.

2. **D.P. MITTAL, COMPETITION LAW AND PRACTICE, Taxmann, (3rd Ed 2011)**

   The author has given a detailed study upon the S. 4 of the Competition law, which deals with abuse of dominant position holders. It has been laid down that there is need of abuse of the position, only then the entity can be held liable under the Competition Law. The case laws discussed will be included in this thesis.

3. **S. M. DUGGAR, GUIDE TO COMPETITION LAW, Lexis Nexis, (5th Ed 2010)**

   The relevant parts for the research include the chapters upon the Section 4 of the Competition Act which contain the provisions regarding laws upon abuse of dominant position. The book is a vivid study of the events in India over the competition laws. It has also compared India's laws upon antitrust with other foreign countries. The chapter over abuse of dominant position in the market contains various case-laws, definitions, process and punishments; all these will be referred to in the thesis.

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- Green Country Food Market, Inc v. Bottling Group, LLC and Bottling Group Holdings, Inc
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- Ilan Golan v. Pingel Enterprises Inc (decided 7th Nov 2002)
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- Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993)

- Tetrapak Interational SA v. Commission of European Communities [1996 ECR I-5951]
- United Brands Co and United Brands Continental BV v. The Commission of European Communities (1978) 1 CMLR 429
- United States v. E.L. du Pont de Neumours and Co 351 US 377 (1956)
- United States v. Grinnell Corp 384 U.S. 563 (1966)
- United States v. International Harvester Co. 274 US 693, (1927)
- Volkswagen AG v Commission of the European Communities [2000] ECR II-2707
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CHAPTER 1

INTRODUCTION

The objective of competition law regime in any state is the promotion of competition and ensuring fair-play in the market. With greater competition in the market, enterprises face the challenge to protect their market share. While this applies to the majority of the players in the market; for those enjoying market power it is not so difficult. The perk of being dominant in the market for any enterprise is the control it enjoys over the market. It is this control over the market that can prove detrimental to the business of the competitors and mar consumer interest. Preventing abuse of dominant position is therefore, one of the major concerns of competition law in any jurisdiction.

Across jurisdictions, the concept of abuse of dominance is present in the statues but the provisions are not as such. While Australia has a concept of "misuse of market power"; "monopoly" or "attempt to monopolize" is present in the United States (US) texts. Both of these concepts envisage similar situations, but their meaning is not exactly similar to "abuse of dominance" used in European Union (EU) and India. Although, all these conceptions essentially *"pertain to the exploitation by a single firm or group of firms of their market power or use of improper means for attaining market power"*[1].

The present work is an attempt to study the provisions on the subject of abuse of dominance in India. Throughout the paper, parallels are drawn with provisions in the EU and the US. The paper first introduces the readers, in Chapter II, the concept of Relevant Market that is a pre requisite in any case of abuse of dominance. Chapter III contains the definition of *"Dominance"* and includes the various factors that are taken into account to establish *"dominance of an enterprise in the relevant market"*.

[1] Van Sicen, Saly : Background Note in OECD (1995) "Abuse of Dominance and Monopolization", http://www.oecd.org/dataoecd/024/611/2371239409.pdf

Chapter IV focuses on the various activities that are termed as abuse and the parameters to deal with the same.

Before we move to the chapters that follow, it is to be kept in mind that in most jurisdictions, being in a dominant position is not a violation of the competition law. It is the abuse of such dominance that the law tries to curb. This is because; an improper conduct by an enterprise in a dominant position in the market would be detrimental to the business interests of the fellow players in the market as well as be against consumer welfare.

For instance, in EU law, in ***N. V. Netherlands Bandeen Industries Michelin v. Commission of the European Communities***[2], it was observed that *"*a finding that an undertaking has a dominant position is not a recrimination but simply means that irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market*"*.

In ***Berkey Photo Inc. v. Eastman Kodak Co.***[3]**,** it was observed that "As the court recently held in United States v. Grinnel Corp 384 US 563 (1966), that it is not a violation of Section 2 of the Sherman Act for a business with monopoly power to achieve growth or development as a consequence of a superior product, business acumen or historic accident". In ***US v. International Harvester Co.***[4], the Court citing the case of US v. US Steel Corp. 251 US 417 observed that "the law does not make mere size of a corporation, however impressive, or the existence of unexterted power on its part, an offence, when accompanied by unlawful conduct in the exercise of its power."

[2] *[1984] ECR 351*
[3] *44 US 1093 (1981)*
[4] *247 US 639, (1928)*

The laws of most jurisdictions restrict the abuse of dominant position/abuse of market power/or endeavor to corner by ventures. It might be noticed that the competition laws of all jurisdictions don't contain a general forbiddance on the abuse of dominance or on the abuse of market power. A few laws just preclude determined leads by endeavors in a dominant position or having a generous level of market power.

There is a general prohibition on the "abuse of dominance" by enterprises in the EU and Indian competition laws. In the European Union, "Any abuse by one or more undertakings of a dominant position within the internal market or a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States".[5] While in India, "No Enterprise shall abuse its dominant position".[6]

It is to be noted that in India, there is a general prohibition on the abusive conduct by an enterprise in the dominant position. The law of the EU prohibits abuse of dominant position in the 'internal market', in so far as it may or if it may affect trade 'between the member states' Toward the day's end, in EU, denial on "abuse of dominant position" is obligated to a supplementary condition that such abuse may impact trade between the part states. No such condition can be found in the Indian institution. It can, along these lines, be communicated that in India, the conduct of the try or firm alone is to be considered and not the effect of such lead on competition.

The terms "dominance" or "abuse of dominance" are absent under the antitrust laws of the US. Rather, the concept of 'monopoly' and 'attempt to monopolize' is present. In the United States, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and…"[7] Therefore, activities of sole enterprises that

[5] *Article 102 (ex Article 82 of the EC Treaty)* of the *Treaty on the Functioning of the European Union*
[6] *Section 4 (1)* of the *Indian Competition Act*
[7] *Section 2* of the *Sherman Act*

monopolize or endeavor to monopolize & also the intrigues and combinations that endeavor to monopolize[8] are addressed in the Sherman Act.

In determining whether an enterprise has abused its dominant position or not, there are essentially three stages. The first stage is to define the relevant market. The second is to determine whether the enterprise/firm/undertaking in question is in a dominant position/ has a considerable degree of market power/ has monopoly power in that relevant market. The third stage is to determine whether the said undertaking has engaged in conducts specifically prohibited by the statute or those amounting to abuse of dominant position/monopoly or attempt to monopolize under the applicable law.

[8] Spectrum Sport Inc. v. Mc Quilan 507 US 446 (1993).

CHAPTER 2

RELEVANT MARKET

Defining the relevant market is the very first step while determining if a firm or enterprise or undertaking has abused its dominant position or not. It is only when the relevant market has been defined that dominance has its significance for competition. Relevant market means "the market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets".[9] The Act lays down several factors of which any one or all shall be taken into account by the Commission while defining the relevant market. There are two dimensions to the concept of relevant market - the "relevant product market" and the "relevant geographical market".

As per ***Blacks Law Dictionary*** (7th Ed.), "the product market is that part of the relevant market that applies to a firm's particular product by identifying all reasonable substitutes for the product and by determining whether these substitutes limit the firm's ability to affect prices". It means-

"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."[10]

The relevant geographical market is a market incorporating that domain in which the situations for the source of items and organizations are unmistakably similar and can be perceived from the conditions winning in the region regions. It means, *"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"*[11]

[9] Section 2 (r) of the Competition Act, 2002
[10] Section 2 (t) of the Competition Act, 2002
[11] Section 2 (s) of the Competition Act, 2002

The Courts of most jurisdictions analysed have watched the essentialness of describing the "relevant market" (both geographical and product) as the underlying stage in choosing the "abuse of dominance"/"abuse of market power"/monopoly or try to store. In India, the statute itself communicates that for choosing the relevant market, the relevant product market or the relevant geographic market, or both are to be considered.

The European Court of Justice (ECJ) has in various decisions such as ***Hoffman La Roche v. Commission of the European Communities***[12] ***(1979), NV Nederlandsche Banden Industries Michelin v. Commission of the European Communities, Oscar Bronner GMBH***[13] ***(1998)*** observed that "it is essential to define the relevant market and it must be defined both from the geographical and the product points of view." In ***Volkswagen A.G. v. Commission of the European Communities***[14], it was observed that-

> *"For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined".*[15]

The EC's 1997 warning on the importance of relevant market with the finished objective of gathering laws lays out purposely the thoughts to recognize product and geographical markets. A relevant product market contains each one of the products or organizations which are tradable or substitutable by the client, by reason of the product's qualities, their expenses and their normal use. A relevant geographical market incorporates each one of the reaches in which the attempts concerned are incorporated into supply and demand of products or organizations, in which

[12]Para 34, http://europa.eu.int/smart.ape/cgiei/sga_doc?smart.api!!celex.plus!prod!!CELEXnum.doc&lg==en&numdoc=61976J0H345085
[13] http://www.worldlii.org/eu/cases/EUECJ/1999/C779.html
[14] [2001]ECR I- 207
[15] Para 203, http://www.worldlii.org/eu/cases/EUECJ/2001/T6928.html

conditions of competition are enough homogeneous and which can be perceived from neighborhood domains in light of the way that the conditions of contention are impressively unmistakable in these zones".

The importance of defining the relevant market in the initial stages has also been laid down by the ***American*** courts, referring to both the product and geographic aspects. In cases such as ***Walker Process Equipments Inc. v. Food, Machinery & Chemical Corp.***[16], it was observed that "without a definition of the relevant market, there is no way to measure the defendants' ability to lessen or destroy competition." In ***Ilan Gollan v. Pingel Enterprises Inc.***, citing Thurmaan Industries v. Pay Pack Stores Inc. 857 F. 2d 1396 (9th Circuit), it was observed that "defining relevant market is indispensable to a monopolization claim under section 2 of the Sherman Act"[17]. In ***Image Technical Services Inc. v. Eastman Kodak Co. US Court of Appeals (9th Circuit)***[18], the court observed that "The relevant market is the field in which meaningful competition is said to exist. Generally, the relevant market is defined in terms of product and geography".

In ***Ilan Gollan v. Pingel Enterprises Inc.***, it was also observed that "the relevant market has two dimensions, the relevant product market which includes a determination of the lack or presence of readily available substitutes and the relevant geographic market when competition is geographically confined." In ***Green Country Food Market, Inc. v. Bottling Group, LLC & Bottling Group Holdings, Inc***.[19], it was observed that, "accordingly, both S 203(B)(monopoly or attempt to monopolize) and S 203(C) (of the Oklahoma Antitrust Reform Act) require proof of a relevant market." The relevant market inquiry has two components: geographic market and product market. The Supreme Court enunciated the standard for describing the relevant product market in US v. E.I. du Point de Nemoures & Co.[20] "A relevant product market consists of *products that have reasonable interchangeability for the purposes for which they are produced Ä price, use and qualities considered."* In

[16] *328 US 127*
[17] http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/2nd/009342.html
[18] http://lw.bna.com/lw/19970916/9615293.htm
[19] http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/10th/025076.html
[20] 350 U.S. at 440

Brown Shoes Co. v. United States[21], it was observed that "the area of effective competition must be determined by reference to a product market (the line of commerce) and a geographic market (the section of the country It was furthermore watched that the outside furthest reaches of the product market are controlled by the sensible cover variability of use or the cross-adaptability of enthusiasm between the product itself or substitutes for it." Further it was watched that the criteria to be used as a piece of choosing the suitable geographic market are fundamentally like those used to choose the relevant product market…. Congress embraced a calm minded, valid approach to manage the importance of the relevant market and not a prescribed, legalistic one. The geographic market picked must, henceforth, both "identify with the business substances" of the business and be fiscally tremendous. In this way, disregarding the way that the geographic market in a couple cases may wrap the entire State, under various conditions it may be as meager as a lone municipal reach. [22].

The ***Indian*** Competition Act, 2002, as mentioned earlier, expressly provides in ***Section 19 (5)*** that "the Competition Commission shall have due regard to the relevant product market and the relevant geographical market in determining whether a market constitutes a relevant market for the purposes of the Act." The definition of relevant market provided by ***Section 2(r)*** of the Act also states that "the relevant market means the market that may be determined by the Commission with reference to the relevant product market or the relevant geographical market or with reference to both."

"Relevant product market" and "relevant geographic market" have been specifically defined in the Indian Competition Act. ***Section 2 (t)*** defines the ***relevant product market*** as –

[21] *307 US 249 (1961)*
[22] http://caselaw.1p.findlaw.com/scripts/get.case.pl?nav.by=case&court=us&vol.=307&page=249

"a market comprising all those products or services which are regarded as interchangeable or substitutable by the customer, by reason of the characteristics of the product or service, the prices and the intended use."

Section 2 (s) defines the ***relevant geographic market*** as –

"a market comprising the area in which the conditions of competition for supply of goods or provision of services are sufficiently homogeneous and can be distinguished from the conditions prevailing in neighbourhood areas."

CHAPTER 3

DOMINANT POSITION

3. 1 - Defining Dominant Position

While the laws of numerous countries prohibit or declare illegal the abuse of dominant position/monopoly or attempt to monopolize/ the misuse of market power or provide for a prohibition of certain conduct by undertakings in a dominant position/ having a substantial degree of market power, the manner in which "dominant position", 'monopoly' or 'substantial degree of market power' is defined is different in different countries. 'The concept of dominance is broader than economic power over price. It is not the same as economic monopoly, although a monopoly would clearly be dominant'[23]. The general significance of dominant position or market power followed in jurisdictions, for instance, the European Commission and India consider the limit of a firm or dare to bear on openly of its opponents and the nonappearance of competition or prerequisite from the conduct of contenders.

The ***Indian Competition Act*** contains a definition of dominant position that takes into account whether the concerned enterprise is in such a position of economic strength that it can operate independently of competitive forces or can affect the relevant market in its favour.

However, before going into that it will be beneficial to examine the position under the old law, which is The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. The provisions of this Act were targeted at "dominant undertakings" and as a result firms were being hit merely due to their size. The term "dominant undertaking" was defined under Section 2(d) which is as follows:

(d) "dominant undertaking" means

[23] OECD (2006): "Competition law and Policy in the European Union", http://www.oecd.ord/data.oecd/7/411/35909008641.pdf

(i) an undertaking which by itself or along with inter-connected undertaking produces, supplies, distributes or otherwise controls not less than one-fourth of the total goods that are produced, supplied or distributed in India or any substantial part thereof, or;

(ii) an undertaking which provides or otherwise controls not less than one-fourth of any services that are rendered in India or any other substantial part thereof.

The SVS Raghavan Committee set up by the Government set down in superbly clear terms that regardless of the way that dominance is an essential condition for setting up encroachment of obtainment as for abuse of dominant position: it is by no means, a satisfactory condition. Subsequently the board prescribed that "dominance" and "dominant undertaking" may be suitably portrayed in the competition law in terms of *"the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its actions"*[24]

Following the recommendations of the Raghavan Committee, Competition Act, 2002 was enacted which includes Section 4, prohibiting the abuse of dominant position by enterprises.

Explanation (a) to ***Section 4*** of the ***Indian Competition Act*** defines dominant position as-

"dominant position means a position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to-

(i) operate independently of competitive forces prevailing in the relevant market or,

[24] Report of the High Level Committee on Comp. Law and Policy, 2000 at 4.44

(ii) affect its competitors or consumers or the relevant market in its favour.

It is intriguing to note that dominant position is not described on the reason of any arithmetical parameters or a particular offer of the market like the case in the MRTP Act. 1969. On the other hand, dominance of an endeavor is to be judged by its vitality to work uninhibitedly of centered forces or to impact its opponents or buyers to bolster its. In this way, an endeavor with an offer of say under 25 % of the market could be made plans to be the "dominant" in case it satisfies the above criteria: on the other hand, a try with higher market offer may not be considered as "dominant" in case it doesn't meet the criteria indicated in the Act. The Act also sets out different variables which the Commission needs to think about in making sense of if an endeavor welcomes a dominant position or not, such as market share, size and resources of the enterprise, size and importance of competitors, economic power of the enterprises, vertical integration of the enterprises, Entry barriers, etc. which would involve a fair amount of economic analysis.

There is no specific definition of "dominant position" in the EC Treaty. However, the ECJ has in certain judgements defined "dominant position". For instance, In ***United Brands Co. & United Brands Continental B.V. v. The Commission of European Communities***[25], and ***Hoffman La Roche v. Commission***[26]**,** it was perceived that dominant position under *Article 86* of the EC Treaty as-

"a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers."

Since then, this definition has been relied upon in various subsequent judgements including ***N. V. Netherlands Bandeen Industries Michelin v. Commission of the***

[25] *(1978) 1 CMLR 429*
[26] [1979] E.C.R.-461

European Communities[27], Centre Belge d' Etudees de Marchée – Télé marketing (CBEM) v. S.A. Compaign Luxemburgeoisee de Télé diffusion (CLT) & Information Publicit Benelox (IPB) (1983), ***Hilti v. Commission[28]***, ***Aéroport de Paris v. Commission of the EC[29]***, ***Amministrasione Autonome dei Monopoli de Stato (AAMS) v. Commission of the EC (2001)***[30] and ***Vaan de Bergh Foods Ltd. v. Commission of EC (2003)***[31].

Certain authors have seen two elements in this definition, namely (i) the power to behave independently of competitors, customers and consumers; and (ii) the ability to prevent effective competition being maintained on the relevant market.[32] However, as Neven, Nutall and Seabright have rightly observed, it seems that on the legal ground, these elements are simply one and the same thing.[33] This is confirmed by the rulings of the Community Courts which have never drawn any distinction between these elements.

Regardless, the arrangement used by the ECJ is not by any stretch of the creative ability pleasing. The thought of "acting self-sufficiently" does not give an adequate reason to isolating between dominant firms and non-dominant firms. No firm can act to an evident degree unreservedly, since every firm will be obliged by its different interest curve. To begin with, every firm is compelled in its business behavior to some degree by contenders since the region of these contenders impacts the organization's advantage twist. Despite the way this is by definition legitimate for firms working in an engaged market, it is in like manner substantial for a dominant firm. All associations, including those that are held to be dominant, will extend expenses to the time when further cost augmentations would be unprofitable. In this sense, contenders do urge the behavior of firms so that even a dominant firm does not act openly of its

[27] *[1983] ECR 3451*
[28] *[1991] ECR II-1439* (Para 90)
[29] *(2000)*, (Para 147)
[30] http://www.worldlii.org/eu/cases/EUECJ/2001/T13323598.html
[31] http://www.worldlii.org/eu/cases/EUECJ/2003/T96706598.html
[32] M. Bishop and S. Walker, "*The Economics of EC Competition Law"*, 3rd Ed. Sweet and Maxvell, London, 2001 at para. 5.06
[33] R. Neven, P. Nutall and D. Seabright, "*Merger in Daylight – The Economics and Politics of European Merger Control"*, CEPR, 1994 at pg.18.

adversaries. Second, an individual organization's advantage twist is pretty much as affected by the behavior and slants of its customers. Firms normally go up against sliding slanting solicitation twists, showing that a higher quality goes to the impairment of less gives: it is not overall open to a firm to raise expenses and offer the same sum as some time as of late. Again, this is substantial for a dominant firm the same measure of as it is legitimate for a non-dominant firm.[34]

There is, clearly, one imperative sense in which a predominant firm can act to an obvious degree unreservedly of its adversaries. A predominant firm can grow its expense over the engaged level in this manner can to some degree exhibition openly at the forceful expense. As Professor Whish notes, "the ability to restrict output and increase price derives from independence or, to put the matter another way, freedom from competitive constraint."[35]

Regardless, there is an estimation issue here: in what way can one evaluate whether a firm can cost over the forceful quality level? The forceful worth level is basically continually hard to figure (on both sensible and data grounds). All the more in a general sense, in case it could be routinely processed then the ID of a dominant position would get the chance to be abundance, since one could fundamentally get the standard that all business sector individuals are required to cost at the forceful level.

As mentioned earlier, under the antitrust law of the ***United States***, the term corresponding to "dominant position" is "monopoly". "Monopoly Power" is defined as the power of the concerned entity to control prices or to restrict or exclude competition. In ***United States v. E.L. du Pont de Neumours and Co[36],*** it was

[34] Similarly, in cases where firms' customers are not its end consumers (e.g., wholesale markets), the firm is still unable to act independently of consumers. It is so because demand for intermediate goods is a "derived" demand, i.e. it is finally decided by end consumers.

[35] R. Whish, *Competition Law*, 5th Ed., Butterworths, 2003 at p.179. Other elucidations have likewise been proposed. Professor Motta watches that carrying on autonomously of its rivals may be formalized where the (dominant) firm amplifies its profits considering the best answers of its rivals. See M. Motta, *Competition Policy – Theory and Practice*, Cambridge University Press, (2004) at note 88.

[36] *351 US 377 (1956)*

observed that, “Our cases determine that a party has monopoly power if it has, over "any part of the trade or commerce among the several States." a power of controlling prices or unreasonably restricting competition”. In ***Jefferson Parish Hospital Distt No. 2 v. Hyde***[37], citing *inter alia* United States Steel Corp. v. Fortner Enterprises, 492 U.S. 601, (1978), it was observed that “market power is the ability to raise prices above those that would be charged in a competitive market.” These interpretations in du Point and Jeferson Paresh have been quoted and trailed in a number of cases such as ***US v. Grinnel Corp***[38]***, Cooperweld Corp. v. Independence Tube Corp.***[39]***, American Professional v. Hardcourt***[40]***, Country Food Market, Inc v. Bottling Group, LLC and Bottling Group Holdings, Inc.***[41]. In ***Eastman Kodak Co. v. Image Technical services Inc.***[42], again, mentioning these two judgements it was witnessed that “market power is the power to force a purchaser to do something he would not do in a competitive market. It has been defined as the ability of a single seller to raise prices and restrict output.”

In ***American Tobacco Co. v. United States***[43]**,** it was observed that-

> *“the authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and competition is actually excluded but that power exists to raise prices or to exclude competition”.*

[37] *466 US 2 (1984)*
[38] *384 US 563 (1966)*
[39] *467 US 752 (1984)*
[40] http://caselaw.lp.findlaw.com/scripts!/get.case.pl?nav.by=search!&case=/data.2/circs/9th/9567556513.html
[41] http://caselaw.lp.findlaw.com/scripts!/get.case.pl?nav.by=search!&case=/data.2/circs/10th/025789076.html
[42] *504 US 451 (1992)*
[43] *328 U.S. 781 (1946)*

3.2 - Dominance - EU vs US

In assessing whether or not a firm is dominant, the European Commission and the Court place great emphasis on the market share of the firm. Already in *Hoffmann-La Roche*, the Court held that very large market shares are in themselves, save in exceptional circumstances, evidence of dominance. While it is not possible to give an exact boundary, it is frequently stated that if the market share is above 50%, dominance is essentially presumed, while to date, there have been no cases where a firm with a market share of significantly less than 40% was found to be dominant. Of course, market shares are a very imperfect proxy for market power and, indeed, both the European Commission and the ECJ (the European Court of Justice) have frequently been criticized for attaching too much weight to market shares when assessing dominance, and for paying relatively little attention to other market characteristics, such as entry barriers.

Without a doubt, the substance of Article 82 leaves this request open. An imprudent examining might give the inclination that the article deals in a general sense with clear monopolistic abuse, thus, that the consideration is on obliging forcing plans of action. Such a restricted comprehension is in like manner proposed by the French and German vernacular types of Article 82 that talk about "harming abuse". Plainly, for this circumstance, there would be a sensible emerge from Section 2 of the Sherman Act in the US that just seems to go for neutralizing "controlling base" of markets, hence, at threatening to forceful (exclusionary) conduct facilitated at contenders. This is not to say that the US is not agonized over exploitative behavior, rather in the US that lead is normally countered by section specific regulation. As a considerable piece of the writing in trial money related matters begins in the US, such a sharp distinction would be relevant for this article. From one point of view, one should not expect the "controlling framework" trials to oversee exploitative behavior, however rather be more revolved around exclusionary conduct; on the other hand, the exploratory composition on regulation would be relevant for this paper as well. Fortunately for us, basically the refinement is not that broad. EC competition law focuses furthermore for the most part on exclusionary conduct, as was affirm the dialog on the change of

Article 82 EC by a Discussion Paper on exclusionary abuses, which the Commission thought to be the need range.[44]

Two aspects contribute to EU policy in this domain not being fundamentally different from policy in the US. First of all, in *Continental Can,*[45] the ECJ made it clear for the first time that Article 82 does indeed apply also to anti-competitive conduct that weakens competition that is already weak. Since then this has been confirmed on various occasions. For example, in *Hoffman-La Roche*, the ECJ wrote that abuse relates to taking "recourse of methods different from these of normal competition" with the effect of hindering the competition still existing in the market or the growth of that competition. Secondly, in practice, the European competition authorities have been reluctant to intervene in cases of alleged exploitation; see below. Consequently, although historical factors may explain a difference between the two sides of the Atlantic,[46] in practice policy focuses on anti-competitive behaviour.

To diagram, under Article 82 EC, firms are not illicit from having market force, nevertheless, firms with basic market power are banned from using certain business frameworks that other, non-dominant, firms are permitted to use. Presumably, the musing is that welfare and client surplus can be hurt if dominant firms would be allowed to take an interest in such (anticompetitive) practices. As will be clear, the test now is the best approach to divided average forceful behavior from behavior that should be named unfriendly to centered and, accordingly, be forbidden.

Test money related angles could add to taking note of this request and, subsequently, to competition game plan in three ways. In the first place, if dominant firms can set expenses over the forceful level, to offer products of a menial quality, or to reduce the

[44] European Commission, *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (19 December 2005).
[45] Case 6/72 Europemballage Corp and Continental Can Co Inc v. Commission, [1973] ECR 215, [1973] CMLR 199.
[46] Policy in the Us aimed at preventing dominant firms from coming into existence, on the other hand European industrial policy acknowledged the importance of large firms successfully competingon world markets, only if they are kept in constraints.

rate of headway underneath the level that would exist in an engaged market, examinations can be coordinated to see whether dominant firms will in all actuality join in such practices. Additionally, where speculations are too much fragile, making it difficult to perceive run of the mill forceful behavior from threatening to centered conduct, tests might help to see which theory is germane, or which is the most relevant one. Thirdly, since, when settling on their decisions, antitrust officials rely on upon a variety of formal and easygoing disputes, tests may be useful to see to what degree these conflicts hold water: if a particular kind of behavior is termed onerous, is it no ifs ands or buts found in the test research office and, gave this is genuine, does it diminish welfare or buyer overabundance?

Conversely, antitrust cases may be a source of inspiration for experimental economics. Real life cases may demonstrate a variety of behaviours, which may or may not be profit maximizing, and one may investigate whether these behaviours are observed in the laboratory, and whether they can survive there. As we will discover in this paper, there are a considerable measure of purportedly brutal frameworks that don't seem to have been formally investigated in the examination focus. The arrangement of trial money related viewpoints is in every way affected inside (by various examinations) and by progressions of theory, however less by bona fide cases and issues, let alone by abuse cases. As we discuss more comprehensively in the end fragment, this is not to say that trial monetary matters is irrelevant for professionals of competition law: since tests may help in sketching out the cutoff points where diverse contention speculations are relevant, they can be to an extraordinary degree relevant.

Dominance or monopoly power or market power of undertakings is defined in most jurisdictions on the basis of the ability of enterprises to act autonomously of competition or to raise/control prices. Various variables are to be mulled over to decide dominance/monetary force/monopoly control. Such criteria might have been indicated in the statute itself, for example, in Germany and India or might need to be resolved from chose cases.

It can be seen that the Indian competition law mostly follows the EU model and so its influence is evident in the Indian provisions regarding dominant position also. Be that as it may, the Indian meaning of dominant position contrasts from the EU definition in two angles. First, Section 4 Explanation (a) (i) refers to ability to behave independently of competitive forces only whereas the EU definition talks of behaviour independent of not just competitors but also consumers. Second, the EU definition does not deal with the ability of the enterprise to affect its competitors, consumers or the relevant market, like Explanation (a) (ii) of Section 4.

It is important to recognize that the Competition Act does not frown upon positions of market dominance per se, unlike the Monopolies and Restrictive Trade Practices Act. 1969. It is not illegal for an undertaking to have a dominant position: however, where a firm is seen to be in a dominant position it has an exceptional commitment not to allow its conduct to cripple certifiable competition on the consistent market.

CHAPTER 4
FACTORS FOR DETERMINATION OF DOMINANCE

In the Antitrust arena, an enterprise is said to have a dominant position in the market when it enjoys a certain amount of control in the said market. Across jurisdictions, there are different criteria for observing if an enterprise enjoys a dominant position or not. To a layman, market share would be a synonym to dominant position. But in Antitrust Law it is not the case. Although, market share is an important aspect of deciding on the issue of dominance but there are various other factors such as the size and resources of the enterprises, size of the competitors etc. that come into play to come to a final decision.

A number of factors are taken into account to determine whether a particular undertaking or group of undertakings is in a dominant position in the relevant market. "The factors to be taken into account are market share of the undertaking or enterprise, barriers to entry, size of competitors and financial power of the enterprise. In some jurisdictions, the competition legislations themselves specify the factors to be taken into account but in others case laws may have to be looked into to identify the factors." The Indian Competition Act expressly lays down the factors that are to be taken into account to determine dominant position.

Under ***Section 19 (4)*** that "the Commission may have regard to certain factors for determining whether an enterprise is in a dominant position including market share of the enterprise, size and resources of the enterprise; size and importance of competitors; economic power of the enterprise including commercial advantages over competitors, vertical integration of the enterprises or sale or service network of such enterprise; dependence of consumers on such enterprise, monopoly or dominant position whether acquired as a result of any statute or by virtue of being a government company or public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of

market; social obligations and social costs; relative advantage by way of the contribution to the economic development by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; or any other factor which the commission may consider relevant for the inquiry."

Under the competition laws of the ***EU***, also, it has been accepted that market share is one of the significant pointers of dominant position. The DG Competition discussion paper on "the Application of Art. 82 to Exclusionary Abuses" records that market shares offer valuable first signs of the market structure and of the relative significance of the several undertakings vigorous on the market[47].

An OECD Paper on competition law and policy in the EU[48], records that "dominance depends upon factors other than market share, such as the number and relative size of other firms and the conditions of entry. A finding of dominance is more plausible if segment is troublesome or there are the same firms of proportional size or with capacity to counter the pioneers' systems". Moreover, the DG Competition discussion paper on "the Application of Art. 82 to Exclusionary Abuses" observes that when the relevant market has been portrayed, it can be researched if on the market the as far as anyone knows dominant undertaking can act to a measurable degree self-governingly of its adversaries, customers and in the end of its purchasers, that is, "whether it holds liberal market power. In conducting this analysis, it is relevant to consider in particular, the market position of the competitors, barriers to expansion and entry, and the market position of the buyers"[49].

Once the relevant market(s) has been defined, the status of the enterprise is assessed according to several criteria. An almost universally applied criterion is that of "market share", although the details of extent are certainly different.

[47] http://europa.eu.int/comm/competition!/antitrust/others/disc.paper/03/34/34577213.pdf
[48] http://www.oecd.org/data.oecd/3/214/2496837266.pdf
[49] http://europa.eu.int/comm/competition/antitrust/others/discpaper.pdf

The utilization to which the basis is put might vary, differently making, e.g., safe harbors, a refutable assumption of dominance or a refutable assumption of non-dominance. Likewise, the elucidation of specific estimations of market offer varies.

The accompanying observers recommend the varieties in understanding of estimations of market shares that exist among jurisdictions. Whish says that "the Commission of the EU has taken the view that a dominant position can generally be taken to exist when a firm has a market share of 40-45 per cent, and cannot be ruled out in the range 20-40 per cent." On the other hand, Hovenkamp says that *"courts in the United States consistently find market shares of 80-90 per cent and higher to be sufficient to conclude that the defendant is a monopolist. They also consistently find market shares of less than 50 per cent to be insufficient. A majority of courts are reluctant to find sufficient monopoly power when the market share is less than 70 per cent."* Other American commentators say that "a market share of over 70 per cent is regularly sufficient to support a refutable construing of monopoly and that a market share of fewer than 40 for every penny for all intents and purposes hinders a finding of monopoly."

Other criteria that may be useful include the presence of barriers to extension by rival firms, other firms' market shares, the presence of big purchasers, access to capital in instances of apparent, degree of vertical integration, and the incidence of abuse.

Regardless of having certain components in like manner - thoughtfulness regarding piece of the pie and to section hindrances - there seem, by all accounts, to be a few unmistakable ideas in this classification. "Dominant position" in the Canadian sense may or may not differ from a "dominant position" in a European Union sense. "Monopolisation" in the United States is not corresponding to European Union "dominant position," seeming at least to entail a much higher market share. Relating honest to goodness thoughts in various purviews evidently moreover move. The whole deal effect of judges actualizing two courses of action of competition laws (in

EU Member countries) and offended gatherings and complainants refering to other purviews' statute may be blending towards one or more measures.

4.1 - POSITION IN US

In the US, Sec. 2 of the Sherman Act, is the principal legislation speaking of "monopolization or attempts to monopolize". On its face, it delivers little guidance to decide when a firm is a monopolist or attempting to monopolize a market for antitrust purposes.[50]

The judicial understanding of monopolization under Section 2 of the Sherman Act has evolved over time, and indeed "the application of U.S. antitrust law overall has changed quite significantly in the course of the last three decades." By the end of the 1950s and through the 1960s, the U.S. Supreme Court was applying antitrust law *"to protect the viability of small and middle-sized businesses, to preserve the freedom of action of independent business people, and to disperse economic and political power"*.[51] Starting in the 1970s, and incredibly impacted by the grant and rationality of the Chicago School, "a directing guideline of elucidation in U.S. antitrust cases became economic efficiency."

In United States v. Grinell Corp., the U.S. Supreme Court held that illegal monopolization involves two elements: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power, as distinguished from "growth or development as a consequence of a superior product, business acumen, or historic accident".[52]

[50] Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any or part of the trade or commerce among the several states, or with foreign nationals, shall be deemed guilty of a felony..."
[51] Eleanor Fox, "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness", 60 Notree Dame L. Rev. 918 (1 986).
[52] 383 U.S. 653 (1965) at 579-81.

As a methodological matter, courts examine whether the firm has substantial market power in relation to some well-defined product and geographic market.[53] Characterizing the relevant market is a basic part of the investigation. Lately, the level of market force expected to discover restraining infrastructure has shifted. A 90 for each penny piece of the pie has been viewed as sufficient to reinforce an incitement of syndication power, and courts have seldom discovered such power when the piece of the pie was underneath 70 percent.[54]

Market shares are used as one rundown or screen of market power, yet diverse components, for instance, obstructions to entry, openness of substitutes, the number and size of contenders, and the method for the product are in like manner considered in making sense of if or not a firm has critical market power. Market power is in this way set up in light of a review of the diverse forceful weights at work in the market under examination.

Attempting to expend is its own specific unmistakable offense from syndication, despite the way that for all intents and purposes the refinement often darkens. The segments of "attempt" fuse a specific arrangement to control expenses or smash competition; savage or anticompetitive conduct composed toward an unlawful reason; and a dangerous probability of success. [55]

[53] In U.S. v. E.I. du Point dee Nemours & Co. monopoly power was defined as "the power to control prices or exclude competitors". 315 U.S. 367 (1957).

[54] In the Alcoa case, Judge Learned Hand expressed that a market share of 90 percent is "sufficient to constitute a monopoly; it is dicey whether 60 or 64 percent would be sufficient and positively 33 percent is most certainly not."U.S. v. Aluminum Co. of America, 184 F2e 461 (1945).

[55] See, Swift & Co. v. U.S., 169 U.S. 357; Spectrum Sport, Inc. v. Mc Quilan, U.S. 131 S. C T. 848. What constitutes illegitimate plan is an unpredictable matter that shows up not to be completely settled for the situation law. Discovering particular anticompetitive goal raises the peril of being over comprehensive and dissuading rivalry on the benefits. Being under comprehensive conveys with it the likelihood of damage both to buyers and contenders. As indicated by an outline of the case law, the accompanying sorts of expectation have been discovered adequate: "expectation to accomplish monopoly power or to get adequate power to control costs; aim to bar rivalry; or purpose to perform the particular demonstration satisfying the behavior necessity of the endeavor offense."

In distinguishing between monopolization and "attempt" cases, one U.S. expert put it this way: "the power showing in attempt cases is less, but the conduct requirement is greater. By contrast, any practice that will support a charge of attempt will also support a charge of illegal monopolization, provided that the higher market power requirements of the latter offense are met." [56]

U.S. law is currently generally lenient towards the one-sided behavior of even those organizations having considerable market power. The reasoning is that vigorous competition is to be encouraged, "even if the conduct disadvantages competitors and increases a firm's dominance".[57] The insignificant responsibility for market share has not, without anyone else's input, been seen as anticompetitive. Enormous market share may have been proficient as an outcome of productivity and red hot contention, not through monopolistic practices. There is an apparent weight between the need to invigorate imaginative and successful execution that can achieve market power from one viewpoint, and afterward again to ensure that associations with such market power don't join in damaging conduct that energizes the securing or assurance of monopoly power. Given this tension, U.S. courts have tended to focus more on the economic effects of particular business practices than on scale alone.

Under what circumstances have the monopolization provisions of Section 2 been applied? The accompanying dialog condenses U.S. law in a couple of regions. Although the right of firms to chose their customers is seen as a fundamental feature of freedom of trade,[58] in particular circumstances courts have constrained upon them a commitment to deal. For example, under the "essential facility" regulation, if a firm controls an office that can't fundamentally or sensibly be duplicated, and if access to

[56] H. Hovenkampf, Id. at 259.

[57] Eleanor Fox & J. Ordover, "Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action, prepared for Columbia University Law School Conference on Multilateral Trade Regimes in the 21st Century", November 2-3, 1996. In spite of the relative tolerance of U.S. law in some regards, U.S. courts and requirement officials keep on pursueing anticompetitive behavior by dominant firms.

[58] U.S. v. Colgate & Co., 251 U.S. 301 (1919) an old U.S. case where the Supreme Court held that "the Sherman Act does not confine the privilege of a firm to practice its own particular prudence with respect to its exchanging partners."

such an office by the affiliation's adversaries is essential for competition, and if the firm that controls that office can offer get to, such get to ought to be provided.[59]

A further variation of this regulation expresses that a firm in a restraining infrastructure position has an obligation to arrangement when it is occupied with practices intended to force more noteworthy expenses on its rivals than on itself.[60] U.S. courts have also deemed firms to have a duty to deal under the "leveraging theory." This doctrine may apply when a firm has sought to extend its dominance into a second market without having developed a competitive basis for achieving that dominance.[61]The liability stems from the "abuse" of economic power already held in the first market. [62]

MCI Communication Corp. v. AT&T Co. 780 F.2e 1019. Here the defendant, by declining to interface MCI offices to neighborhood dispersion offices controlled by AT&T members, was found to have cornered the long-remove phone correspondences market. This refusal kept MCI from offering contending long-separate administrations. The Seventh Circuit restated the crucial offices teaching under which a monopolist controlling a key office possibly obliged to make the office accessible to contenders. The Court distinguished four components for such a discovering: (1) the monopolist must control a key office; (2) a contender must be not able for all intents and purposes or sensibly to copy the key office; (3) the contender more likely than not been precluded the utilization from securing the office; and (4) it probably been practical for the monopolist to give the office. The crucial offices regulation is not without discussion in the United States. Professor Philip Areeda has proposed that cases don't give a predictable method of reasoning to the doctrine. See, Philipe Areda, "Essential facilities: An Epithet in Need of Limiting Principles," Antitrust Law Journal Vol. 59 (1990).

[60] See Aspen Skiing v. Aspen Highland Skiing Corp., 150 S. Ct. 2487 (1985). In that case, the U.S. Supreme Court affirmed a Tenth Circuit choice that the Aspen Skiing Company, which possessed three out of four mountains at the Aspen skiing resort and declined to participate in the offer of a ticket to the proprietor of the fourth mountain ticket was obliged to keep offering access to this office. U.S. antitrust specialists keep on debating how comprehensively the guideline set up for this situation ought to be connected. Some have suggested, for example, that an obligation to manage previous joint venturer or co-venturers bodes well however it has less rhyme or reason if the Aspen case were to make an altogether new commitment to arrangement where there was no prior business arrangement.

[61] See for instance, Berkey Photo v. Eastman Kodak Co. 630 L.2d 236; White & White Inc. v. American Hospital Supply Corp, 732 L. 2d 459 and Kerasotees Michigan theaters v. National Amusements Inc., 845 L. 2nd 153. In the last case, the Sixth Circuit held that it was a bit much "that the gathering endeavoring to influence its monopoly power from a given market into a second market have monopoly power or dominant market position in that second market. As the Second Circuit expressed: '[A] firm disregards area 2 by utilizing its monopoly power as a part of one market to pick up an upper hand in another, but without an endeavor to hoard the second market.... there is no motivation to permit the activity of such power to the impairment of rivalry, in either the controlled market or whatever other. That the opposition in the utilized market may not be wrecked but rather only bended does not make it any more satisfactory. Social and financial impacts of an expansion of monopoly power militate against such lead." It goes ahead to open up that when " the sole reason for such an assention is to amplify a business' dominance from one market into a second market, without developing so as to achieve that dominance in the second market a predominant product or as the aftereffect of other real upper hands" it is impermissible.

[62] See, H. Hovenkampf, supra note 56 at 248.

As per one U.S. antitrust master, U.S. cases propose that a refusal to arrangement might be passable if the choice is one of picking one's clients and choosing how best to administration them; it is impermissible *if "its effect is to lessen competition and thereby raise prices to consumers or otherwise degrade the price/service package offered to them."*[63]

Fidelity discounts and exclusive dealing arrangements are other areas in which U.S. courts examine the competitive effects. These might be censured on the off chance that they are seen as pointlessly barring equals or keeping up or expanding market power and are not methods for meeting consumer demands.[64]

4.2 - POSITION IN EU

Market shares are a useful first indication of the importance of each firm on the market in comparison to the others. The Commission's view is that the higher the market share, and the longer the period of time over which it is held, the more likely it is to be a preliminary indication of dominance. If a company has a market share of less than **40%**, it is unlikely to be dominant.

The Commission furthermore considers diverse variables in its examination of dominance, joining the straightforwardness with which distinctive associations can enter the market – whether there are any blocks to this; the vicinity of countervailing buyer power; the general size and nature of the association and its advantages and the extent to which it is accessible at a couple levels of the stock system (vertical blend).

[63] Eleanor Fox, "Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity and Fairness", 61 Notre Dame L. Rev. 981 (1986).
[64] Ibid. There have likewise been various cases went for achieving certain manipulatory business rehearses attempted by a firm with substantial market power- - e.g., tying game plans, ruthless innovative work hones, predatory pricing etc.

The application of A.102 comes into picture only where an undertaking enjoys a *"dominant position"* or in cases with two or more undertakings enjoying *"collective dominance"*. The meaning of dominant position was described in a leading case[65] by the ECJ:

> *"The dominant position thus referred to by Article [102] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its Consumers"*[66].

Having described the market, it is principal in an Article 102 case to make sense of what is inferred by a dominant position. This can't be determined essentially by reference to an attempt's market share. Possibly it is imperative to investigate three issues:

- ***"Market position of the dominant undertaking and its competitors"****: The limitations that are imposed by the position of the firm and its actual competitors.*
- ***"Expansion & Entry":*** *The constraints that firms have to face from threat of actual competitors' expansion or potential competitors' entry in the market.*
- ***"Countervailing buyer power":*** *The restrictions that firms face due to the bargaining power of its customers.*[67]

[65] United Brands v. Commission 27/761 [1978] ECR 207
[66] The definition fails to highlight the fact that A.102 applies to both the purchasing and the selling sides of the market.
[67] Para 12 of the Guidance.

As per Para.11 of the Guidance to the Commission, finding a dominant position depends on a couple of variables which, taken freely, are not relentlessly determinative.

(A) **Actual competitors**

It's a rarity to have a true monopoly, beside where displayed by the state. Most of cases are thusly stressed with the issue of picking when an attempt, however not a honest to goodness monopolist, has enough control over the said market that A.102 can be applied over the case in hand.

(i) Statutory monopolies

There are various cases where the undertakings enjoy "*statutory monopoly"* for providing goods and services. The contention has time and again been denied by the ECJ that, on the grounds that a mono poly that finds its origins in the statute, this inoculates the endeavour from A.102; in case a firm possesses *"statutory monopoly"*, it must submit itself to be under the application of A.102, where it enjoys only one special privilege that is conferred by A.106(2)[68]. Another viewpoint is that if a firm enjoys *"statutory monopoly"* that does not give a clear inference to the fact that it has specific rights mentioned under A.106[69].

(ii) Market shares' significance

There are circumstances where there is no *"statutory monopoly"*. In such cases a significant amount of information is given by the *"market shares"* regarding the market structure; in any case, as it is laid down under Sec.13 of the Guidance on A.102, "*market shares"* are only an 'accommodating first sign', & the pre-condition of evaluating market power is that the conditions all over the market should be considered, that shall comprise of the market's components, the measure of degree to

[68] R. Whish & D. Bailey, Comp. Law, 7th Ed. *LexisNexis-Butterworths*, 2011 at pg. 235-241.
[69] R. Whish & D. Bailey, Comp. Law, 7th Ed. *LexisNexis-Butterworths*, 2011 at pg. 224-225.

which the products are left alone i.e. without any substantial competition in the market & the example or change in *"market shares"* after some time.

To the degree A. 102 is to be the subject in hand, it is very clear that the likeliness of finding dominance is directly proportional to the amount of market share of the enterprise. A cent per cent market share is phenomenal without statutory advantages, regardless of the way that not impossible.

The ECJ's Judgement in the Hoffmann Case-

In *Hoff mann- La Roche v Commission*[70] the ECJ said:

> *"41 . . . Furthermore although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time . . . is by virtue of that share in a position of strength . . ."*

(B) The AKZO "*presumption of dominance" in cases where an undertaking's market share is exactly half or more than that*

In *AKZO v Commission* the ECJ implied-

"the segment from Hoffmann-La Roche refered to above and continued with that a market share of 50 for each penny could be thought to be limitless so that, without unprecedented circumstances demonstrating the other way, an attempt with such a

[70] Case 85/761 [1979] ECR 462., [1979] 31 CMLR 211.

market share will be expected dominant; that try will bear the evidential weight of setting up that it is not dominant."[71]

Nevertheless, when we look at the recent judgements, we find that there is no intention of the EU Courts to update or hurl the presumption laid down in the AKZO case; many of the fresh decision such as the *French Telecom v Commission*[72], *Solvaay S.A. v. Commission*[73] and *AstraaZeneeca A.B. v Commission*[74] have sustained concentrating on that it is quite normal for dominant enterprises to have high market shares & to allude to the AKZO supposition of dominance; to make certain in *AstraaZeneeca A.B.* the Court held that the enterprises' broad market share could in no manner be ignored by the Court all through the pertinent time of asserted abuse[75].

(B) **Potential competitors**

Market shares don't in themselves make sense of if a firm has a dominant position; particularly they can't show the engaged weight connected by firms not yet taking a shot at the market yet rather with the ability to enter it in a fortunate way. Paras.16 & 17 of the Guidance on A.102 Enforcement Priorities clear up the hugeness of the effect of improvement by prevailing contenders & segment by prospective contenders to an examination of dominance. Particularly para.17 gives delineations of several impediments, for instance, real obstacles; fiscal inclinations got a kick out of by the dominant enterprise; costs & framework affects that square clienteles from changing beginning with 1 supplier then onto the following; & the dominant affiliation's own behaviour.

(i) Legal barriers

[71] Case C- 62/866 [1991] ECR. II- 3359, [1993] 5. CMLR 215, para 60.
[72] Case T- 340/003 [2007] ECR. I- 107, [2007] 44 CMLR 919, paras 98–102.
[73] Case T- 57/1 [2009] ECR. II- 4621, [2011] 4 CMLR 9, paras 276–304.
[74] Case T- 321/5 [2010] ECR. II- 0000, [2010] 5 CMLR 1585, paras 243–257.
[75] Ibid, para. 247.

One of the barriers to entry for enterprises is posed by the ownership of intellectual properties such as patents and trademarks in the market. This factor depends on the strength and duration of the same.[76] It is to be kept in mind that, they, themselves do not portray dominance in the market.

Other apparent true blue blocks to segment are Government approving necessities and organizing regulations, the regulation of distribution of radio frequencies by Govt. to enterprises[77], *statutory monopoly power"*[78] and other barriers that are either related or not related to tariffs.

(ii) Costs and network effects

Another example of a barrier to expansion or entry would be network effects which was of pertinently contemplated upon in the *Microsoft* case[79]: The view of the Commission was that Microsoft's omnipresence in the non-open PC working frameworks marketplace implied that almost all business bundles software program get to be composed first and essential to be appropriate with the Microsoft stage. This gave upward push to a self-fortifying element: the more prominent clients there have been of the Microsoft stage, the additional software got to be composed for the same, and vice versa[80].

(iii) Conduct

The ECJ in a leading case[81] concurred with the thought that *"the behavior of a charged dominant company might be considered in choosing whether or not it's miles dominant."*

[76] *Eurofi x- Baucoo v. Hiltii* O.J. [1988] L. 65/191, [1989] 4. CMLR 67, para. 67; *Magil T.V. Guide, B.B.C.*
[77] *Deccaa Navigator Systems* O.J. [1988] L. 43/29, [1989] 4 CMLR 629.
[78] Case 311/83 *Centre Belge d'Etudees de Marchee Telemarketing v. C.L.T.* [1986] ECR 626.
[79] Commission decision of 24 March 2004.
[80] Ibid, paras 448–459.
[81] *United Brands v. Commission;* 27/73 [1979] ECR 206, [1978] 11 CMLR 249, paras 63–66.

This means, for instance, that it may be actual to bear in mind the manner that a company has supplied oppressive refunds to specific clients in choosing whether it is dominant: the reductions might themselves counteract contenders coming into the market thus constitute an obstruction to passage.

In another case,[82] the charge was based upon Michelin's rate separation as a sign of dominance. The enterprise contended in the witness of the ECJ this methodology changed into round: the expense get to be reporting that since it had given unfair charges, it changed into dominant, and on the grounds that it changed into dominant its oppressive charges were exploitive. There is expanding acknowledgment that there are sorts of conduct that might dissuade entry[83], what's greater, it's miles irrelevant to markdown such direct of the fact that whether a firm is dominant or not.

(C) **Countervailing buyer power**

Buyer strength[84] is another aspect that suppliers/dealers/providers have to face.

(D) **The emergence of super- dominance**

"It may be the case that the responsibility of a dominant firm becomes greater, so that a finding of abuse becomes more likely, where the firm under investigation is not merely dominant, but rather enjoys a position of dominance approaching a monopoly"[85].

[82] *Michelin v Commission* Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282.
[83] Ordoveri & Saloneen *"Predation, Monopolisation and Antitrust"* in "*Th e Handbook of Industrial Organisation",* December 2003, para 4.23–4.28.
[84] R. Whish & D. Bailey, Comp. Law, 7th Ed. *LexisNexis-Butterworths*, 2011 at pg. 45.
[85] C- 39/96 P. etc. *Compagnie Marimtime Belge Transport S.A. v. Commission* [2001] ECR II- 1364, [2001] 4 CMLR 976.

The ECJ pointed out that while considering the degree of exceptional commitment of a dominant enterprise, reference to the remarkable situations of every case is a definite must[86].

In a leading case,[87] the Commission noted that:

> *"the actual scope of the dominant firm's special responsibility must be considered in relation to the degree of dominance held by that firm and to the special characteristics of the market which may affect the competitive situation"*[88].

The Commission was of the view in the Microsoft case, that since it had a market share more than 90%, it thus possessed an *"overwhelmingly dominant position"*[89]. "*The Commission, while requesting IMS to surrender a stipend of its copyright to outsiders on the market on a non-baseless reason, saw that IMS was in* a *sends a clear signal that super- dominant companies cannot abuse their position to hurt consumers and dampen innovation by excluding competition in related markets"*[90].

The expression "super-dominance" is absent from the text of the Guidance on A. 102. However in entry 20, inspecting variables that are to be considered while picking whether to mediate on the reason that particular conduct may be having an against centered relinquishment sway on the market, it is of the view that greater he grounding of the dominant position of the firm under investigation, greater are the chances of direct guaranteeing that such an effect would be caused by the position. Interestingly the ECJ's judgement in *Konkurensverkeet v. TeliaaSoneraa*[91] seems to backing this procedure: *"whilst perceiving that some of its judgments had implied*

[86] Case C- 33/944 P. *Tetra Pak v. Commission* [1997] ECR II- 595, [1998] 4 CMLR 626, para. 24.
[87] *Deutschie Post A.G.: Interception of cross-border mail* - O.J. [2000] L. 33/401, [2001] 4 CMLR 698.
[88] Ibid, para. 107, citing the *Tetra Pak II* case.
[89] Ibid, para. 345.
[90] See SPEECH/07/539, 17 September 2007.
[91] Case C.- 52/091 [2010] ECR II- 001, [2012] 4. CMLR 892.

superdominance and semi monopoly, it said that, if all else fails, the level of market nature of a dominant firm was relevant to the evaluation of the effects of its conduct instead of the subject of whether an abuse in light of current circumstances exists."[92]

4.3 - POSITION IN INDIA

'Dominance", in some jurisdictions, relies on upon a composed system having suspicions that can be debateable or non-debateable. For instance, in South Africa & Israel, there is a non-debateable presumption of dominance if an endeavor values a market share of "45%" and "5O%" independently. A discredit table suspicion of dominance rises if there ought to be an event of market share of 80 for each penny in Canada, 50 for every penny in Korea and 33 for each penny in Germany, separately. In India, under the MRTP Act, 1969, a dominant undertaking was one which acknowledged "25 for every penny of total market share in India or substantial part thereof."[93] The benefit of fundamental tactic is that it promises conviction & consistency.

The Raghavan Committee on Comp. Policy and Law in para. 4.3.6 of its Report watched that "a firm with a low market share of 20 for every penny with the remaining 80 for each penny diffusedly held by incalculable, may be in a position to abuse its dominance, while a firm with say 60 for each penny market share with the remaining 40 for every penny held by a contender may not be in a position to abuse its dominance because of the key dispute in the market."

Setting up a purely numerical limit to judge dominance may result in real cases going unnoticed and unnecessary cases piling up. Along these lines, in a component altering budgetary environment, a fixed numerical figure to portray "dominance" will be a "mutilation." Keeping in context the proposition of the Committee furthermore

[92] Ibid, paras 78–82.

[93] Section 2 (d) of the MRTP Act envisages that "dominant undertaking means an undertaking which either by itself or along with inter connected undertakings produces, supplies, distributes or otherwise controls one fourth of the total goods produced or services rendered in India or substantial part thereof."

watching overall example, the fashioners of the Act have bid adieu to the sole numerical benchmarks that existed under the then surviving competition law particularly the MRTP Act, 1969 and chose for joint organisational cum behavioural tactic by describing dominance as follows:

"Dominance means position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to:

(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour."

Thus, the two elements are (a) the enterprise's position of strength (b) a conduct which is unaffected by competitive forces, or affect the participants or customers or market and all these are entwined and needs to be shown cumulatively. In this background, Section 19(4) of the Act provides for a complete premise which the CCI is requested to look at while choosing dominance. It will be pertinent to say that in an audit grasped by the "International Competition Network (ICN)", 28 jurisdictions out of the 33 responded that their importance of dominance was present in the class of "combined structural behavioural approach".[94] The main purpose of inclination of this tactic is that it well reflects "dominance" as coming to fruition on account of a multi-faceted examination which accomplishes well past market shares. Where there are statutory presumptions of dominance associated with market share alone, picking if an association is dominant or not does not ordinarily show any issues in jurisdictions, however various matters and troubles develop when law submits the opposition power to choose and review the same. Referring to the context, host of variables as depicted in the Act, a try is made to separate each of such parts which the CCI is requested to take a gander at when it is detained of choosing "dominance".

[94] Report on the "Objectives of Unilateral Conduct Laws, Assessment of Dominance! Substantial Market Power, and State Created Monopolies" prepared by "Unilateral Conduct Working Group" and presented at the "6th Annual Conference of the ICN at Moscow in May, 2007."

(a) <u>"Market Share of the Enterprise"</u>

Once the relevant market is determined, the next phase in determining "dominance" is to evaluate market share of enterprise or group. Distinctive strictures are utilized to quantify piece of the pie relying on the way of area and the issue under scrutiny. For instance, the piece of the pie of a carrier could be measured on the premise of "number of flights, number of airplanes, number of traveler's conveying limit, the city sets and so on and every parameter may give distinctive results." In the mining business, the piece of the pie can be founded on stores held by various administrators.

In case there are diverse mix of products, it is reasonable to find out market share similarly as worth imparted in revenue and in case products are similar, as far as possible and recoveries are acknowledged to be better pointers of market share.

In a general sense, the CCI is to view the present market share as obtainments are fitting only to former dominance. Regardless, significant data may be of relevance in markets that are depicted by and large uncommon far reaching uneven Orders. In house manufacturing is generally rejected in the evaluation of market share. The opposition composing moreover imply that if market share has wavered significantly after some time, this is normal for convincing competition and breaking down of market share as time goes on, is decisive of nonappearance, of dominance and if the market pioneer has had the ability to keep up or construct its market share, it validates the enterprise's dominance in the market. In India, amid 1993 to 2004, in energy about 40 products, the configuration of introductory five players proceeded as before and in profound respect of 12 products specifically meds! "pharmaceuticals, TV, restorative apparatus, infant youngster milk support, iodised salt, cigarettes, commercial vehicle, gaskets and carburettors, the leaders not only maintained their position but also increased their market shares." A high market share is also indicative of the fact that there are less options for consumers to shift in the market.

(b) "Size and Resources of the Enterprise"

A dominant position in the market may be credited to large size, superior financial position or resources. In the United Brands[95] case, "a market share of 40-45 for every penny was seen to be dominant and diverse variables were thought to be significant."

In India, the BCCI, that has absolute control over cricket in India did not affirm the ICL a partnership with itself and denied access to cricket playing grounds & thwarted players and coaches of ICL from participating in activities that were sponsored by the BCCI. The fiscal smack and different resources at the charge of BCCI empowered it to propel its own specific bolstered IPL by notwithstanding the ICL molded by Essel Group in May, 2007. The region of two cricket unions to be particular the IPL and ICL would have provoked extended contention to the occasion of cricket fans, cricketers and market with everything taken into account.

(c) "Size and Importance of Competitors"

Exactly when looking at market share it is also relevant to look at the greatest organization's market share concerning its opponents; the more diminutive the shares of the contenders, it is reasonable to hold that the greatest firm as dominant. Market share of one opponent in the market moreover choose the opposition constraint on the another player. Case in point, both Pepsi and Coke acknowledge more than 40 for every penny market share in soft relish market India and again in the truck outline market, there are only two players to be particular Ashok Leyland and Telco and both have essentially square with market shares. This mirrors one has ability to rehearse forceful weight on another and in this way, neither of the two must be said to be "dominant in the relevant market".

[95] 27/67 [1 978] ECR 307

(d) "Economic Power of the Enterprise Including Commercial Advantage Over Competitors"

A dominant market position may be a result of superior market position or resources. The Court of Justice in United Brands Case[96] deliberated on "economies of scale and expansion as a noteworthy power provoking dominance." In India, LIC of India is enjoying the benefit of previous entry and that of sovereign accreditation in the individual security market and in this way has business benefit over new hopefuls. Admission to capital which inhabitant has to the disallowance of others may be seen as relevant for the reason. In Continental Co. Inc. [97] case, the Commission regarded "access to widespread capital market as significant part in choosing dominance."

(e) "Vertical Integration of the Enterprises or Sales or Service Network of Such Enterprises"

The vertical coordination and the benefit of dug in allocation system may go about as deterrent to segment as it can weaken or obstruct admission for a possible member to the market. The Court of Justice noted that Roche's[98] "highly developed sales network as a relevant factor conferring upon its commercial advantage over its rivals."

In India, the railroads claims the rail tracks furthermore work prepares, the generators of power additionally possesses appropriation frameworks, telecom organizations have system and offer correspondence administrations. The vertical joining in these open utilities support naming them as "dominant". Bajaj Auto Limited has the benefit of firm dealership system to market its bikes over last contestants, to be specific Kinetic Honda Ltd. what's more, Lohia Machines Ltd.

[96] Ibid.
[97] Commission Decision 27/12 O.J. L6.
[98] Hoffman - La Roche v. Commission, Case 85/67 [1 979] ECR 463.

*(f) **“Dependence of Consumers on the Enterprise”***

The reliance of consumers is unvaryingly high in the case of public utilities. Not at all like in other made jurisdictions, at present, a customer of power in India, does not have the say in choosing the supplier. Essentially, without transportability of number, an adaptable customer in India is being controlled to change to another and the consequential result is introducing dominance on the current provider of service. Yet again, in after arrangement market or if there ought to be an event of goods where the premium is inflexible, empower the supplier of stock or organizations to practice market power with solace. Non regulation of additional parts urges the maker to overpower. For instance, in India, regulation of LPG chamber and controller will apply bury se competition weight on open part gas associations and on their wholesalers. Charging over the top expense for additional parts or after arrangement organization is not astounding in various markets. These are suggestive of "dominance".

*(g) **“Monopoly or Dominant Position Whether Acquired as a Result of Any Statue or Virtue of being a Government Company or a Public Sector Undertaking or Otherwise”***

A past state monopoly later on facing contention from new candidates, may have acquired reasons for premium, for instance, a solid fiscal position, control of certain system workplaces, affiliations and political backing or created relations with suppliers and clients and such overwhelming firm may make life of new individuals troublesome and might uproot them out of business sector. The deviation between a past state monopolist and the new characters have been seen all around.[99]

In India, all bits of power territory are at present ruled by individuals all in all section (87 for each penny in period, loo per penny in transmission, 86 for every penny in transport and retail stream and 92 for every penny in transaction development. Within

[99] Para 21 of OECD (2004) available at www.oecd.org/!data.2/competition/03/24/84539284.pdf

the time divide, the market share of NTPC is around 81 for every penny and it is required to unite its dominance through seizures, JVs, Greenfield exercises and fixing up of its present foundations. In like way, in oil and gas section, the National Oil associations hold around 86 for each penny market share of India's oil Exploration and Production, 76 for each penny of trademark gas, 73 for each penny of oil refining limit and 85 for each penny of marketing set-up. These open portion tries do have advantage over new private section members. Shell and Reliance meandered into marketing of oil bigly yet expected to close their oil distributing outlets due to nonattendance of centered nonpartisanship between open part and private fragment by keeping the sponsorship (state offer) just to open section some assistance with oiling associations.

(h) "Entry Barriers Including Barriers Such as Regulatory Barriers etc."

Barriers to entry, way out or improvement and robustness to market power have been perceived as vital variables in the evaluation of dominance. If entry deterrents went up against by the adversaries are low, the try which has great market share will be not able continue with noteworthy market power for long. Case in point, in the midst of 1988 to 2003 all in all, 19 firms arrived and 22 left in the pesticide business in India and this shows limits to area and way out have not been substantial.[100] This shows that the entry and exit barrier have not been considerable. The extensive section hindrances protect current contenders from contention and nurture market power. The key impediments are those which are made by the officeholder in a market which have the effect of discouraging entry e.g. whole deal supply contracts, limitation contracts, over enthusiasm for cutoff or advancing, select overseeing or tying et cetera. In case limits substantially concede entry, the officeholder would not be at present constrained by segment. Ceaseless and successful delineations of segment reflect nonattendance of block to section. The likelihood of area and profitability are essential fragments of section examination. The need to enter at significantly gigantic scale or with tremendous sunk costs decreases the inspirations for new candidates.

[100] Market Study Report conducted by the JNU for and on behalf of the Competition Commission of India.

(i) "Countervailing Buying Power"

For an enterprise, apart from its actual and potential competitors, even its customers may turn out to be constraints. A buyer getting a charge out of monopoly can tame a dominant seller to practice market power. In case there are contenders with tasteful capacities to deal with interest, a buyer's threat to change to another seller may have a significant punitive result on a seller that offers a critical bit of its creation to a lone buyer. A strong buyer may make prepared for new admission or lead current dealers in the market to extend their yield with a specific end goal to vanquish the action of market power to its own specific favorable position and also to the formal of various buyers and purchasers.

(j) "Market Structure and Size of Market"

Market structure which is branded by a sole seller of goods/services either on separate basis or by virtue of shared ownership makes conditions supportive for movement market power affecting competition, clients or market. The UKCA has starting late seen that normal obligation regarding air terminals of British Airport Authority (BAA) is keeping the progression of contention moreover blocks the degree for bury se competition and has along these lines, guided the BAA to sell London Gadwick, London Stansteed and either Edinburgh or Glasgow air terminals to a buyer certified by it within a period of two years.[101]

International Airport in Delhi is the sole supplier of airplane terminal administrations to the aircrafts and the travelers and rising air terminal charges is supposedly asserted to be one of the reason requiring remote carriers to pull back over loo flights amid the most recent 6 months.[102] Further, more diminutive the degree of the market, the more conspicuous is the likelihood of pervasiveness of dominance. It would in like manner

[101] Press Release dated 18th March, 2008 by the UK Comp. Commission.
[102] News article in the Indian Business Standard of 16th April, 2008 with the caption "Foreign Airlines pull out of India."

not be on the whole correct to expect that only a tremendous measured firm is inclined to be dominant. Given that the relevant market is slim, somewhat firm may be seen to be dominant.

(k) "Social Obligations and Social Costs"

This variable offers versatility to Commission to consider social responsibilities performed by a substance. There is more essential affirmation more than ever that business house is trustee of society. The profit income driven's motivation is transforming into a tarnished word and focal point of future business is on ethics, organization near mission for viability, insurance of essentialness et cetera[103] For example, Lucifer lights non-public Ltd. Has created LEDs (light discharging diode) which paintings on low gift and is thereby, a noteworthy wellspring of vitality sparing and feature five to ten times longer life than the normal lights products. Being the essential and best one in the market, at present it can be dominant member in the relevant marketplace however protection of quality and basic sparing to the clients ought to be understood as a relieving components even as evaluating its dominance. In like manner, in the meantime as looking at the dominance of the Indian Railways, its basic position in ensuring network between the various areas inside of the united states entomb se requiring little to no effort passage need to be taken positively through the charge.

(l) "Relative Advantage by Way of Contribution to Economic Development, by the Enterprise Enjoying a Dominant Position having or Likely to Have Appreciable Adverse Effect on Competition"

Section 38 of the MRTP Act, 1969, gave certain circumstances where there ought to be suspicion of open pastime paying little respect to the way that there is a case of considered restrictive trade understanding under Section 33(1) thereof. Two such circumstances were the time when an unfavorable endorsement by MRTPC would

[103] Boston Consulting's study Report in Business Standard of 22nd April, 2009 under the caption "From crisis to leadership".

have certified and decided hostile effect on the general level of occupation or diminishment in the volume or profit of toll business.

(m) "Any other Factor which Commission may Consider Relevant for the Inquiry"

Ample amount of scope is given to the Commission to take into account any factor it may deem fit for the inquiry. Cost and profit level are also used as a part of some jurisdictions as a relevant segment while studying dominance however some jurisdiction caution about potential misstep in using them as choosing forceful cost or profit is amazingly troublesome and further over the top cost or profit is seen as prompting to others to go into the market. Access to essential inputs on whole deal reason may be strong of reviewing dominance.

CHAPTER 5

PARAMETERS TO DETERMINE ABUSE

The competition laws of many OECD countries contain a concept of single firm exploitation of market power or use of improper means of attaining or retaining market power. These concepts are variously called "abuse of dominant position" or "monopolisation" or "misuse of market power," or some similar term. Competition laws may also contain a related concept, called "joint dominance" in some jurisdictions, which involves multiple firms but which is a distinct concept from firms acting pursuant to an "agreement." Typically, an analysis of an abuse of dominance involves two distinct parts, determining the status of the firm or firms and then evaluating the behaviour.

Holding a dominant position, jointly dominant position, a monopoly or a position of substantial market power is generally not abusive or illegal. In any case, some behavior by such firms is. The importance of what is damaging, or if nothing else what is unlawful, should depend on upon the objective of the law. As noted above, if budgetary adequacy is the essential objective, then welfare-reducing exercises should be thought to be brutal. In case, then again, sensible trading is the essential target then, e.g., abusing a prevalent bargaining position may be seen as damaging. Other possible objectives - pluralism, headway of little business, etc - would each surmise a plan of exercises that hamper their achievement and along these lines that would be unforgiving given that objective.

While it is luring to division conduct by dominant firms into two sorts, abuse and check with the engaged method (e.g. raising area deterrents), this may be beguiling. Maybe, the effect of a particular behavior depends on upon the earth in which it is involved with. For example, "esteem isolation" can be exploitative - of the buyers who pay the higher expense - and interfere with area - for the competitor who sees his new customers pulled in away with "uncommon offers" by the inhabitant. The effect of quality partition on welfare is, the point at which all is said in done, questionable.

Therefore, if the objective of the opposition law is financial proficiency, then the law's treatment of worth division must be finely tuned or recognize significant goofs.

Further, an affiliation's procedure regularly involves a stack of working together practices - e.g., most great resale esteem backing and tip top areas concurrences with vendors - so disengaging out a particular behavior from the pile of practices and separating it may realize finding a damaging effect where there is none or finding no pernicious effect where one exists. Finally, when a market can't be perfectly engaged and is not totally contestable, there is no reason in money related hypothesis for, with everything taken into account, assuming that area is best.Therefore, rules against entry-deterring conduct may not be beneficial.[104]

Without a doubt, it is hard to devise lawful standards for deciding anticompetitive behavior in vital situations. Some analysts respond by recommending that no conduct, even by dominant firms, be denied in the conviction that any favorable circumstances which are not identified with unrivaled aptitude and effectiveness will be immediately dissolved. Different reporters respond by recommending a progression of channels and that any lead that goes through the channels would be managed by straightforward yet in fact blunder inclined guidelines. At long last, different pundits respond by recommending "a detailed investigation of the purpose and effects of specific acts under the Rule of Reason."[105]

5.1 - POSITION IN US

Section 2 of the Sherman Act has left to the courts the elaboration of what is “monopolisation” and “attempt to monopolise.” Meanwhile, it creates the impression that in the United States there is a thought that a firm that has true blue monopoly power has no expansive commitment to help its adversaries, yet exclusionary practices are the wellspring of most of the abuses. If the courts must describe what is an abuse, if evasion is an issue, yet if then again there is no wide commitment of monopolists to help contenders, unequivocally where does one stick to a significant

[104] Ordover and Saloner, p. 590
[105] Ordover and Saloner, pp. 579-580, quoting Comanor and Frech

limit under United States law? What is the circumstance law recognizing what is exclusionary and what is fundamentally not helping one's adversaries? The central request is, the way by which does one portray a "genuine reason" for, e.g., refusal to continue partaking in an accommodating attempt as in the *Aspen Ski* case[106]?

The US Supreme Court has emphasised that the opportunity to attain a monopoly and reap its benefits encourages investment and innovation.[107] Thusly, having and rehearsing monopoly power does not abuse US antitrust law 'unless it is joined by a part of threatening to centered conduct'. Not at all like the opposition laws of various different jurisdictions, in this manner, US antitrust law does not see declares for abuses of dominance that just experience existing monopoly power, for instance, claims for over the top assessing. This qualification in focus is mirrored all through the rules got in US law as discussed underneath.

The US antitrust statute specific to syndications is Section 2 of the Sherman Act, 15 USC Section 2. It provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony […]".

There are three distinct violations that are within the purview of the US legislation:

a. monopolisation, which requires (1) monopoly power and (2) anti-competitive conduct that helps to obtain or maintain that power;[108]
b. attempted monopolisation, which requires (1) a dangerous probability of achieving monopoly power; (2) anti-competitive conduct that threatens to help achieve that power; and (3) a specific intent to monopolise;[109] and
c. conspiracy to monopolise, which requires (1) a conspiracy; (2) a specific intent to monopolise; and (3) an overt act in furtherance of that conspiracy.[110]

[106] 472 U.S. 585 (1985)
[107] See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 US 398, 407 (2004).
[108] Id.
[109] Spectrum Sport, Inc. v. Mc Quilan, 560 US 474, 455–56, 458 (1994).

Other statutes likewise observe to the conduct of monopolists. Most first rate is segment 5 of the Federal alternate commission (FTC) Act, 15 USC section 45, which disallows 'out of line techniques for rivalry'. The FTC Act achieves all conduct secured by the Sherman Act and maximum probably reaches more broadly.[111] It can be implemented totally with the guide of the FTC by means of common development for orders and planned cease-and-desist orders.[112]

Several US states have much like statutes that practice to monopolists. Likewise, in unique commercial organizations, different policies can likewise practice to and conceivably restrain monopolists.

Syndication requires towards competitive behavior that acquires or preserve up a monopoly. Getting or maintaining up a monopoly thru different way, such as 'superior product, business acumen, or historic accident', is therefore not a violation.[113]

US courts and antitrust controllers have not set up a conclusive posting of what conduct can be against focused nor have they took after clean benchmarks for recognizing among prepared forceful and hostile to aggressive conduct. The DOJ issued controlling on syndication in 2008 however pulled back it in May 2009.[114]

Inside the laws of America, as stated above there's no know-how of abuse of dominant function and what is restrained is monopoly or endeavor to corner. It might

[110] United States v. Yellow Cab Co., 332 US 218, 225–26 (1947).
[111] FTC v. Cement Inst., 333 US 683, 691–94 (1948).
[112] 15 USC Sections 45, 53(b).
[113] See, for example, United States v. Grinnell Corp., 384 US 563, 570–71 (1966).
[114] Press release, US Dep't of Justice Office of Public Affairs, 'Justice Department Withdraws Report on Antitrust Monopoly Law' (11 May 2009), available at www.justice.gov/opa/ pr/2009/May/09-at-459.html

be noticed that underneath the Sherman Act, no unique behaviors were recognized which aren't to be keen on by using endeavors having monopoly electricity or of their enterprise to nook. In ***United States v. Grinnell Corp***[115], it was observed,-

"The offence of monopoly under 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

This opinion has been noted and accompanied in some of instances such as ***American Professional v. Hardcourt***[116]***, Ilan Gollan v. Pingel Enterprises Inc., Aspen Skiing Co. v. Asppen Highlands Sking Corp.***[117] & ***Eastman Kodak Co. v. Image Technical Services Inc.***[118].

In ***American Tobacco Co. v. United States***[119]**,** it was observed that-

"The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it, which methods, means and practices are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment".

In ***Spectrum Sports, Inc. v. Mc Quilan***[120]**,** it was observed that-

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[115] *384 U.S. 563 (1966)*
[116] http://caselaw.lp.findlaw.com/scripts!/get.case.pl?nav.by=search!&case=/data2./circs/9th/578756513.html
[117] *472 US 385 (1985)*
[118] *504 US 451 (1992)*
[119] *328 U.S. 781 (1946)*

"*Consistent with our cases, it is generally required that, to demonstrate attempted monopolization, a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market".*

Courts basically take a gander on the litigant's marketplace percentage and whether good sized obstructions to segment exist. The second thing for a locating of imposing enterprise model calls for an performing of towards competitive, exclusionary, or savage conduct. This component consists of both conduct used to benefit a monopoly unlawfully and behavior used to preserve up a monopoly. The appearing of exclusionary conduct should mischief competition, thereby hurting clients. Damage to one or greater contenders is for the maximum component inadequate to suggest exclusionary conduct. That is due to the fact '[t]he purpose for the [Sherman] Act is not to defend companies from the working of the market; it's miles to defend the overall population from the disappointment of the market.' *Spectrum Sports Inc. v McQuillan*'[121].

A unimaginably expansive assortment of behavior has been tested underneath fragment 2 of the Sherman Act, and a showing of 'exclusionary conduct' is thus genuinely one of a kind and might take numerous printed material (depending at the affirmed infringement).

The Sherman Act does now not contain a thorough posting of classifications of oppressive or hostile to forceful conduct, and it must be expressed that most direct that might be resolved to be "harsh" can likewise be procompetitive and advantage

[120] *506 U.S. 447 (1993)*
[121] 506 U.S. 447, 458, 113 S. Ct. 884, 891-92 (1993)

clients. After some time courts have perceived various classifications of possibly oppressive conduct, which comprise of refusals to bargain, diverse managing, positive dedication rebates, dissents of get right of passage to essential focuses, ruthless valuing, abuse of government elegant setting, tying, and concurrences with rivalry to consume.

5.2 - POSITION IN EU

It is not questionable to say that A. 102 is debatable. Because of A. 101 attempts are at danger exactly where they go into understandings or facilitated rehearses that farthest point contention; a ton of the Commission's thought is revolved around the cognizant and surreptitious cartelisation of business sectors, and there exist couple of religious pragmatists today for such behavior. A. 102, instead, bears upon the individual behavior of prevailing firms ; by its slant the usage of A. 102 incorporates a resistance power or a court choosing whether that direct goes out of order from "run of the mill" or "sensible" or "undistorted" competition, or from 'contention on the advantages', all of them being far from convenience. It should be incorporated that the verbal confrontation enveloping A. 102 is not exclusive to the EU: all structures of dispute law contain acquisitions on the uneven behaviour of firms with liberal business area power, and competition powers and courts worldwide have anticipated that would consider the issues under thought in this part.

Absence of an exhaustive list explaining the meaning of abusive behaviour from A. 102

A. 102 gives instances of behaviour that is onerous –, for instance, charging uncalled for costs, compelling production and partition that places certain trading parties at a forceful prevention – yet this summary is unquestionably not exhaustive[122]; there are a number of Commission decisions and case law where the EU courts have associated

[122] Case 5/27 *Continental Cans v. Commission* [1974] ECR 125, [1974] CMLR 198, para. 62; Cases C-935/96 P. etc. *Compagnie Maritime Belge Transports S.A. v. Commission* [2001] ECR II- 1356, [2001] 3 CMLR 1067.

A.102 to diverse practices that are not especially to be found in A.102. Latest being the General Court's verdict in *AstraZeneeca A.B. v. Commission*[123] in which it held that "an illustration of making beguiling duplicities to national patent offices in various Member States that incited the extension of patent certification for pharmaceutical products to which AZ was not, undoubtedly, qualified summed for an abuse of a dominant position; the same was legitimate for the settlement of requesting to open powers to deregister market authorisations for particular prescriptions, thereby blocking section to the market by tasteless creators. A scrutinizing of the summary of tests of harsh behavior in A. 102 would not set up any but instead the most inventive peruser to accept that these practices were harming; however the Court appears to have had no deferral in watching them to be unlawful."

Meaning of abuse

As it has been noted, the list of practices that can be termed as abuse mentioned under A.102 is not exhaustive. Neither is their a specific judgment of the ECJ or the General Court that gives an exhaustive importance of what is inferred by abuse. This is reasonable: cases on abuse of dominance all that much turn in solitude particular truths – a point pushed on different occasions[124] – furthermore, the EU Courts have abstained from wide hypothetical explanations, leaning toward rather to choose every case on its benefits.

Paragraph 91 of the ECJ judgment in *Hoffmann- La Roche v Commission*[125] is one section that is consistently referred to on the significance of abuse of dominance. It says that abuse is:

> *"An objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question the*

[123] Case L- 231/06 [2011] ECR I-001, [2011] 5 CMLR 1855.
[124] For eg., Case C- 59/03 P *British Airways plc. V. Commission* [2006] ECR II- 2313, [2006] 3 CMLR 928, para. 46.
[125] Case 58/67 [1978] ECR 416, [1978] 2 CMLR 210.

> *degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."*

This is a crucial segment, in any case it doesn't give a sweeping importance of abuse. For example it doesn't get the considered exploitative, rather than exclusionary, practices of a dominant firm, for instance, charging customers an excess of high costs: such direct can't be said to impede contention, however it can no ifs ands or buts mean an abuse of a dominant position, as A. 102 unequivocally lays down. Though the Court's verdict in Hoffman-La Roche presents the possibility that "dominant tries must stop methodologies one of a kind in connection to those which condition common contention." Clearly this makes one marvel: what is "run of the mill" competition, an unclear and obscure word. But the considered "normal" contention appears more doubtlessly in the centre if somewhat assorted vernacular is used: specifically that dominant firms should "fight on the advantages", and that "opposition that is not on the advantages is interesting competition." The EU Courts do incorporate the lingo of competition to the advantages, distinguishably so in late decisions. In one of the cases[126], the EU Court quoting from para. 91 of Hoffmann said, that –

> *"a dominant firm must not strengthen its dominant position by using methods other than those which come within the scope of competition on the merits"*[127].

Pargraph 43 of the judgement incorporates similar language in *TeliaSonera*[128]; the same was done by the General Court in two judgments in 2010, *AstraZeneeca A.B. v. Commission*[129] and *Tomraa Systems A.S.A. v. Commission*[130]. There are different A.

[126] *Deutsche Telekom v Commission* C - 208/80 L [2011] ECR II- 001, [2011] 4 CMLR 1459.
[127] Ibid, para 117.
[128] Case C- 43/08 [2010] ECR II- 001, [2010] 5 CMLR 928.
[129] Case T- 312/06 [2011] I- ECR 001, [2011] 4 CMLR 1558, paras 345–350, 627 and 842.
[130] Case T- 115/07 [2011] ECR I- 001, [2011] 5 CMLR 461, paras 200 and 214.

102 cases that are undecided by the EU Courts at present, and it will be of eagerness to check whether they continue using the lingo of "competition on the advantages", and whether they will try to clear up in more noticeable profundity what this term suggests.

There are examples given by the Commission of what according to it is "competition on the advantages" in para.5 of the Guidance on A. 102 – "offering lower costs, better quality and a more broad choice of as good as can be expected products and organization." Exactly when stood out from business behavior of this kind, it is not hard to see that other showings –, for instance, an edge press, the beguiling of patent powers inciting the honor of extra patent protection from non-particular creators of medicinal products and the endowment of discounts thus for particularity or close limitation – don't aggregate to competition on the advantages, and are therefore fit for being seen to be harmful.

Whether "per se" rules are present under Art.102?

Genuinely there can be seen a slant concerning both the Courts and the Commission to apply all things considered standards, at any rate to some abuses; though the certain design is a long way from a basically typical towards sways based examination. There is without a doubt tongue can be found in certain decisions that suggests that "at any rate some uneven practices are accordingly illegal." A few isolates from the General Court's ruling in Michelin case, condensing earlier case law, speak to this[131]:

"It is clear from an enduring line of decisions that a commitment discount, which is permitted in kind for a try by the customer to get his stock just or exclusively from a try in a dominant position, is disregarding Article [102 TFEU][132]."

[131] Case C- 230/02 [2004] ECR I- 4017, [2005] 5 CMLR 932.
[132] Case C- 230/02 [2004] ECR I- 4017, [2005] 5 CMLR 932, para 65.

It may be derived largely from past judgments that any devotion impelling markdown structure associated by an attempt in a dominant position has deserting sways denied by Art.102 of TFEU.[133]

If these declarations are correct, then probably there are, clearly, all things considered rules under A.102, at any rate for some sorts of discounts and refunds. Particularly it is perceivable that the General Court says here that "deserting effects can be interpreted: that is to say that they don't ought to be illustrated; in the tongue of Article 101(1), this would suggest that an immovability actuating rebate system abuses by thing, so that there is no convincing motivation to exhibit sways."

Exploitative abuses

It is clear from its to a great degree wording that A. 102 is prepared for application to exploitative behavior: A. 102(2)(a) provides as an instance of an abuse the obligation of out of line purchase or offering costs or other ridiculous trading conditions. There have also been cases on the activities of gathering social requests in which their standards have been explored remembering the finished objective to confirm that they don't act in a way that nonsensically abuses the proprietor of the copyright or the future licensee of it.

In its regular sense, abuse proposes the acquiring of domination profits to the hindrance of the purchaser. The other "points of interest" of the monopolist is the "tranquil life" and "the adaptability from the need to progress and improve proficiency to stay mindful of or before competitors[134]." A question, thus is raised whether or not inefficiency or inactivity could be abuse under A. 102. A. 102(2)(b) gives as a delineation of abuse the hindrance of manufacture, markets or concentrated headway to the inclination of the purchaser, and in *British Telecommunications*[135],

[133] Ibid, para 55.
[134] R. Whish & D. Bailey, Comp. Law, 7th Ed. *LexisNexis-Butterworths*, 2011 at pg. 7-8.
[135] O.J. [1983] J 306/63, [1984] 4 CMLR 475.

"the Commission addressed behavior on BT's part which, notwithstanding other things, suggested that the possible usage of new advancement was prevented."

Exclusionary abuses

A. 102 has most as often as possible been connected to conduct which the Commission and EU Courts contemplate to be exclusionary. The "Commission's *Guidance on A. 102 Enforcement Priorities"* contains profitable bits of learning into the contemplations that it considers to be essential while picking whether to take a gander at a conceivable exclusionary abuse; however the peruser is retold this report does not contain a revelation of the law, yet rather a sign of the Commission's essential needs.

Effects analysis

It was referred that there has been much input that the law of A. 102 has been inadequately changed in accordance with sound monetary measures. Starting late there have been a couple of events on which the Commission has recognized that, where uneven behaviour of a dominant firm is the subject-matter, something more than showing the vicinity of that lead is relied upon to make sense of in the event that it is abusive[136]. "There is much to be said for condemning confirmed exclusionary conduct as harming exactly where it can convincingly be shown that there have been or will be unfavorable outcomes for the market[137]." Decision like *Deutsche Telekom* and *TeliaSonera* promote such an approach.

The Commission's Guidance on A. 102 illuminates, at segment 19, that the purpose of its execution development in association with exclusionary abuses is to make sure that dominant tries don't block powerful contention by seizing their opponents in an against forceful way: the stress is that such lead would adversy influence client

[136] R. Whish & D. Bailey, Comp. Law, 7th Ed. *LexisNexis-Butterworths*, 2011 at pg. 200-201.
[137] Ibid.

welfare, whether as higher quality levels than would otherwise have won, or fit as a fiddle, for instance, compelling the way of stock or organizations or diminishing buyer choice. ‘Threatening to forceful deserting' changes from “basic Foreclosure”, which happens “where the dominant undertaking wins business on the advantages as a delayed consequence of its pervasive adequacy.”

The effects examination portrayed in the Guidance can be depended upon to influence the future usage of A. 102 to exclusionary conduct. One must acknowledge that the Commission will, before long, apply its Guidance while picking up the cases to be brought. “This will infer that future cases brought by the Commission will concern lead which it considers to have had, or to be inclined to have, a significant threatening to centered confiscating sway.” It is still to be seen if, after some time, EU Courts will take after the lead recommended by the Commission for a more point by point sways examination under A. 102. It will be entrancing to watch the extent to which the Guidance eventually affects the decisions came to by national contention powers and national courts. While it is clear that for them it is important to be within the bounds of the statute of the EU Courts, but there shall be instances when, stood up to with an "old" judgment debilitated in advanced monetary examination, and examination in the Commission's Guidance that is from every angle all the all the more convincing, the Guidance will have impact in the last decision.

5.3 - POSITION IN INDIA

Abuse of dominance is not defined in the India Legisltion on the subject. ***Section 4 (2)*** of the ***Indian Competition Act states that***,

“There shall be an abuse of dominant position under sub-section (1), if an enterprise.—-

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service,[138] *or*

(b) limits or restricts—

(i) production of goods or provision of services or market therefore; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market".

Abuses as determined in the Act fall into two widespread classifications: exploitative (needless or oppressive estimating, consisting of savage comparing) and exclusionary (for instance, foreswearing of market get entry to).

Exploitative physical activities, inside the interim, are those where the dominant element misuses its dominance by way of forcing prejudicial and/or shameful conditions on different firms or clients. An a legitimate example would be Pankaj Agarwal, in which, for a scenario relating to distribution of residences, the agreements drafted singularly by using DLF empowered them to be subjective approximately apportioning of superb-place, secretative approximately statistics relevant to the client, just like, the amount of lofts on a story, and to scratch off assignments and

[138] Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition;

relinquish reserving sums. The fee held the agreements to be exploitative against customers, and therefore, injurious.

Exclusionary exercises are the ones in which the dominant substance utilizes its dominance to restrict passage of contention into the applicable market. For example, in Re Shri ShamsherKataria v Seil Honda, where there existed assentions among the dominant factors and the overseas providers of unique automobile elements which kept the distant places suppliers from imparting elements to autonomous repairers, such understandings have been held to be against competitive as they restrained section of latest companies.

The Act places a special responsibility on any enterprise which enjoys dominant position not to conduct its business in a manner prohibited under the section 4(2). In a layman's dialect harsh behaviors incorporates the greater part of the demonstrations of dominant undertaking that are a deviation from general practice and achieve preventing the upkeep or change of the level of opposition nonetheless existing in the marketplace. It must be expressed that the demonstrations disallowed under the area aren't culpable as indicated by se, on the grounds that the indistinguishable demonstrations will no more amount to repudiation of fragment 4 if conferred by a firm no more dominant inside the relevant marketplace. It moreover related to component that posting of acts under fragment 4(2) is thorough in nature and no movement might be taken if the behavior of a test does not fall in the subsection. It isn't crucial to demonstrate that the abuse was committed inside of the marketplace which the mission commands. In certain circumstances, prohibition under section 4 may apply where an undertaking that is dominant in one market commits an abuse in a different but closely associated market.

The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where , Resulting from the very area of the endeavor being cited , the level of

competition is debilitated and which , via response to strategies now not pretty similar to those which circumstance usual contention in products or administrations on the idea of the exchanges of business directors , has the effect of frustrating the renovation of the level of competition as yet present within the marketplace or the improvement of that opposition.

One difference between the EC Law and the Indian Act is that according to the EC laws, the conducts specified may amount to abuse dominant position whereas according to the Indian Act the conducts specified shall amount to abuse of dominance". While the Indian Act particularly counts 'works on following trying to claim ignorance of marketplace get passage to' and 'the use of dominant capacity in one marketplace to go into or secure, distinctive relevant markets' as behaviors adding up to the abuse of dominance, they have not been refered to inside the ecu lawful rules. "making utilization of numerous circumstances to equivalent exchanges with various purchasing and offering parties, thereby setting them at a similar disadvantage", is noted inside the ecu law however has now not been ensured in the Indian Act.

CONCLUSION AND SUGGESTIONS

In the Competition laws of all the jurisdictions studied, the size of a firm or its dominant position as such is not prohibited. However, Abuse of dominance /misuse of market power/ monopoly or the attempt to monopolize are considered bad under all competition laws despite the differences in concepts enumerated in the law and manner of determination.

Under the laws of most jurisdictions, the first step in determining whether there is an abuse of dominance, misuse of market power or "monopoly or an attempt to monopolize" is defining the relevant market. In defining the relevant market, both the relevant product market and the relevant geographic market have to be defined.

The second step is determining whether the concerned undertaking/enterprise/firm is dominant or has monopoly power or a substantial degree of market power. Dominance or monopoly electricity or marketplace energy of endeavors is characterised in many jurisdictions on the idea of the endeavors potential to paintings freely of rivalry or to raise/control expenses. Numerous elements are to be mulled over to decide dominance/financial electricity/monopoly energy. Such standards might have been indicated within the statute itself, as an instance, in India or may need to be resolved from chose cases. Market percentage is by all money owed the most essential rule in all jurisdictions. "obstacles to passage to the marketplace" is by means of all money owed every other paradigm taken into consideration in all jurisdictions. Other criteria taken into consideration, for instance, administrative obstacles, size and structure of the marketplace, joins with other endeavors and so on, and the significance related thusly criteria trade in various jurisdictions regardless of the truth that there is probably a few fundamental factors. It may be noted that total market power or the complete elimination of opportunity for competition is not necessary in order to attract the provisions regarding the abuse of dominance. What is required is a dominant position or a substantial degree of market power.

Abuse of dominance/ misuse of market power/ monopoly have not been defined by most competition legislations. European Union's and Indian law merely enumerate certain conducts which the dominant venture or undertaking having market electricity is not to interact in. The Antitrust statutes of the US don't enumerate any unique prohibited conducts.

Historically the monopolization offense in the United States, or the parallel offense of Abuse of Dominant Position in Article 82, has been one of the most difficult for the law to define. Regardless of the truth that our lawful conventions have an abundance of law that preparations with uncalled for, unjustifiable, or tortious practices via single corporations, subsequent to no of it changed into concerned with competition therefore, and almost none of it became simply involved with the basic signs of financial monopoly. In my own particular ordinary law custom there are quite a few desirable chronicled analogs for the restrictions compelled by using '1 of the Sherman Act on intrigue or other obstacles of alternate, but the important pre-Sherman Act points of reference regarding unmarried-company monopoly clearly alluded to syndications made by the kingdom and to the electricity that both the charter or a few higher sovereign, for example, the authorities may additionally impose.

Similarly, monopolistic behavior is particularly tough to watch and represent, for various reasons. Initially, even as maximum assentions among exceptional firms are promptly watched, the inward workings of most selections through dominant corporations are without a doubt no longer. 2nd, severa multifirm assentions look like suspicious, however now not the only-sided demonstrations of a dominant company. As an example, we're relatively suspicious of multi-firm fee placing, yet the monopolist appearing singularly can't paintings together without putting a value. We legitimately doubt multilateral understandings, particularly if level, that imply the regions of stores, dealerships, or other dissemination palms of an organisation. Interestingly, the monopolist should come to a decision a desire approximately in which to assemble its own shops or the way to set up its dissemination system. We doubt the manufacturer's endeavors to signify the resale expenses of its traders; however the monopolist essentially determines the value of absolutely possessed

affiliate divisions. An assention among severa agencies proscribing the permitting in their licenses or other IP rights might also incite close research. But, every monopolist should determine a desire approximately whether and the amount to permit its very own IP rights instead of use them completely for internal production.

The India law on the subject of abuse of dominance shares huge similarity with that of the European Union. While there are concepts that can be found present in the US statutes as well, it is the EU Law that is most close to the Indian legislation.

With respect to the hypothesis of the project, it can be said that clear legal parameters for determination of conduct of an entity in dominant position as abuse or otherwise are present under Indian jurisdiction. Although Section 4(2) of the Act provides for different types of conducts that shall be termed as abuse, in practicality it comes to the factual circumstances of the cases to consider whether the said conduct is an abuse or not. It can thus be said that the law on the subject is backed by judicial precedents and is evolving with different conducts that come to light.

One could go on with this list, but the point should be clear: many of the things that are suspicious when done by two or more firms acting in concert are essential parts of routine business for the dominant firm. Therefore it's miles just about in no way, shape or form adequate to watch that the monopolist has occupied with a specific practices, which incorporate setting a rate or discovering in which to develop retail shops. One also craves a magnificent arrangement of theory and assessment to see the circumstances underneath which those practices are anticompetitive, with the understanding that they potentially are anticompetitive in just a little share of cases.

The conclusion drawn can be found in the words of Philip Lowe, at the time the Director General of DG COMP, who, in his remarks on unilateral conduct in Washington in September 2006, said:

"Just as physicists strive to find the theory that unifies Newtonian physics and quantum mechanics, so economists strive to find the theory that unifies the various aspects of anticompetitive unilateral conduct. And the economists, just as the physicists, have not yet found it."

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