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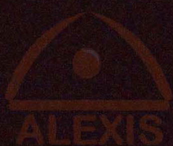

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FOREWORD

The Competition Act, 2002, was enacted as a part of efforts which were geared towards globalization and in the liberalization of the economy. This was seen as a major step in the Competition Law regime, both for national and international players in the market. However, although it was enacted in 2002, the Competition Act became fully operational only in 2011 and is thus still in a very nascent stage.

The role of the Competition Commission and the Competition Appellate Tribunal is to ensure that there is a level-playing field for all players and what with the increasing complexities in business process/es, it becomes all the more challenging to do so. This is especially true when there are powerful and influential players in the market. The Act, however, does not prohibit competition; its main intent is to prohibit those practices and/or activities which have adverse effects on it.

I am thus proud to learn of Alexis Foundation's publication on Competition Law in the upcoming edition of their journal. Indeed, the enthusiasm of the Alexis team is truly infectious.

When I was asked to write the foreword for this journal, I was extremely pleased to learn of the keen and intense research that the team has engaged in to produce thorough and robust scholarship with their sharp academic acumen. The informative compilation of articles provides readers with interesting perspectives and insights on the Competition Law landscape in India and in the oft-evolving realm of business. In a maturing economy such as ours, this compilation of articles with its particular emphases on important judgements will certainly be of interest and import not just to lawyers, students and businesses, but also to any layperson whose interests lie in this important field of legal study.

I therefore wish the Alexis Foundation (and the Public Policy Department in particular), the editorial team and all those who have contributed, all the very best.

Ms. Rama R. Iyer
Advocate, Supreme Court of India.

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ANTI-COMPETITIVE PRACTICES AND MONOPOLY IN INDIAN COTTON SEED MARKET

Shagufta Praveen*

The cotton industry in India has undergone a rapid change. The advent of Bt cotton revolutionised the entire cotton industry. With the oncoming of big players such as Monsanto in India, there was a likelihood of them using their dominant position in the international market to dominate the local market. This nightmare came true when the local seeds were eventually phased out of the market, leaving only Bt cotton as the only viable option. Further, the actions adopted by Monsanto are not only in violation of Section 3(5) of the Competition Act, 2002, which is a provision against abuse of dominant position, but also in violation of the farmers' right to save the seeds granted under the PPFVR Act, 2001. Further to complicate the situation, there are the Indian Patents Act, 1970 and the Seeds Bill, 2004, which permit procedure adopted in agriculture to be patented, thus permitting patenting of seeds, if not directly, then indirectly. In this situation the question remains as to determining the steps that the government is required to take in order to curb the monopoly created by Monsanto. Countries like America and Canada have had a bad experience with these policies of Monsanto and recently, their ripple has been felt by the Indian farmers. Some solutions like Standard-Essential Patents and Standard Setting Organizations seem promising but there is an urgent need for a legislation which promotes and propagates protection of farmers' rights along with development of the cotton industry.

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I. INTRODUCTION

Cotton is widely regarded as the king of textile fibres or the leading plant fibre crop in the world and may be considered to be the most influential plant on earth.[1] The structure of the Indian cotton seed market has changed rapidly from dominance of local seed markets to that of private players, who have completely displaced the local seed market. One such private player is Monsanto India, which is a subsidiary of Monsanto Company, USA, which is the largest seed distributor in the world. Monsanto officially came to India in 2002 by forming a joint venture with MAHYCO, known as MAHYCO-Monsanto Biotech (MMB).

MMB introduced around 1128 varieties of hybrid seeds, leading to complete domination of the market.[2] To some extent, the bio-safety laws have protected the monopoly of the incumbent.[3] However, the market structure is not frozen because of diffusion from illegal seeds, competition from alternative gene suppliers and changing regulatory practices.[4] Monsanto has been charged of over-pricing and abusing its patent rights at various instances. The public sector, instead of intervening in the matter and regulating the distribution of seeds, is receding from the cotton seed market, which has lead to increased farmer suicides in India.

Monsanto charges an exorbitant trait fee for seeds and the absence of price ceiling

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[1] Devparna Roy, *Food Sovereignty: A Critical Dialogue*, J. of Peasant Studies, Int'l Conference (Sep 14-15,2013), http://www.iss.nl/fileadmin/ASSETS/iss/Research_and_projects/Research_networks/ICAS/64_Roy_2013.pdf.

[2] Dr. Vandana Shiva, *More sickening and cynical spin from Monsanto stooges*, GM-FREE CYMRU (Aug. 6, 2010), http://www.gmfreecymru.org/pivotal_papers/sickening.html.

[3] Milind Murugkar et al., *Competition and Monopoly in Indian Cotton Seed Market*, ECONOMIC AND POLITICAL WEEKLY, Sept. 15, 2007, at 3781 [hereinafter Murugkar et al.].

[4] *Id.*

proves disadvantageous to the alternative gene providers and farmers. Further, Monsanto prohibits the age-old practice of re-sowing left over seeds in the next season and at various instances, has sued the farmers for doing so. If this level of monopoly continues then the small farmers will be priced out of the market. *Bt* cotton, the only genetically modified crop approved for commercial cultivation in India, was released in March 2002. In the last eleven years, the seed companies have used aggressive marketing practices and removed non-genetically modified (non-GM) seeds from the market, which has left the Indian cotton farmer almost entirely dependent on Monsanto's *Bt* cotton seed.[5] This monopoly has also given Monsanto the strength to manipulate and influence state governments on seed prices and royalties.[6] If Monsanto is not stopped, what is in store for us is one company controlling almost all our agriculture through its patented genes and seeds.[7]

II. ANTICOMPETITIVE PRACTICES BY MMB

With *Bt* cotton, the seed industry encompasses a seed market as well as a technology market.[8] As of now, the technology market is dominated by MMB, which has licensed its *Bt* genes to almost all the leading cotton seed companies.[9] For development of *Bt* cotton seeds by a seed company, there is a requirement of substantial hike in R&D.[10] As a result, as many as 20 firms (as of April 2005)[11] mostly medium-sized, opted for cheaper and more viable option, that is, licensing of *Bt* technology from MMB. These firms are, however, contractually bound to pay

[5] Neha Saigal, *BRAI Bill, 2013: India's Monsanto Promotion and Protection Act?*, GREENPEACE (July 1, 2013), http://www.indiaenvironmentportal.org.in/files/file/BRAI-Monsanto-briefing.pdf.
[6] *Id.*
[7] *Id.*
[8] SAKIKO FUKUDA-PARR ED., THE GENE REVOLUTION: GM CROPS AND UNEQUAL DEVELOPMENT, 168 (2007).
[9] Murugkar et al., *supra* note 3, at 3788.
[10] ANCHAL ARORA & SANGEETA BANSAL, PRICE CONTROL ON BT COTTON SEEDS IN INDIA: IMPACT ON SEED PROVIDERS 5 (2012).
[11] S*upra* note 3.

royalties to MMB, which sets the *Bt* seed prices, even with competition among these firms.[12]

Section 3 of the Competition Act, 2002 prohibits any agreement which "causes or is likely to cause an appreciable adverse effect on competition within India." An adverse effect results when the agreement harms the competitors in the consumer welfare sense of economics i.e. effect on price or output.[13] That consequence may even be unintended. It is not always necessary to find a specific intent in order to find an agreement having an appreciable adverse effect on competition and thus, contravening Section 3(1). It is sufficient that the likely effect is the consequence of the person's conduct or business arrangements.[14]

The conduct of the party should be such so as to cause an appreciable effect on competition within India[15]. In *Mahindra and Mahindra Ltd v. UOI*[16] it was held that a line has to be drawn between trade practices which regulate and promote competition and which restrict and destroy competition.

In *Aston v. CIR*[17], it was held that if an arrangement has a particular purpose, then that would be its intended effect and that if it has a particular effect that will be its purpose. Even if the consequence is probable, the agreement is anti-competitive.

On this point, the case of *Summit Health Ltd et al. v. Pinhas*[18] held, "when the competitive significance of respondent's exclusion from the market is measured, not by a particularized evaluation of his practise, but by a general evaluation of the restraint's impact on other participants and potential participants in that market, the restraint is covered by the Act."

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[12] *Id.*
[13] D.P. MITTAL, COMPETITION LAW AND PRACTICE 175 (3d ed. 2008) [hereinafter MITTAL].
[14] *Id.*
[15] Pawan Hans Ltd v. UOI, (2003) 5 SCC 71.
[16] Mahindra and Mahindra Ltd v. UOI, (1979) 2 SCC 529.
[17] Aston v. CIR, (NZ) 75 ATC 6001.
[18] Summit Health Ltd. et al. v. Pinhas, 500 US 322 (1991).

Another case with a similar judgement is *US v. Griffith et al.*[19], saying, "it is not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that sections 1 and 2 of the Sherman Act have been violated. It is sufficient that a restraint of trade or monopoly results as a consequence of the defendants' conduct or business arrangement."

The adverse effect of the agreement on competition within India must be significant. Appreciable adverse effect includes acts, contracts, agreements or combinations which operate to the prejudice of the public interest[20] by unduly restricting competition or unduly obstructing due course of trade and limit rights of individuals.

Now, to determine the question of adverse effect, the court must ordinarily consider the facts peculiar to the business, their condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable.[21]

In *DGIR v. UB-MEC Batteries,*[22] it was held that the effect is to be judged with reference to the market share in the relevant market. Once the market has been defined, market share must be measured.[23] Generally, market share is measured by analyzing output within the market in one of three ways: (1) as physical units sold, (2) as revenues as a percentage of all physical units sold, or (3) as firm revenues.[24] Market share is one of the factors for determining dominance but it is not the only factor.

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[19] US v. Griffith et al., 334 US 100 (1948).
[20] Haridas Exports v. All India Float Glass Manufacturers Association, (2002) 6 SCC 600.
[21] Chicago Board of Trade v. United States, 246 US 231 (1918).
[22] DGIR v. UB-MEC Batteries, 87 Comp. Cas. 891 (Kar. 1996).
[23] LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 64 (2000) [hereinafter SULLIVAN].
[24] IIB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 273-84 (3d ed. 2007) [hereinafter AFREEDA & HOVENKAMP].

A. Adverse Effect of the Agreement between MMB and Firms

Monsanto is now the owner of Cargill Seeds, DeKalb, Calgene, Agracetus, Delta and Pine Land, Holden and Asgrow and Seminis. Monsanto's intellectual property includes eighty percent of all genetically engineered seeds.[25] Further, Monsanto owns broad species patents on cotton, mustard and soya bean – crops that were not "invented" or "created" by Monsanto but have been evolved over centuries of innovation by farmers of India and East Asia working in close partnership with the natural biodiversity.[26] The agreements entered between MMB and the firms have adverse effects such as:

i. Small markets being priced out of the market

Until 2006, the technology market consisted of only one supplier, MMB, which had licensed its *Bt* gene to almost all of the leading cotton seed companies. Although the non-MMB varieties entered the market in 2006, it became difficult for them to compete, as the choice and preference of farmers shifted to MMB.[27] The prospects and promises of the *Bt* gene were high, thus shifting the entire focus to *Bt* cotton seeds. With growing demand, the local companies started tie-ups with MMB. Thus, this led to a complete phasing out of hybrids produced by the local companies.[28] Prior to 2006, *Bt* hybrids price were four times that of non-*Bt* hybrids. Thus, MMB exercised its monopoly as long as it could.[29] Further, as the market is dominated by the GM seeds, it is highly impractical for farmers to buy non-GMO seeds.

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[25] Dr. Vandana Shiva, *Profiteering From Death: TRIPS and Monopolies on Seeds and Medicines*, 4 RBDI 296, (July, 2006) [hereinafter V. Shiva (2006)].

[26] Michael Specter, *Seeds of Doubt,* THE NEW YORKER (Aug. 25, 2014), http://www.newyorker.com/magazine/2014/08/25/seeds-of-doubt.

[27] N. LALITHA, CARL. E. PRAY& BHARAT RAMASWAMI, THE LIMITS OF INTELLECTUAL PROPERTY RIGHTS: LESSONS FROM THE SPREAD OF ILLEGAL TRANSGENIC SEEDS IN INDIA 9 (2008) [hereinafter N. Lalitha et al.].

[28] *Id.*

[29] N. Lalitha et al, *supra* note 27, at 10.

ii. Farmers left with no alternatives

Farmers are witnessing lesser seed choices in countries where GMOs have been introduced.[30] In India, genetically modified *Bt* cotton accounts for 85% of the country's cotton production. Non-GMO cotton seed varieties are being phased out by private and public seed breeders.[31]

If the current situation is analyzed, the technology market is dominated by MMB, which has licensed its *Bt* genes to almost all the leading cotton companies. Hence, MMB has the position of the dominant gene supplier, which is not protected by intellectual property laws.[32]

iii. Farmers committing suicide

The promises and prospects of high priced *Bt* seeds soon turned sour as they turned out to be unreliable,[33] further pushing farmers into debt trap.[34] Non-renewability of these seeds pushed hundreds of thousands of Indian farmers to suicide.[35] The figures were as high as 1,50,000 till 2006.[36] The suicides are highest in the regions where seeds monopolies are established by corporations like Monsanto.[37] An internal advisory by the Agriculture Ministry of India in January 2012 said that cotton farmers are in a deep crisis after shifting to *Bt* cotton.[38] The

[30] Ken Roseboro, *Farmers' seed options drastically reduced in GMO-producing countries,* THE ORGANIC & NON-GMO REPORT (Feb. 28, 2013), http://www.non-gmoreport.com/articles/march2013/farmers-seed-options-GMO-producing-countries.php.
[31] *Id.*
[32] Murugkar et al., *supra* note 3, at 3788.
[33] Rhea Gala, *Indian Cotton Farmers Betrayed*, INSTITUTE OF SCIENCE IN SOCIETY (Feb. 2, 2006), http://www.i-sis.org.uk/IndianCottonFarmersBetrayed.php.
[34] Dr. Vandana Shiva, *The Seeds of Suicide: How Monsanto Destroys Farming*, GLOBAL RESEARCH (March 13, 2014) www.globalresearch.ca/the-seeds-of-suicide-how-monsanto-destroys-farming/5329947 [hereinafter V. Shiva (2014)].
[35] V. Shiva (2006), *supra* note 25, at 300.
[36] *Id.*
[37] *Id.*
[38] V. Shiva (2014), *supra* note 34.

spate of farmer suicides in 2011-12 has been particularly severe among *Bt* cotton farmers.[39]

iv. Agreements fixing prices

Agreements which fix prices or allocate territories are treated per se as illegal.[40] In *US* v. *General Electric Co.*[41] it was held that such conditions for sale can be permitted by the patentee as to secure maximum benefit to the patent holder. In the case of *United States* v. *Univis Lens Co.*[42] it was held that a patentee cannot control the sale price after the sale of the patented article. Such acts were held to be anti-competitive. Thus, controlling and setting a floor for *Bt* seed prices is anti-competitive.

Agreements that directly or indirectly fix price are prohibited under Section 3(3)(a) of the Competition Act. In a free competitive market, the price is determined purely on the basis of intersection between demand and supply.[43] However, sometimes, big players in order to avoid uncertainties agree to maintain uniform prices by forming cartels.[44] Agreements or combinations between dealers, having as their sole purpose the destruction of competition and fixing of prices, are injurious to public interest and are void.[45]

B. Lack of Specific Provision Dealing with Technology Transfer Agreements

Monsanto has licensed many companies to produce *Bt* cotton at a fixed price, and according to its terms and conditions. This is an example of technology transfer.

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[39] *Id.*
[40] T. RAMAPPA, COMPETITION LAW IN INDIA: POLICY, ISSUES, AND DEVELOPMENTS 114 (Oxford University Press, 2006) [hereinafter RAMAPPA].
[41] US v. General Electric Co., 272 U.S. 476 (1926).
[42] United States v. Univis Lens Co., 316 U.S. 241 (1942).
[43] MITTAL, *supra* note 13, at 210.
[44] *Id.*
[45] Dr. Miles Medical Company v. John D. Park & Sons Co., 220 US 373.

According to the European Commission Regulation,[46] technology transfer agreements concern the licensing of technology. Such agreements usually improve economic efficiency and are pro-competitive as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.

The likelihood that such efficiency-enhancing and pro-competitive effects will outweigh any anti-competitive effects due to restrictions contained in technology transfer agreements, depends on the degree of market power of the undertakings concerned and therefore, on the extent to which those undertakings face competition from undertakings owning substitute technologies or undertakings producing substitute products.[47]

Under Indian competition law there is no specific provision for regulation of anti-competitive practices in licensing technology. The appropriate place to provide this is after Section 3(5)of the Act. Having recognized the right of the owners of intellectual property rights to protect the rights granted to them by law, the section should go on, with a rider to the effect that, however, in the exercise of those rights, they would be subject to the relevant provisions of the Competition Act.

C. Interface between Competition Law and Intellectual Property Rights

The first question which arises in the present situation is whether MMB can exercise its IPR even though its conduct is anti-competitive. The law under Section 3(5) is that a patentee can impose only those conditions on the licensees and the buyers which are necessary to protect the right that is granted under the patent. If any patent holder imposes a condition which is beyond the rights given by the

[46] European Commission Regulation, (EC) No. 772/2004, 27 April, 2004.
[47] *Id.*

patent or interferes with the competitive practices then it will be an anti-competitive practise.[48]

Again, a question arises with regard to the age old practice of re-sowing seeds and imposing a condition on this practice. This condition will definitely have an anti-competitive effect on the market. The sale of these seeds will increase in comparison with other seeds in the market as the farmers will be compelled to buy new needs for each season. There ought to be a balance between the interests of the patent holders, who exercise certain exclusive rights conferred on them, and the need to preserve the process of competition, free from adverse influences.[49] The restrictions imposed must be reasonable.

The Raghavan Committee[50] made propositions regarding the conflict between IPR and competition law. Intellectual property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopolistic power in a market or society.[51] Paragraphs 5.1-8 discuss the dichotomy between intellectual property rights and competition policy. A need was felt to establish a balance between individual rights and consumer or public interest. If any anti-competitive trade practice or conduct is visibly to the detriment of consumer interest or public interest, then competition policy can be assailed.[52]

In order to deal with such problems, a blanket protection is provided for IPRs under Section 3(5) to protect innovations, but this section does not provide specifically for licensing technology. The exercise of Section 3(5) is different from

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[48] RAMAPPA, *supra* note 40, at 109.
[49] *Id.*
[50] HIGH LEVEL COMMITTEE ON COMPETITION POLICY & LAW, REPORT OF HIGH LEVEL COMMITTEE ON COMPETITION POLICY & LAW (2000).
[51] M. DUGAR, COMMENTARY ON THE MRTP LAW, COMPETITION LAW & CONSUMER PROTECTION LAW—LAW, PRACTICES, AND PROCEDURES 757 (Wadhwa 2006) [hereinafter DUGAR].
[52] DR. SUNIL KAVE, MANAGEMENT ISSUES & OPTIONS 113 (Maratha Mandir's BGIMS, 2012).

what was proposed by the High Level Committee. The Committee recognised the potential competition policy problems that all IPRs can raise.[53] Therefore, to take the benefit of the exceptions, the conditions provided in the IPR agreements have to be reasonable. If the conditions are found to be unreasonable, the Competition Commission of India can declare them to be anti-competitive under Section 19 of the Act.[54]

The conflict between IPR and competition law was encountered by the MRTP Commission at many instances. Section 15 of the MRTP Act was similar to Section 3(5) of the Competition Act, as it excluded the application of the provisions to the patented product. In the earlier cases under MRTP Act, the only instance when the provisions of MRTP Act could be attracted was when there was an abuse in the exercise of rights protected by IPR.[55] Thus, even before the enactment of the Competition Act, the unfair trade practices emanating from misuse of IPRs were under the ambit of the MRTP Act.[56] Similar issues can be undertaken by the CCI under the mandate of the Competition Act 2002.

There have been various instances when Mahyco-Monsanto Biotech India Limited was indicted by MRTP Commission for unfair trade practices as it was abusing its dominant position by charging a high royalty fee, thus increasing the price of the seeds.[57] Hence, if there is no check on the use of IPR, the chances of abuse increase, as demonstrated by these cases.

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[53] EASHAN GHOSH, COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS WITH SPECIAL REFERENCE TO THE TRIPS AGREEMENT 15 (FEBRUARY-MARCH 2010).

[54] ABHILASH CHAUDHARY, COMPULSORY LICENSING OF IPRS AND ITS EFFECT ON COMPETITION 15 (2013).

[55] Vallal Peruman v. Godfrey Philips (India) Limited, 16 CLA 201(1995); Manju Bharadwaj v. Zee Telefilms Ltd., 20 CLA 229 (1996).

[56] DUGAR*, supra* note 51, at 757.

[57] Ramu Bhagat, *Mahyco banned from selling Bt cotton seeds in Maharashtra*, TIMES OF INDIA, Aug. 10, 2012, http://timesofindia.indiatimes.com/city/nagpur/Mahyco-banned-from-selling-Bt-cotton-seeds-in-Maharashtra/articleshow/15427722.cms.

III. ABUSE OF DOMINANT POSITION BY MMB

A. Structure of Cotton Seed Market

Till 2007, private seed players had 41%[58] in total cotton production. Currently, Monsanto holds 90% market share of the *Bt* cotton seeds market[59]. There has been a significant increase in the production of cotton after introduction of *Bt* cotton - from 302 in 1998-99 to 466 in 2007-08 kg per ha.[60] Gujarat, Maharashtra, Andhra Pradesh and Tamil Nadu accounted for 69 percent of the cotton production in India in the triennium ending 2007-08.[61] Andhra Pradesh recorded an annual rate of growth of 3.84 percent in cotton production during the period 1990-9 to 2001-02.[62] The sources of growth during 1990-91 to 2007-08 on account of area and yield were at 2.21 percent and 3.74 percent respectively to achieve the overall production growth rate of over 6 percent.[63]

MAHYCO is Monsanto's partner in India. Rasi Seeds and Ankur Seeds are sub-licensees of Monsanto, producing Ankur 651 *Bt*, Ankur 2354 *Bt* in North India, and Ankur 651 *Bt* and Ankur 09 *Bt* in Central India. In India, Andhra Pradesh reported 5608 hectares of commercial cultivation of *Bt* cotton with Maharashtra reporting the highest production at 14746.[64]

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[58] INDIAN SEED SECTOR, (May 5, 2014), http://seednet.gov.in/material/IndianSeedSector.htm (Last visited 22 May, 2014).
[59] Vivian Fernandes, *PAU to debut reusable Bt cotton seeds*, FINANCIAL EXPRESS, Apr. 28, 2014, http://www.financialexpress.com/article/industry/pau-to-debut-reusable-*Bt*-cotton-seeds/67429/; *Monsanto holds 90% market share of Bt cotton seeds*, FIBRE2FASHION, Jan. 21, 2010, http://www.fibre2fashion.com/news/textile-news/india/newsdetails.aspx?news_id=81484.
[60] VASANT P. GANDHI & N. V. NAMBOODIRI, ECONOMICS OF BT COTTON VIS-À-VIS NON-BT COTTON IN INDIA: A STUDY ACROSS FOUR MAJOR COTTON GROWING STATES 12 (2009).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] DUGAR, *supra* note 51, at 757.

B. *Abuse by MMB*

MMB continues to hold its dominant position in the domestic hybrid and transgenic seed market, with its strong research and development capabilities and robust network of hybrid seed growers.[65]

The abuse of a dominant position is another way of interfering with competition in the market place. In substance, 'dominant position' means the position of strength enjoyed by an enterprise that enables it to act independently of competitive forces prevailing in the relevant market. Such an enterprise will be in a position to disregard market forces and unilaterally impose trading conditions, fix prices etc.[66]

Section 4 of the Competition Act deals with the abuse of dominant position. According to Section 4(2)(b)(ii), there shall be abuse of dominant position if there is a limitation or restriction on technical or scientific development relating to goods and services to the prejudice of consumers. Further, sub-clause (c) of the same provision states that there would be abuse of dominant position if an enterprise indulges in practice or practices resulting in denial of market access. Section 4 is based on Article 82 of European Community Law.

Conduct amounting to an abuse of a dominant position may also be such that it affects its competitors or consumers or the structure of the market in its favour. It should show 'market power' as opposed to 'market share'. Market power arises where an undertaking does not face sufficiently strong competitive pressure. Both suppliers and buyers can have market power.[67]

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[65] Ind- Ra Revises Maharashtra Hybrid Seed Company's Outlook to Stable, Affirms 'Ind A', INDIA RATINGS & RESEARCH (Dec. 23, 2013), https://www.indiaratings.co.in/sectors/showPage.jsp?file=/upload/sectors/pressReleases/ratingsRelated/2013/12/23/indra23Hybrid.htm.

[66] RAMAPPA, *supra* note 40, at 139.

[67] *Draft National Competition Policy 2011*, MCA (2011), www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf.

C. Ways to Determine Dominant Position

The dominant position of an enterprise is a question of fact to be determined in each case, taking into consideration a number of relevant factors, such as the product and geographic market, its market share, the market shares of the competitors, any technological advantages held by that enterprise, the strength of its competitors, and barriers to entry. Dominant position is always in reference to a relevant market. Now, relevant market can be 'relevant product market' and/or 'relevant geographic market'.[68]

'Relevant product market' means a market comprising all those products or services that are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

'Relevant geographic market' 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.[69]

The main purpose of ascertaining a market is to determine dominant position of a particular enterprise in the market. In *Hoffmann-La Roche & Co. Ag. Basle* v. *Commission of the European Communities in Brussels*[70] the court listed the following as the relevant factors in determining the existence of a dominant position:

(1) The relevant market shares of the undertaking concerned and of its competitors. (2) The technological lead of an undertaking over its competitors.
(3) Existence of a highly developed sales network, and the absence of potential competition.

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[68] § 2(r), The Competition Act, 2002.
[69] § 2(s), The Competition Act, 2002.
[70] Case 85/76, Hoffmann-La Roche & Co. Ag. Basle v. Commission of the European Communities in Brussels, 1979 E C. R. I-00461.

i. Creation of monopoly

In 2001, MMB, the joint venture of Monsanto and MAHYCO, was given a temporary monopoly by the bio-safety regulatory system on the 'legal' *Bt* cotton industry until 2006, when Nath seed and J.K. Seed were allowed to sell the *Bt* Genes. In 2006, the Monopolies and Restrictive Trade Practices Commission (MRTPC) ruled that MMB had a monopoly and the prices of *Bt* Seed were too high and should be controlled.[71]

The question is, whether the temporary monopoly on *Bt* cotton harm farmers through higher prices or reduce innovation.[72] The empirical studies on the *Bt* seed industry show that *Bt* seeds are more expensive than next hybrids, but they save money per unit of output or per unit of land by saving pesticide costs and increasing yields.[73]

ii. Over pricing

One of the ways of abusing dominant position is by setting unfair prices that are excessively high, and above competitive level. MMB has been held guilty of monopolistic practices at various instances. An instance from 2006 may be quoted, where the Director-General of Investigation and Registration (DGI&R) has held Mahyco Monsanto Bio-Tech (India) guilty of monopolistic trade practices on account of charging an exorbitant trait fee, Rs 1,250 for every 450 gm packet of Bollgard Technology (*Bt*) cotton seed in India.[74]

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[71] SHYAMA V. RAMANI, INNOVATION IN INDIA: COMBINING ECONOMIC GROWTH WITH INCLUSIVE DEVELOPMENT 130 (Cambridge University Press 2014) [hereinafter RAMANI].
[72] *Id.*
[73] *Id.*
[74] Indu Bhan, *Monsanto held guilty of monopolistic practices*, BUSINESS STANDARD, Apr. 11, 2006, http://www.business-standard.com/article/companies/monsanto-held-guilty-of-monopolistic-practices-106041101160_1.html

Further, Monsanto has been charged with continuously hiking trait fee.[75]

Sahai and Rahman[76] found that the price of *Bt* cotton seeds was higher by approximately Rs. 1200 per acre when compared to non-*Bt* hybrid varieties, while the savings on pesticide was a meagre Rs 217 per acre. The results directly contradict the findings of MMB. At the end of the day, farmers spend more than what is saved.[77]

iii. Farmers getting sued for re-using seeds.

Monsanto sued Ralph, asserting that Ralph's license was for one season only—1998, claiming that planting in 1999 and 2000 infringed its patent.[78] Monsanto has a policy which does not allow for saving or re-sowing of the seeds.[79] The saving and replanting of seeds leads to patent infringement, the most common subject of cases being brought by Monsanto.[80]

iv. Sky high royalty.

Mahyco-Monsanto Biotech India Ltd. has recently been confronting an interesting legal challenge - that the royalty fees for technology being charged by them was excessive and hence in breach of principles of fair competition under the MRTP

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[75] K. V. Kurmanath, *Cottonseed pricing: Hike royalty fee but deposit it in escrow account, orders Court*, BUSINESS LINE, June 10, 2013, http://www.thehindubusinessline.com/industry-and-economy/agri-biz/cottonseed-pricing-hike-royalty-fee-but-deposit-it-in-escrow-account-orders-court/article4800842.ece [hereinafter KURMANATH].

[76] Sahai S and Rahman S, *Performance of Bt cotton: data from first commercial crop*, ECONOMIC AND POLITICAL WEEKLY, July 26, 2003, at 3139.

[77] QAYUM AND SAKKARI, BT COTTON IN ANDHRA PRADESH: A THREE-YEAR ASSESSMENT 12 (2005).

[78] Monsanto v. L. Ralph, 382 F.3d 1377 (Fed. Cir. 2004).

[79] Benjamin M. Cole et al., *Food for thought: Genetically Modified Seeds as de facto Standard- Essential Patents*, 85 Univ. of Col. L. Rev. 338, 363 (2014) [hereinafter B. Cole].

[80] Monsanto Co. v. Bowman, 657 F.3d 1341 (Fed. Cir. 2011), *aff'd*, 133 S. Ct. 1761 (2013); Monsanto Co. v. David, 516 F.3d 1009 (Fed. Cir. 2008); Monsanto Co. v. McFarling, 488 F.3d 973 (Fed. Cir. 2007); Monsanto Co. v. Ralph, 382 F.3d 1374 (Fed. Cir. 2004); Monsanto Co. v. Hargrove, No. 4:09-CV-1628 (CEJ), 2011 WL 5330674 (E.D. Mo. Nov. 7, 2011); Monsanto Canada, Inc. v. Schmeiser, [2004] 1 S.C.R. 902 (Can.).

Act. The MRTPC ordered the company to reduce the royalty fees. The company appealed to the Supreme Court against the order of the MRTPC, arguing that licensing of technology does not fall within the purview of the MRTPC. The case is going on in the Supreme Court.[81] The Supreme Court, significantly, has not stayed the order of the MRTPC.

In its interim order, the MRTPC had observed that Mahyco-Monsanto had not provided any rationale for its exorbitant license fees, and that because of lack of competition, it was in a position to charge arbitrarily high fees, and establish its monopoly.

Then the MRTP Act was replaced by the Competition Act, which places emphasis on principles to establish whether an act is anti-competitive or abusive of a dominant position. Being dominant itself is not prohibited under the new law; what is problematic is an abuse of dominance.[82]

A reasonable royalty can be based on an established royalty. An established royalty is what others actually pay for the right to use the patent.[83] MMB had been charged at various instances, with charging a sky high royalty from Indian licensees.[84] The royalty alone, on the *Bt* cotton seeds, is grossing over Rs. 1,500 crores for the US firm and its Indian licensees, since 2002, when *Bt* cotton was introduced in the country.

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[81] Latha Jishnu, *Battle royal over Bt cotton royalty,* BUSINESS STANDARD, May 28, 2010, http://www.business-standard.com/article/economy-policy/battle-royal-over-Bt-cotton-royalty-110052800037_1.html [hereinafter Jishnu].

[82] K. D. RAJU, GENETICALLY MODIFIED ORGANISMS: EMERGING LAW AND POLICY IN INDIA 2 (2007) [hereinafter Raju (2007)].

[83] Monsanto Co. v. McFarling, 488 F.3d 973, 978–79 (Fed. Cir. 2007).

[84] Jishnu, *supra* note 81.

IV. BIO-SAFETY LAWS IN INDIA

Cotton is a versatile crop that can be cultivated any time from June to September, making it one of the most profitable crop, which allows income distribution among tenants and small and marginal farmers. Recently, there have been crop failures and huge losses due to pest menace, for more than 60% of the cost of cultivation goes into expenses on pesticides.[85] Hence, there is a need for technology which would reduce the incidents of crop failures and save the net returns was felt. Hence, the advent of *Bt* cotton in India benefitted farmers hugely as it helped farmers on both fronts by increasing their yield[86] and reducing pest menace.

The arguments that *Bt* cotton has yielded better results are fallacious as only some farmers have benefitted from it while the rest have incurred losses. The patent protection granted to these varieties further complicates the situation.[87]

The non-biological processes for the production of plants are subjected to patent rights protection under the TRIPS agreement. Article 27.3.b of TRIPS provides certain exemptions from patentability which include plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. Methods of agriculture and growing plants were excluded from patentability under the Indian Patents Act of 1970. Section 3(i) of the Patents Act stated, 'any process for medical, surgical, curative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products are not inventions, and not subject matter for patents.'

[85] Raju (2007), *supra* note 82, at 4.
[86] *Id.*
[87] *Id.*

By the second amendment to the Patents Act, the word 'plants' has been deleted and a new section 3(j) has been added, which impliedly states that plants in whole or in parts cannot be patented, but any process that is not essentially biological for the production or propagation of plants can be patented. Genetic modification technology, which is a non-biological method of production of plant varieties, is thus, subject to patent rights for a period of 20 years in India.

But the question remains whether the seeds of the GM crop are also subject to patent rights. The answer depends on the national laws, and in India, the Seeds Bill, 2004, and the PPVFR (Protection of Plant Variety and Farmers' Rights) Act of 2001 deal with the issue. They allow the farmers to save, use, exchange and share seeds from their fields, allowing them to gain from the technology without paying any further royalties once it has been obtained from the patent holder or its agencies. Local multiplication by farmers will lead to violation of patent rights.[88]

A. *Actual Effect of these Bio-safety Laws: Negative Impact*

i. Increase in monopoly

If the compulsory registration is permitted, farmers' seed supply will be destroyed as it will become illegal to plant unlicensed varieties, and farmers will be pushed into dependency on corporate monopoly of the patented seed.[89] The Seeds Bill is therefore the handmaiden of the Patent Amendment Acts, which have introduced patents on seeds.[90] A new change has been carried out in the Indian Patents Act, 1970. Post the third amendment in the Indian Patents Act, 1970 on the lines of the WTO Agreement, patents can be granted on seeds, plants, micro-organisms, cells and even GMOs and animals.

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[88] Mahindra and Mahindra Ltd v. UOI, [1979] 2 SCC 529.
[89] Vandana Shiva, *The Indian Seed Act and Patent Act: Sowing the Seeds of Dictatorship*, GRAIN, Feb. 14, 2005, http://www.grain.org/fr/article/entries/2166-india-seed-act-patent-act-sowing-the-seeds-of-dictatorship [hereinafter V. Shiva (2005)].
[90] *Id.*

If the Bill is scrutinised, its objective will be quite apparent, that is, to stop farmers from saving and exchanging seeds and forcing the farmers to buy from private players. The new Seeds Bill focuses more on criminalizing farmers rather than holding the private players accountable for contaminating GMOs.

The Seeds Bill leaves only one alternative with the farmers, that is, to approach the Consumer Protection Board for compensation. Further, the representation of the state governments has been reduced in the Central Seed Committee. This will further allow the private players to arm twist state governments. There is a dire necessity for the government to understand that there exists a need to regulate the MNC seed industry and not the farmers.[91]

ii. Rise in illegal seed markets.

All the new varieties of transgenic crops introduced in India are required to comply with certain bio-safety regulations. Between 2002 and 2006, only MMB had permission to sell the *Bt* gene. There was a rise in illegal markets of seeds as various genetically modified seeds started coming into market even without complying with bio-safety regulations. Hence, this shows failure on the part of these laws in dealing with the rise of illegal seed markets.[92]

The bio-safety regulations create a de-facto patent for *Bt* cotton because regulatory authorities are unlikely to approve a *Bt* hybrid that incorporates an unlicensed version of the MMB gene.[93] Any firm dealing with *Bt* seeds has two options, i.e., either to deal with MMB or consider an alternative *Bt* strategy.[94] At this point, most

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[91] *Id.*

[92] Bharat Ramaswami, Carl E. Pray, N. Lalitha, *The Spread of Illegal Transgenic Cotton Varieties in India: Biosafety Regulations, Monopoly and Enforcement*, INDIAN STATISTICAL INSTITUTE (Feb. 2011), http://www.isid.ac.in/~bharat/Research/worlddevt_Ramaswami_feb11.pdf.

[93] *Id.*

[94] *Id.*

of the firms have chosen to license the *Bt* technology from MMB.[95] An example is Navbharat Seeds, which was prosecuted by the government for violating bio-safety laws.

B. *Encouragement of Monopoly by the Current Patent Regime in India*

Till the Second Amendment, 2005 to the Indian Patent Act, 1970, methods of agriculture and plants were excluded from patentability. The 2nd Amendment made changes in the definition of what is not an invention. This has opened flood gates for the patenting of genetically engineered seeds.[96]

According to S. 3(j) of the Indian Patent Act, the following is not an invention:

'Any process for the medical, surgical, creative, prophylactic or other treatment of human beings or any process for a similar treatment of animals or plants to render them free of disease or to increase their economic value or that of their products.'

In the Second Amendment however, the mention of 'plants' has been deleted from the section. The Second Amendment has also added a new section 3(j). This section allows the production or propagation of genetically engineered plants as inventions. But this section excludes as inventions 'plants and animals, including seeds, varieties and species and essentially biological processes for production or propagation of plants and animals.' The deletion of 'plants' means that now method or process modification is qualified to be patented. Thus, this allows the protection of cotton from bollworm to be within the exclusive right. In other words, this amendment had opened a gate for Monsanto to have plant patent in India. [97]

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[95] *Id.*

[96] BK Keayala, *Amended Patents Act: a critique*, INDIA TOGETHER, May 22, 2005, http://indiatogether.org/combatlaw/vol4/issue2/patents.htm.

[97] Raju (2007), *supra* note 82, at 3.

C. Analysis of Article 27.3(b) of TRIPS vis-a-vis Indian Patent Act, 1970

What is most concerning is how the language of Section 3(j) is a verbatim reproduction of Article 27.3 (b) of the TRIPS Agreement.[98] Article 27.3 (b) of TRIPS states:

'Parties may exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, parties shall provide for the protection of plant varieties either by patents, by an effective sui generis system or by any combination thereof. This provision shall be reviewed four years after the entry into force of the Agreement establishing the WTO.'

Article 27.3(b) is under review, but the Indian Patents Act has been amended. This particular move is hasty and thoughtless as the government should have waited till the completion of Doha Round of negotiations. As a result of sustained public pressure, after the Agreement came into force in 1995, many third world countries made recommendations for changes in Article 27.3(b) to prevent biopiracy.[99]

The amendments to the Indian Patents Act, 1970 have jeopardized seed and food security. Patents granted under sections 3(i) and 3(j) will aggravate the monopolistic situation as it will prevent the farmers from saving seeds and local seed companies from producing seeds.[100]

In the case of *Imagio Nursery v. Daina Greenhouse*, Judge Spence Williams, for the U.S. District Court for the Northern District of California, ruled that a plant patent can be infringed by a plant that merely has similar characteristics to the patented

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[98] Vandana Shiva, *The Indian Seed Act and Patent Act: Sowing the Seeds of Dictatorship*, GRAIN, Feb. 14, 2005, http://www.grain.org/fr/article/entries/2166-india-seed-act-patent-act-sowing-the-seeds-of-dictatorship [hereinafter V. Shiva (2005)].
[99] *Review of Article 27.3(b),* WTO Paper IP/C/W/369/Rev.1 (Mar. 9, 2006).
[100] Raju (2007), *supra* note 82, at 3.

plant.[101] When combined with the reversal of burden of proof clauses, this kind of precedence based on product patents can be disastrous for countries from where the biodiversity that gave rise to those properties was first taken, more so, if the original donors of the biodiversity are accused of 'piracy' through such legal precedence, in the absence of the prior existence of laws on traditional knowledge, that prevent the misuse of such legal precedence.[102]

The question arises as to how Monsanto is able to patent life forms. The answer to this is that patenting plants directly is not allowed but patenting properties and characteristics of plants is.[103] This is how Monsanto is able to establish monopolies in countries like Canada even though it does not allow direct plant patents.[104]

D. Traditional Rights of Farmers Getting Violated

IPR is not just limited to intellectual property but has expanded its scope to plant varieties, which has the likelihood of affecting the farmers' right to a great extent. Certain treaties such as The International Treaty for Plant Genetic Resources for Food and Agriculture (ITPGRFA) and The International Union for the Protection of New Varieties of Plants (UPOV) recognise the farmers' right along with sui generis system for recognition for plant breeder's right.[105]

Article 5 of the UPOV Act, 1961 provides for the protection of the interest of farmers as against those of plant breeders.[106] The 1978 Amendment of the UPOV Act provided for restricting the plant breeders' right on the ground of public

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[101] V. Shiva (2005), *supra* note 98.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] Anshu Pratap Singh & Padmavati Manchi, *Sui Generis IPR Laws vis-à-vis Farmers' Rights in Some Asian Countries: Implications under the WTO*, 16 J. INT. PROP. RTS., 107-116 (2011).
[106] International Convention for The Protection of New Varieties of Plants, Dec. 2, 1961, 815 U.N.T.S. 89.

interest to prevent adverse effect of the monopoly.[107] The first mention of farmers' rights was made in the meeting of the Working Group of the FAO Commission on Plant Genetic Resources (IUPGR). The IUPGR observed that generations of farmers have conserved, improved and made available plant genetic resources; however, the contribution of these farmers were not sufficiently recognized or rewarded.

In 1992, the Convention on Biological Diversity was adopted. It recognized the sovereign rights of the nation on their biological resources. Article 8 (j) of the Convention also recognized the contribution of communities and indigenous local people in the conservation and preservation of biological resources. It also recognized the rights of community and indigenous people to have a fair and equitable share in the benefits arising out of utilization of such knowledge.

The 27th session of the FAO Conference recognized the need to further the process of renegotiations for unresolved issues, including the realization of farmers' rights. These negotiations culminated in the adoption of the ITPGRFA, through Resolution 3/2001, by the FAO Conference in November 2001. The Treaty recognized the enormous contribution that the local and indigenous communities and farmers have made to the conservation and development of plant genetic resources. It recognized the following rights as the main components of the farmers' right:

(1) right to save, use, exchange and sell farm-saved seed and other propagating material, (2) right to fair and equitable sharing of the benefits arising from the use of plant genetic resources for food and agriculture, (3) protection of traditional knowledge.

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[107] Charles E. Hess, *Ten reasons not to join UPOV: Global Trade and Biodiversity in Conflict*, GRAIN, May, 1998, http://www.grain.org/article/entries/1-ten-reasons-not-to-join-upov.

By 1995, with the establishment of the WTO, the TRIPS Agreement provided that IP in agriculture should be protected either by patents or by an effective *sui generis* protection or both.[108]Also, the provision for extending the *sui generis* protection provided the legitimacy to protect the farmers' rights and balance the rights of the breeder and the farmer. It also provided for extension or limitation of the extent of farmers' rights as per the need of the concerned nation.

India has tried to incorporate these provisions in the PPVFR Act, in compliance with TRIPS requirement. Its extent of success in granting farmers' rights is discussed in the next section.

V. WHETHER COMPULSORY LICENSE CAN BE PROVIDED

Compulsory licensing is when a government allows someone else to produce the patented product or use a process without the consent of the patent owner. It is one of the flexibilities of patent protection included in the TRIPS Agreement.[109]

The State of Ohio is aiming to draft a legislation, the Seed Availability and Competition Act of 2011, which allows farmers to harvest and replant seeds obtained from plants derived from patented seeds.[110] The proposed legislation would establish a compulsory licensing program for

seeds harvested from patented seeds. The law attempts to nullify any patent derived rights that patent holders may have to prevent or require payment for retained seeds.[111]

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[108] Agreement on Trade-Related Aspects of Intellectual Property Rights, Jan. 1, 1996, Art. 27.3(b), 1869 U.N.T.S. 299.
[109] *Compulsory licensing of pharmaceuticals and TRIPS*, WTO (Sept., 2006), https://www.wto.org/english/tratop_e/trips_e/public_health_faq_e.htm.
[110] Courtenay C. Brinckerhoff, *Compulsory License for Patented Seeds?*, PHARMA PATENTS (Jan. 27, 2011), http://www.pharmapatentsblog.com/2011/01/27/compulsory-license-for-patented-seeds/.
[111] *Id.*

This kind of compulsory license can be provided in Indian Patents Act, 1970 to allow farmers to retain the seeds and curb monopoly market of seeds by Monsanto. Section 84 of Indian Patents Act, 1970 provides for compulsory license on the ground to prevent abuse of patent as a monopoly. Also, license is granted if reasonable requirements of the public have not been satisfied or patent invention is not available to the public at affordable prices.

Compulsory licensing is still a widely debated topic. While the developing countries are willing to adopt it, developed countries are sceptical about it. The difference in the opinion exists because licensing of the technology will make it available at a cheaper price thus; making it beneficial for the developing countries.[112]Voluntary licenses are difficult to obtain, hence, compulsory license can be resorted to in certain situations.

VI. FAILURE OF THE GOVERNMENT TO TAKE MEASURES TO CURB MONOPOLY

One of the main reasons for State failure was the introduction of *Bt* cotton through unauthorized seeds which resulted in a regulatory nightmare for the Indian State which it is still unable to end.[113]

The question arises why the government institutions are unable to stop the spread of the illegal seed market. The need of the hour is that state governments should start prosecuting violations of bio-safety law. There is an exception in Indian seed law which allows farmer-to-farmer exchange of seed. The illegal seed sellers try to take advantage of this loophole by passing off seed sales as seed exchange.[114]

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[112] Anshu Bansal ,*Compulsory Licensing: An Emerging Trend towards Indian-Patent Regime*, LEXOLOGY, (Feb 7, 2014), http://www.lexology.com/library/detail.aspx?g=5013648a-d181-4a2a-bfc7-5eb40c2d9265.

[113] Devparna Roy, *Toward Genetic Democracy? Seed Sovereignty, Neoliberal Food Regime, and Transgenic Crops in India,* Food Sovereignty: A Critical Dialogue, 64 INT. CONF. YALE UNIV. 9 (Sept. 14-15, 2013).

There is an urgent need to control the monopoly exercised by the seed and biotech industry. The need of the hour is that all states adopt a uniform pricing system rather than different states enforcing different *Bt* cotton seed prices, which also halts innovation. One way to check prices can be by allowing new firms to enter the market, which will bring the overall prices down.[115].

The recent case of Andhra Pradesh can be considered, where the Andhra Pradesh High Court asked seed companies and the State Government to create an escrow account to temporarily put an end to the row over the cottonseed technology trait fee.[116] MMB enters into agreement with cottonseed companies every year for transfer technology on payment of Rs. 110 for Bollgard-I and Rs. 163 for Bollgard-II per packet, containing 450 grams. The contention raised was that MMB, in lieu of providing the technology that gives cotton hybrids internal strength to kill bollworms, was fixing the maximum retail price of the seed. The Andhra Pradesh government had capped the trait fee at Rs. 50, triggering the row. Thus, instead of regulating and solving the problem of over-pricing, the government has placed a cap on the trait fee.

VII. SOLUTIONS

A. Standard-Essential Patents and Standard Setting Organizations

A standard, most often seen in technology-based industries, is 'any set of technical specifications that either provides or is intended to provide a common design for a product or process.'[117] Standards serve useful purposes because they encourage interoperability, facilitate competition in replacement parts, and even promote social welfare.[118]

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[114] N. Lalitha et al., *supra* note 27, at 9.
[115] Ramani*, supra* note 71.
[116] Kurmanath, *supra* note 75.
[117] Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1896 (2002).

Standardization may arise in a number of ways.[119] One way is through SSOs.[120] SSOs, which typically act to solve interoperability problems, operate via their members to create standards that ensure that devices within a system will work together and communicate with each other in standardized, predictable ways.[121] Standards that are formed through SSOs often entail bringing together multiple patented technologies owned by different patentees under one standard.[122] But standards may also be formed around the technology of only one specific patentee.[123]

Before SSOs adopt standards covered by SEPs, they frequently require the owners of those patents to commit to licensing their patents under reasonable and non-discriminatory (RAND) terms.[124] Requiring RAND licensing protects adopters and users of the standard from paying extraordinarily high fees when there are no realistic opportunities to produce the product or provide the service without infringing the patent.[125]

To succeed with the affirmative defence that a patent is a de facto SEP and that an implied license is appropriate, the farmer has the burden of establishing three elements. These three elements are[126]:

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[118] *Id.* at 1897.
[119] *Id.* at 1898.
[120] *Id.*
[121] *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents Before the United States Senate Commission on the Judiciary*, 112th Cong. (2012) (statement of Edith Ramirez, Commissioner, Federal Trade Commission).
[122] Aija Elina Leiponen, *Competing Through Cooperation: The Organization of Standard Setting in Wireless Telecommunications*, 54 MGMT. SCI. 1904, 1906 (2008).

[123] Timothy Simcoe, *Standard Setting Committees: Consensus Governance for Shared Technology Platforms*, 102 AMER. ECON. REV. 305 (2012); Joseph Farrell & Timothy Simcoe, *Choosing the Rules for Consensus Standardization*, 43 RAND J. OF ECON. 235 (2012).
[124] Daryl Lim, *Misconduct in Standard Setting: The Case for Patent Misuse*, 51 I.D.E.A. 559, 571 (2011).
[125] Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 876 (9th Cir. 2012).
[126] B. Cole, *supra* note 79, at 33.

(1) Dominance: The patented technology has reached a dominant position in the relevant crop market;

(2) Impracticability: Growing the relevant crop has become impracticable (or impossible) without use of the patented technology; and

(3) Basic Need: The crop is necessary to supplying a basic need (food, shelter, or clothing).

i. Dominance

A patented technology is said to reach a dominant position if they have dominance over the relevant crop market and this is determined by open competition, anticompetitive behaviour, lawful patent protection, tariffs, or other such barriers to access. The measure to determine market power, given under antitrust law,[127] is through market share and structure,[128] which is defined on product to product basis according to geography.[129]

Market share is one of the factors for determining dominance, but it is not the only factor. Once the market has been defined, market share must be measured.[130] Generally, market share is measured by analyzing output within the market in one of three ways: (1) as physical units sold, (2) as revenues as a percentage of all physical units sold, or (3) as firm revenues.[131]

If the current situation is analyzed, the technology market is dominated by MMB, which has licensed its *Bt* genes to almost all the leading cotton companies. Hence,

[127] William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 937 (1981).
[128] SULLIVAN, *supra* note 23, at 60.
[129] *Id.* at 61.
[130] *Id.* at 64.
[131] AREEDA & HOVENKAMP, *supra* note 24.

MMB exercises a dominant gene supply which is not protected by intellectual property laws.[132]

ii. Impracticability

The second element of the de facto SEP defence is that growing the relevant crop has become impracticable (or impossible) without the use of the patented GM technology.[133] This situation can arise when unpatented seed is unavailable in the market and the farmer uses the patented GM seed.[134] This is not uncommon.[135] Alternatives to GM seed often are not readily available. Farmers are seeing less seed choice in countries where GMOs have been introduced. In India, genetically modified *Bt* cotton accounts for 85% of the country's cotton production.[136] Non-GMO cotton seed varieties are being phased out by private and public seed breeders.[137]As the market is dominated by GM seeds, it is highly impractical for farmers to buy non-GM seeds.

iii. Basic need

The final requirement to avail SEP is that the product must be a basic necessity. Now, clothing is a basic necessity and cotton forms a basic raw material in making cloth. To fulfil this test, the crop's primary use is to fulfil basic need.[138]

In the current situation, de-facto SEP can be implied, hence, MMB is required to follow RAND terms and stop its monopolistic practices.

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[132] Murugkar et al., *supra* note 3, at 3781.
[133] B. Cole, *supra* note 79, at 37.
[134] *Id.* at 38.
[135] *Id.*
[136] Ken Roseboro, *Farmers' seed options drastically reduced in GMO-producing countries,* THE ORGANIC & NON-GMO REPORT (Nov. 25, 2014), http://www.non-gmoreport.com/articles/march2013/farmers-seed-options-GMO-producing-countries.php
[137] *Id.*
[138] B. Cole, *supra* note 79.

B. The Seeds Bill, 2004

The Seeds Bill 2004 was introduced in the Rajya Sabha on 9th December, 2004 and the same has been referred to the Parliamentary Standing Committee on Agriculture for submission of report.

i. On curbing monopolistic activities

The new legislation aims to protect the farmers and small scale agriculturists from monopolistic activities of seed producers and suppliers. Also, it aims to comply with requisite WTO obligations.[139]

ii. On checking upon the growth of illegal/spurious seed market

According to the new bill all the new seeds coming in to the market are required to be registered with the Central Seed Committee (CSC), which will serve as a check on growth of illegal seed market. The Standing Committee on Agriculture has recommended that the penalty for supply of spurious and mis-branded seeds must be an amount of Rs. 2,00,000/- which may be extended up to Rs.10,00,000/- and imprisonment of three months which may be extended up to one year.[140]

iii. On regulating the prices

One feature that can be added, which was recommended by the High Level Committee was a price regulatory mechanism in the Seeds Bill, to ensure that there is no arbitrary pricing of the seeds by the seed producers and sellers.[141]

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[139] Y.V. Anil Kumar, *Seed bill 2010: An Analytic view*, INDIA ENVIRONMENT PORTAL (Aug. 1, 2011), http://www.indiaenvironmentportal.org.in/content/335803/seed-bill-2010-an-analytic-view/.
[140] *Id.* at 7.
[141] *Id.* at 6.

VIII. GOVERNMENT MEASURES

Movements like Monsanto Quit India [142] have been started in India against Monsanto and it is high time that the government takes certain measures against the harsh regime of Monsanto.

Recent developments have been seen with the Andhra Pradesh government. The Andhra Pradesh government filed a contempt petition before the Monopolies and Restrictive Trade Practices Commission (MRTPC) on June 26, 2006 against Mahyco – Monsanto Biotech (India) Ltd. for not obeying the commission's order on trait value of *Bt*. Cotton seed.[143]

Monsanto charges a trait value of 1750 per 450 gram pack, which has been challenged by government as being excess of price which can be charged as trait value, which has to be not more than Rs. 750 per 450 gram. Further, a compensation for loss caused to farmers was also demanded by the government. This led to MRTPC compelling the company to reduce 'trait value'.

Another notable development is the Andhra Pradesh government's decision to pressurise Monsanto to reduce the price of *Bt* Cotton so that the burden on the farmers is reduced.[144]

This kind of development shows that there have been certain measures taken by the government. However, there is a requirement of further recognition of the abusive dominant position of MMB.

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[142] *Monsanto Quit India' day observed across the nation*, GREENPEACE INDIA (Aug. 9, 2011), http://www.greenpeace.org/india/en/Press/Monsanto-quit-India-day-observed-across-the-nation/.

[143] J. Venkatesan, *A.P. Government files contempt petition before MRTPC against Monsanto*, THE HINDU, June 26, 2007, http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/ap-government-files-contempt-petition-before-mrtpc-against-monsanto/article3124872.ece.

[144] V. Shiva (2006), *supra* note 25.

IX. CONCLUSION

MMB, thus, exercises an indirect monopoly over the Indian cotton market by entering into anti-competitive agreements and abusing its dominant position. Thus, urgent attention from Competition Commission of India is called for to take relevant action under Section 19 of Competition Act, 2002. Although there are various regulatory frameworks available, they are inadequate in dealing with the rising illegal seed market. Though it is important to promote innovation through patents, there is a need to achieve balance between competition policy and IPRs. Public interest is required to be given primary attention while seeking to attain balance.

Illegal and spurious seeds at various instances fail to produce the desired yield, further pushing the farmers into debt trap, leading to suicides.[145] This is evidenced by the rise in suicides in those areas where cotton is grown as a major cash crop.

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[145] B.B Mohanty, *Farmers Suicide in India: Durkheim's Types*, ECONOMIC AND POLITICAL WEEKLY, May 25, 2013, at 45.

Sukanya Bhattacharya, *Are the Business Practices of Online Portals Anti-Competitive?*
1(2) ALEXIS J. PUB. POL'Y & L. 114 (2014)

ARE THE BUSINESS PRACTICES OF ONLINE PORTALS ANTI-COMPETITIVE?

Sukanya Bhattacharya [*]

The role of Competition Commission of India (CCI) is to promote healthy competition in various sectors of the country. However in achieving its object, the Commission needs to be very careful, so that in the process it does not remove either competition or competitors from the market. Recently, some complaints have been filed against online portals before the Commission whereby allegations of indulging in anti-competitive practices and abuse of dominant position have risen. The importance of this issue lies in the fact that e-commerce is a recent phenomenon in India and hence how viable it is to competition law regime of the country is a point for consideration. In this context this paper discusses the Snapdeal.com case and the issues which may come up before the Commission in future as a consequence of the decision.

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I. INTRODUCTION

E-commerce has become the most popular channel of distribution of products to consumers in the Indian market. This popularity can be attributed to the easy accessibility of internet and the wide range of options provided by the online portals. The offline sellers have retaliated by raising their voice against the aggressive pricing, exclusive distribution agreements and other practices of the online retailers. In the recent past, some issues have come before the Competition Commission of India (hereinafter CCI) regarding the various practices of these online portals. Now the crucial question lies as to how susceptible are these online websites to the competition law regime of India. This article focuses on one of the cases[1] recently decided by the Competition Commission of India.

[1] Ashish Ahuja v. Snapdeal and Anr, Case No. 17/2014 (Competition Commission of India).

II. ASHISH AHUJA V. SNAPDEAL & ANR. : ANALYZING THE TAKE OF CCI

A. Factual Matrix and the Decision of CCI

The informant Mr. Ashish Ahuja, in the case of *Ashish Ahuja v. Snapdeal and another*[2] (hereinafter 'the Snap Deal Case') filed a complaint against Snapdeal.com and SanDisk Corporation (the opposite parties). The informant who is engaged in selling various products like pen drive, laptops etc. entered into an agreement with Snapdeal.com for selling their products through the online portal. However from 24.01.2014, Snapdeal.com stopped selling the informant's product on their website. Snapdeal.com (hereinafter Opposite party No.1) informed the informant that SanDisk Corporation (hereinafter Opposite party No.2) has given a list of authorized online channel partners and only these authorized partners could sell their products through the web portal. The informant needs to obtain a no-objection certificate from Opposite party No.2 to continue with the online sale.

The informant alleged that Opposite party No. 2 being a dominant player in the market has influenced Opposite party No. 1 to sell products only by its authorized dealers, which in effect is creating a monopoly market for SanDisk as it is pricing its own product online. He further contended that he has priced the products competitively and has acquired them from open market and hence it is unreasonable on the part of SanDisk to prohibit it from selling the products in Opposite Party No.1's portal. This act of the opposite parties is in violation of Section 3 of the Competition Act, 2002 as contended by the informant and hence he prayed before the Commission that the Opposite Party No. 1 be directed to allow the informant to sell its product through its online portal.

[2] *Ibid.*

The commission before deciding the said allegation looked into the question of relevant product market and relevant geographical market. It observed that the relevant product market keeping in mind the intended use and price is the market for portable small-sized consumer storage devices that includes USB pen drives, SD Memory Cards and Micro SD Cards. The commission further observed that online and offline markets are not different relevant markets as they only differ with respect to the shopping experience and the discount terms. However the customers see the various options available in both the markets and decide accordingly. Thus if the price in the online market increases significantly they will shift to the brick and mortar shops and vice-versa. Thus these two markets are different channels of distribution of the same products and not different relevant markets. The relevant geographic market was India in this case. Next, the Commission went on to decide whether SanDisk is a market leader. It observed that, from the information available in the public domain, SanDisk is the market leader holding 35% market share,[3] followed by Transcend and Kingston having 11% and 6% respectively.[4] However it observed that the disputed action in question by which SanDisk prohibited other distributors to sell its product other than the authorized distributors in the online portal is not abusive. It had within its rights to frame a business policy whereby unauthorized distributors are not entertained. Thus the said practice was a normal business practice and not abuse of its dominant position.

Regarding the position of Snapdeal, the Commission observed that it is only a web portal which facilitates the purchase and sell of these products online in exchange of a commission. It further observed that Snapdeal is not the only online portal available in the market, rather there are multiple players present namely, Flipkart, Amazon, Yebhi, Junglee.com etc. All these online players survive in the market by

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[3] *Ibid.*
[4] *Ibid.*

virtue of special deals and discounts. Hence, prima facie, SnapDeal.com cannot be said to be a dominant player. Thus the commission held that SanDisk is not in violation of Section 3 and Section 4 of the Competition Act, 2002.

B. Analysis

The observations of the Commission in the above-mentioned case and the other cases as well cannot be much criticized. The issue which was raised in this case was regarding the sanctity of an exclusive distribution policy of SanDisk to allow the sale of its products by only authorized sellers. The question was as to whether it was an abuse of dominant position by SanDisk and also whether the agreement between SnapDeal.com and SanDisk amounted to a collusive agreement. To prove that there has been a case of abuse of dominant position, the first and foremost thing which needs to be shown is that, the firm in question is the leader in the relevant market, and if it is, then whether the practice adopted by it has an appreciable adverse effect on competition.[5] Even in cases in which any practice is challenged as anti-competitive, what is being considered is whether that practice has an appreciable adverse effect on competition.[6] To determine the appreciable adverse effect on competition, factors such as any barrier to new entrants in the market or driving existing competitors out of market are seen.[7] On analysis of the present case, we see that SanDisk is the market player but the distribution policy of SanDisk didn't drive the informant from the market as he could still sell computer accessories, laptops of other brands. Moreover this practice didn't bar any new entrant from entering the market. Thus the Commission was justified in saying that such practices are part and parcel of a business and cannot be termed as anti-competitive or abuse of dominant position by SanDisk.

[5] Section 4 of Competition Act, 2002.
[6] Section 3 of Competition Act, 2002.
[7] Section 19(3) of Competition Act, 2002.

III. ISSUE OF CONCERN

However, the competition law question cannot be restricted to only one particular case of exclusive distribution agreements. One of the probable issues which can arise against these online players is the question of predatory pricing. This issue was raised against Flipkart.com for its big billion day sale and also against the other popular online portals for the end of season sale and other discounts they keep on providing throughout the year. The All Delhi Computer Trader Association (ADCTA) filed a complaint against various online retail portals, wherein it was alleged by them that these portals have been selling products at very low prices.[8] It was further alleged that such methods were practiced by online retail portals in order to eliminate competition from the relevant product market, as brick and mortar retail outlets will not be able to compete as they cannot offer the product at such cut prices. Although CCI had not addressed this part of the complaint as it prima facie held that online retail portals are not dominant in the retail market and therefore their conduct cannot be held to be anti-competitive in terms of Section 4 of the Act, there are various lacunae in the allegations for the CCI to even consider such allegations.[9]

In order to prove that a player has been involved in predatory pricing in the market, it needs to be shown that it is a dominant player in the relevant market and in furtherance of that it has abused such dominant position. The Competition

[8] *CCI rejects charges against five e-commerce majors*, FINANCIAL EXPRESS December, 2014, http://www.financialexpress.com/article/industry/companies/cci-rejects-charges-against-five-e-commerce-majors/69749/

[9] Divye Sharma, *India: Competition Law And E-Commerce: A Concern For The Future, Available* at, http://www.mondaq.com/india/x/400368/Antitrust+Competition/Competition+Law+And+ECommerce+A+Concern+For+The+Future (Last visited on December 15, 2014).

Commission of India has held in all the cases[10], that, *"Both offline and online markets differ in terms of discounts and shopping experience and buyers weigh the options available in both markets and decide accordingly. If the price in the online market increase significantly, then the consumer is likely to shift towards the offline market and vice versa. Therefore, the Commission is of the view that these two markets are different channels of distribution of the same product and are not two different relevant markets."*[11]

Once the relevant market is determined, it is seen whether the player is a dominant one in the market. Now this is a very hard task to prove any of these online portals like Snapdeal.com or Flipkart.com or for that matter any of the other players as dominant in the entire retail space. There are many prominent retailers in the offline market and if the online market is seen, we observe that none of them is dominant per se. If the dominant position of a player cannot be proved, then there can be no allegation of it abusing such a dominant position.

Moreover it can also be argued as has been pointed out by the Commission in this case,[12] that the online portals are not engaged in buying and selling of merchandise. Rather they are intermediaries who simply manage an online portal enabling the sellers to sale their products through the online medium in exchange for a commission. Further if we see the pricing strategies of all these players, we observe that all these players provide such heavy discounts for a certain number of days in a month. Hence the lowering of price by one player is in no way ousting another player from the market or creating a barrier to entry of new players in the online market. Thus pricing strategies adopted by these players cannot be said to be either anti-competitive practice or abuse of dominant position.

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[10] M/s Jasper Infotech Private Limited v. M/s Kaff Appliances (India) Private Ltd., Case No. 61/2014(CCI), Mohit Manglani v. Flipkart India Private Limited & Ors., Case No. 80/2014(CCI) .

[11] *Supra note*, 1.

[12] *Ibid.*

Another issue which has been brought into light before Competition Commission regarding anti-competitive conduct of online retail portals is the exclusive distribution agreement between sellers/distributors and these portals. The availability of the book Half Girlfriend by Chetan Bhagat was available for sale only on Flipkart.com and not anywhere else. Exclusive agreements between online retail portals and distributors are not anti-competitive per se. They are anti-competitive to the extent they have an appreciable adverse effect on competition. Hence anti-competitive agreements should be looked into from the angle of the Section 19 (3) of the Act. However in cases, where a particular product is available only on one online portal and nowhere else, the substitutability of that product with respect to other products that can be categorized in the same relevant market. For example, the smart phone OnePlus One is solely available for purchase on Amazon.in in India, and is not available on any other online retail portal or through any brick and mortar retail outlet. In the event any of the online retail portals or an owner of any of the brick and mortar retail stores that sell smart phones approaches the CCI alleging that Amazon.in has entered into an anti-competitive agreement with OnePlus, they shall have to establish that by denying access to the market of sale of OnePlus One smart phones, an appreciable adverse effect has been caused. In order to substantiate appreciable adverse effect, the CCI shall first determine the market share of OnePlus One. If the market share of a product is high in comparison to the entire relevant market, then the chances of it causing appreciable adverse effect shall be greater as that product will be dominant. The market shares of that particular smart phone needs to be indexed against the market share of the other smart phones available in the market with similar features that can be considered as substitutable by the consumers. Therefore not being allowed distribution rights of a single product in itself is not necessarily anti-competitive in nature but the market share of the same has to be pegged against the market share of other substitutable products in the relevant product market, in

order to determine appreciable adverse effect, and thereby construing the exclusive distribution agreement as anti-competitive.[13]

In the case of *Mohit Manglani v. Flipkart India Pvt. Ltd.*[14] the investigation was started as a result of information filed by Mr. Mohit Manglani (hereinafter the "Informant") against four major online retail players of the Indian e-commerce industry, namely, Flipkart, Jasper Infotech, Xerion Retail, Amazon and Vector E-commerce (collectively, the "Opposite Parties"). The Informant alleged that the Opposite Parties have been indulging in anti-competitive practices in violation of the Competition Act, 2002, by means of exclusive supply and distribution agreements with manufacturers/sellers of goods and services. The Informant also stipulated that the Opposite Parties had executed exclusive agreements for sale of certain products to the exclusion of other e-portals or physical channels. For instance, he cited writer Chetan Bhagat's latest novel which was launched exclusively on Flipkart. Evaluating the impugned exclusive agreements on the touchstone of the factors laid down under Section 19(3) of the Act,7 the CCI concluded that any exclusive arrangement between a manufacturer and an e-portal does not seem to create any entry barriers in the market. Moreover, the availability of substitutable products creates sufficient competitive constraints so as to deter any scope of monopoly or dominance. The CCI, in fact, noted that new e-portals are entering into the market which rather indicates a growth in competition. It further observed that as online distribution channels, the Opposite Parties help the consumers make a more informed decision by comparing prices and products. Based on these observations, the CCI concluded that the alleged exclusive

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[13] *Supra* note, 10

[14] *Ibid.*

arrangements do not cause any appreciable adverse effect on competition in the relevant market.[15]

IV. THE WAY FORWARD

At this juncture the question arises as to whether the e-commerce players are completely safe from the competition law regime of the country. There cannot be any clear cut answer due to the fact that this industry is still growing. From the standpoint of predatory pricing the case looks weak till the time the Commission considers the relevant market as the entire retail market to consider the dominant player, as it is very difficult to identify a dominant player in a large market. However till what time, the Commission will consider both the online and the offline market as one relevant market is doubtful. It has been observed that after originally stating in the SanDisk order that online and brick and mortar are separate channels of the same relevant market, recently in the Mohit Manglani order, CCI refused to opine conclusively by stating that "irrespective of whether we consider e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the online portals seem to be individually dominant". Such statements suggest that CCI has still not decided whether online retail portals do in fact formulate a separate relevant market or not.[16]

However, the verdict with respect to predatory pricing cannot be generalized as these online portals operate on different business models and Competition law inquiries are fact specific. Apart from predatory pricing, there are other anti-

[15] Anubhuti Mishra, *India: CCI's Take On The Indian E-Commerce Market: Protect Competition, Not Competitors*, *Available* at, http://www.mondaq.com/india/x/400076/Trade+Regulation+Practices/CCIs+Take+On+The+Indian+ECommerce+Market+Protect+Competition+Not (Last visited on December 15, 2014)

[16] *Supra note*, 6.

competitive practices that the Commission might delve into and these might be a threat to the growing online market.

This situation can be a potential threat to the brick and mortar stores as the online market has potentially influenced the majority of the Indian population. In order to lessen the threat the offline retailers can participate in the model. In fact a number of offline retailers have started with their online portals. The others can also participate in the model by identifying e-commerce stores and sell their products online through these portals. Another difficult option for these offline retailers is to sell their products with attractive discounts and other offers to keep in par with the online retailers.

As far as Competition Commission of India is concerned, its aim is to protect competition and not competitors. Hence in the future, the Commission will not tilt towards the offline market just because they cannot maintain their viability in the market. It will take steps only when any practice of online retailers can be termed as anti-competitive with respect to the provisions of the Competition Act, 2002. Till then the balance tilts towards e-commerce to the detriment of the offline retailers.

Vaishali Goyal, *Vertical Agreements and IPR Exemption Clause in the light of Shamsher Kataria V. Honda Siel Cars India Limited*
1(2) ALEXIS J. PUB. POL'Y. & L. 125(2014).

VERTICAL AGREEMENTS AND IPR EXEMPTION CLAUSE IN THE LIGHT OF SHAMSHER KATARIA V. HONDA SIEL CARS INDIA LIMITED

Vaishali Goyal *

The Competition Commission of India in a landmark pronouncement in Shamsher Kataria v. Honda Siel Cars India Ltd. imposed a penalty of Rs. 2,545 crores on 14 automobile manufactures for abusing their dominant market position and monopolising the after-market of cars. It is an influential decision rendered by the CCI that creates many firsts in the domain of competition law in India. For the first time, the Commission dealt with vertical restraints and intellectual property rights exemptions provided in Section 3(5) of the Competition Act, 2002 (hereinafter, 'the Act'). Besides this, the decision rendered and the consequent penalty imposed entailed discussion on several issues and concepts related to competition law, for instance, relevant market, abuse of dominant position, agreements causing appreciable adverse effect on competition, etc. The present paper focuses mainly upon the effect of vertical restraints on competition and IPR protection under competition law in light of the aforesaid case.

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I. INTRODUCTION

The landmark pronouncement in the case of *Shamsher Kataria v. Honda Siel Cars India Ltd.*,[1] was delivered on August 25, 2014. The facts of the case were that Mr. Shamsher Kataria had filed in information against Volkswagen India, Honda India and Fiat India for violation of Section 3(4) and Section 4 of the Act. It was alleged that by entering into agreements with the Original Equipment Suppliers (OESs) and authorised dealers, the Original Equipment Manufacturers (OEMs) have restrained the availability of spare parts and diagnostic tools pertaining to the brand of their automobile, in the open market. It was further alleged that it has caused an adverse effect on competition by creating a monopoly of these OEMs in the aftermarket and driving out the independent repairers and multi-brand service providers. Also, the OEMs have abused their dominant position by marking up the prices of these spare parts and diagnostic tools.

The Commission, on request of the Director General (DG) extended the scope of investigation to other automobile manufacturers who were not named by the

[1] *Id.*

informant in order to prevent similar anti-competitive practices which might be prevailing at the behest of other OEMs as well.

The OEMs have argued that restrictions were imposed in their respective OESs and authorized dealer agreements to ensure customer safety by restricting the ability of unskilled independent repairers to repair such OEM branded cars, without being aware of the sophisticated technology used in manufacturing such cars. Further, it was argued that the proprietary interest in the products is covered by their IPRs and they are within the law to preclude the OESs and authorized dealers from dealing in any other manner. Thus, the restrictions imposed are permissible under Section 3(5) of the Act.

The Commission, however, ordered the OEMs to allow OESs to supply spare parts in the open market and to create an effective system with the help of which the spare parts and diagnostic tools would be available in the public domain. It was held that relevant market for spare parts of each brand of car is separate from the market for the car itself. And in that relevant market, the spare parts and tools were available only with the authorised dealers, thus, the OEMs were at a dominant position in that relevant market. And thus, they have abused their dominance by creating entry barriers for the independent repairers. Also, the prices have been marked up by 100%, in some cases even by 5000%. On the IPR exemption, the commission ruled that the protection of Section 3(5) does not extend to OEMs because firstly, OEMs do not own the IPRs as contemplated under Section 3(5) and secondly, protection of IPR cannot be an excuse for abusing dominance under section 4. It is in the backdrop of the aforesaid facts and the order of the Commission that the present paper elaborately discusses vertical restraints and the IPR exemption clause under section 3(5) of the Act.

II. SCOPE OF VERTICAL AGREEMENTS

Vertical agreements are between persons and enterprises which form a part of different levels of production and operate in different markets.[2] Thus, a vertical agreement is between an upstream party and a downstream party in the production chain. For example, an agreement between a manufacturer and a distributor would be a vertical agreement where the manufacturer is the upstream party and the distributor is the downstream party. The various forms of vertical arrangements are defined under the Explanation to Section 3(4) of the Act as follows:

(1) Tie-in Arrangement- It includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. Thus, in a tie-in provision, purchase of two or more goods are tied in together, whereby a downstream party has to buy one or more goods or intermediate inputs from the upstream party in addition to the inputs which it necessarily has to purchase.[3]

(2) Exclusive Supply Agreement- It is any agreement restricting in any manner the purchaser, in the course of his trade, from acquiring or otherwise dealing in any goods other than those of the seller or any other person.[4] Franchising agreements come under this category.

(3) Exclusive Distribution Agreement- It includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for

the disposal or sale of the goods".[5] This is a type of arrangement where the suppliers distribute their product only through authorised dealers.[6]

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[2] The Competition Act § 3(4), No. 12 of 2003, INDIA CODE (2002).
[3] Org. for Econ. Cooperation and Dev. [OECD], *Report on Competition Policy and Vertical Restraints: Franchising Agreements* (1994) *available at* http://www.oecd.org/competition/abuse/1920326.pdf. .
[4] The Competition Act §3(4) Exp., No. 12 of 2003, INDIA CODE (2002).
[5] The Competition Act §3(4) Exp., No. 12 of 2003, INDIA CODE (2002).

(4) Refusal to Deal- It includes any agreement which restricts or is likely to restrict, by any method, the persons or classes of persons to whom goods are sold or from whom goods are bought.[7]

(6) Resale price maintenance- It includes any agreement to sell goods on the condition that the prices to be charged on resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.[8] Thus, it is a provision according to which the final price charged to consumers is not set by the distributor but is imposed by the producer.

The list is not exhaustive and any other type of vertical agreement which is not contained in the list may also be considered in violation of Section 3 of the Act if it is found to attract the prohibition or is likely to cause an appreciable adverse effect on competition.

III. NATURE OF VERTICAL AGREEMENTS

In most jurisdictions, horizontal agreements are termed as per se illegal but it is not always that a vertical agreement is detrimental to competition and thus, illegal.[9] The legality of the agreement depends upon the effect of the provisions of a particular agreement, which can either be anti-competitive or pro-competitive.[10] It is because of this that there has been a transition from the rule of 'per se illegal' to the 'rule of

[6] The Competition Authority,*Competition Authority Guidance Note: Refusal to Supply* (Dec. 2005), *available at* http://www.tca.ie/images/uploaded/documents/Refusal_to_Supply.pdf.
[7]The Competition Act §3(4) Exp., No. 12 of 2003, INDIA CODE (2002).
[8]The Competition Act §3(4) Exp., No. 12 of 2003, INDIA CODE (2002).
[9] Divya Sharma, *Resale Price Maintenance as a Vertical Restraint under the Competition Act, 2002*, (Competition Commission of India,, Internship Project Report, June 2012) *available at* http://cci.gov.in/images/media/ResearchReports/Resale%20Price%20Maintenance%20%20as%20a%20Vertical%20Restraint%20under%20The%20Competition%20Act,%202002.pdf.
[10]SANDRA MARCO COLINO, VERTICAL AGREEMENTS AND COMPETITION LAW: A COMPARATIVE STUDY OF E.U. AND U.S. REGIMES 90 (2010).

reason' for determining the nature of the vertical agreement.[11] The former rule involves declaration of vertical arrangements as illegal at once, whereas the latter states that the vertical arrangements should be declared illegal when it satisfies the criteria that the impugned agreement is in fact affecting competition in adverse ways.

In the US before the 1970s, most vertical agreements were declared per se illegal,[12] after which the 'rule of reason' was employed to most non-price vertical restraints.[13] Then specifically, in 1977, in the case of *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[14] the Supreme Court concluded that such restrictions should be judged under a rule of reason. Then after the Supreme Court decision in *Leeginv. Kat's Korner*[15] in 2007, all vertical restraints are subject to the rule of reason rather than a per se rule.[16]

In the E.U., the rule of reason approach came somewhat later, after the publication of the Commission Guidelines on Vertical Restraints in 1999. In the 21st century, policies towards vertical restraints in the two jurisdictions have converged to a substantial degree as the EU has adopted a position that is closer to the US.

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[11] Nikhil Parikshit, *Demystifying the Rule of Per Se and Rule of Reason in the Indian Context* (Competition Commission of India, Internship Project Report, July 2011) , http://cci.gov.in/images/media/ResearchReports/NikhilIntDemys050911.pdf. (last visited March 20, 2014).

[12] Dr. Miles Med. Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

[13] Francine Lafontaine, Stephen M. Ross School of Business, University of Michigan & Margaret Slade, Department of Economics, University of Warwick,Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy, Presentation at the Conference on Advances in the Economics of Competition Law (June, 2005) *available at* http://www.economics.ubc.ca/files/2013/05/pdf_paper_margaret-slade-exclusivecontracts-verticalrestraints.pdf.

[14] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

[15] Leegin v. Kat's Korner, 551 U.S. 877 (2007).

[16] Subha Gosh, *Vertical Restraints, Competition and the Rule of Reason,* in THE LAW AND ECONOMICS OF ANTITRUST 213-233 (Keith Hylton ed.,2009).

In India, there is no landmark decision of the Supreme Court which clearly lays down the law relating to vertical agreements. The Act of 2002 provides for an effects-based analysis of the vertical arrangements or restraints.[17] As per Section 3(4) of the Act, a vertical restraint is considered an anti-competitive agreement when such agreement causes or is likely to cause an appreciable adverse effect on competition in India. The term 'appreciable adverse effect on competition' is not defined in the Act. However, Section 19 of the Act lists factors which have to be considered while determining whether an agreement has an appreciable adverse effect on competition under Section 3. The factors are: (1) Creation of barriers to new entrants, (2) Driving existing competitors out of market, (3) Foreclosure of competition by hindering entry, (4) Accrual of benefit to consumers, (5) Improvement in production or distribution of goods or provision of services , (6) Promotion of technical, scientific and economic development

If the pro-competitive effects as measured by factors given in sub-clause (4-6) of Section 19(3) of the Act outweigh the anti-competitive effects given under sub-clauses (1-3), then the restraint is considered legal and not anti-competitive.[18]

Thus, in India also, the rule of reason test is applied while determining the nature of a vertical agreement.[19] Wherever this rule of reason is applicable, the analysis becomes two-stage; the first stage is to establish conduct, say, resale price maintenance, and the second stage is to analyse whether the net effect on competition is positive or negative.[20]

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[17] Deepshikha Bharadwaj, *Economic Analysis of Vertical Agreements- The Competition Act, 2002,*(Competition Commission of India, Internship Project Report, June 2011) *available at* http://cci.gov.in/images/media/ResearchReports/DeepshikhaInterns040711.pdf.

[18] ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 58 (6th ed. 2007).

[19] Amitabh Kumar, *Vertical Restraints- Franchise Agreements,* 1 COMPETITION L. REV. 98 (June-Sep. 2010) *available at* http://www.jsalaw.com/Admin/uplodedfiles/PublicationFiles/Vertical%20Restraints-%20Franchise%20Agreement.pdf.

[20] D.P. MITTAL, TAXMAN'S COMPETITION LAW AND PRACTICE 123-124 (2008).

In *Shamsher Kataria,* the OEMs have argued on the same line. The main contention was that the aftermarket of cars in India is flooded with cheap and spurious spare parts and there are no 'matching quality' legislations in India. Thus, OEMs by imposing certain reasonable restrictions in their agreements with OESs and authorized dealers ensure that spare parts carrying its trademark are procured only from their authorized dealers. The parts are genuine and have passed rigorous safety checks to ensure the safety of their customers. Also, the lack of law or regulation requiring road side mechanics or garages to register themselves with the government or to get any license to operate justifies their act of providing the services through their authorised dealers only.

The Commission, however, refuting the arguments, stated in simple words that access to spare parts and diagnostic tools cannot be restricted due to greater public good. Consumer protection cannot be used to cloak the actual effect of curbing competition in the market.[21] While discussing the issue, it referred guidelines on the application of Article 81(3) of the EC Treaty (2004/C 101/08) (where Article 81(3) (currently Article 101(3) of the TFEU) is analogous to Section 19(3) of the Act, which provides that:

> "*When competition is eliminated the competitive process is brought to an end and short-term efficiency gains are outweighed by longer-term losses stemming inter alia from expenditures incurred by the incumbent to maintain its position (rent seeking), misallocation of resources, reduced innovation and higher prices.*" -

Therefore, the Commission was of the view that an agreement cannot be freed from the rigours of being anti-competitive merely because the anti-competitive effects are outweighed by pro-competitive benefits. If the restrictive clauses are such that they are detrimental to competition in their actual and real operation, the agreement would be deemed as anti-competitive.

[21] James A. Rahl, *Antitrust Policy in Distribution,* 104 U.PA. L. REV. 185-221 (1955).

Additionally the Commission ruled the impugned agreements to be anti-competitive, by relying on the ultimate objective of competition law, which is securing choices for consumers. The Commission noted that the choice of *'whether to go to an independent repairer or an authorised dealer'* should not be taken away from consumers. The OEMs can incentivise the customers to avail their parts and services but they cannot in any case curtail their choice. Rather, the market of spurious parts can be curbed when genuine parts are made available to the independent repairers or multi-brand operators, while also ensuring competitive and efficient repair and maintenance options for consumers.

IV. IPR PROTECTION AS PROVIDED BY SECTION 3(5)(I) OF THE COMPETITION ACT, 2002

The protection given by intellectual property is the incentive given to the right holders to exclude others from their benefits. It is to foster innovation and encourage people to create property through their own skill and hard work. Thus, in a way, the IPR holders are given a temporary monopoly over their creation in order to enable them to re-coup their investments and hard work. Whereas on the other hand, the competition laws in India generally look down upon agreements which monopolise the market or pose an adverse affect on competition. Therefore, there comes an inevitable interplay between the two subjects and one has to give way to the other. It is in this backdrop that competition law often provides limited protection to intellectual property. It has been recognised by the European Union that the restrictive covenants incorporated to preserve technical know-how, business reputations etc. are legitimate and do not harm competition.[22] The Competition Act, 2002 also recognizes and facilitates IPR protection. It permits reasonable restrictions imposed by their owners under Section 3(5)(i) of the Act.

[22] Pronuptia de Paris GmBH v. Pronuptia de Paris GmBHIrmgard Schilligalis, (1986) E.C.R. 353.

Section 3(5)(i) protects intellectual property rights *which have been or may be conferred* under the following acts (1) the Copyright Act, 1957 (14 of 1957); (2)the Patents Act, 1970 (39 of 1970); (3) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (4) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (5) the Designs Act, 2000 (16 of 2000); (6) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000).

Hence, protection can only be claimed if the rights have already been conferred or are such that they may be conferred. It was on this ground that the OEMs, in *Shamsher Kataria* were denied the protection of this clause. The Commission noted that none of the OEMs could submit the relevant documentary evidence to successfully establish the grant of IPRs in India, with respect to the various spare parts. Also, where the IPR was registered or was in the process of getting registered, the relevant information about the specific parts was not furnished. Further, noting the territorial nature of the IPRs, the Commission held that the IPR registered in another jurisdiction was valid in that particular jurisdiction and could not be transferred to OEMs by Technology Transfer Agreements. Therefore, the said agreements merely grant a right to the OEMs to exploit the IPR and not the IPR itself. The Commission observed as follows:

"For the Commission to appreciate a party's validly foreign registered IPR, in the context of Section 3(5) of the Act, satisfactory documentary evidence needs to be adduced to establish that the appropriate Indian agency administering the IPR statutes, mentioned under Section 3(5)(i) have: (a) validly recognized such foreign registered IPRs under the applicable Indian statutes, especially where such IPR statutes prescribe a registration process, or (b) where such process has been commended under the provisions of the applicable Indian IPR statutes and the grant/recognition from the Indian IPR agency is imminent."

It is hereby pointed out that the Commission narrowly interpreted the phrase '*may be conferred*' to mean that the registration process for the concerned IPR must have been commenced.

The OEMs also sought protection of designs under the Copyright Act, 1957, which requires no registration. The DG found that the same is not sustainable because of the application of Section 15 of the Act, according to which a design loses protection under the Copyright Act if it has been applied to an article more than fifty times. However, the Commission withheld any opinion on the same.

A. Reasonable and necessary conditions

It is to be noted further that the protection granted under Section 3(5)(i) of the Act is not absolute. It allows a person to impose *reasonable conditions*, as may be *necessary* for protecting any of his rights under the statutes mentioned. Therefore, only those restrictions may be imposed, which are reasonable with respect to the facts of case.[23] It has been observed by the CCI in *FICCI Multiplex Association of India v. United Producers Distribution Forum (UPDF)*[24] that the extent of the non obstante clause in Section 3(5) of the Act is not absolute, as is clear from the language used therein, and it exempts the right holder from the rigours of competition law only to protect his rights from infringement. It further enables the right holder to impose reasonable conditions, as may be necessary for protecting such rights. Similarly, the erstwhile MRTP Commission in *Manju Bharadwaj v. Zee Telefilms Ltd.*[25] and *Dr. Vallal Peruman v. Godfrey Phillips (India) Ltd.*,[26] has also stated that where a person misuses a trademark by manipulation, distortion, contrivances and

[23] S. Jain & S. Tripathy, *Intellectual Property and Competition Laws: Jural Correlatives* 12 J.INTELL. PROP. RIGHTS 236-243 (2007).
[24] FICCI Multiplex Association of India v. United Producers Distribution Forum (U.P.D.F.), 2011 Comp.L.R.0079 (CCI).
[25] ManjuBharadwaj v Zee Telefilms Ltd., (1996) 20 C.L.A. 229.
[26] Dr.VallalPeruman v. Godfrey Phillips (India) Ltd., (1995) 16 C.L.A. 201.

embellishments so as to mislead the consumers, he would be exposing himself to an action.

The Commission in the *Shamsher Kataria case* observed in this regard that the restrictions would be unnecessary if the IPR can be protected even without their presence. Thus, the Commission was of the view that allowing the sale of spare parts and diagnostic tools in the open market will not compromise with the IPRs of the OEMs. What will be sold will be the finished products and the IPRs can be protected by agreements between OEMs and OESs even without the extant restrictions.

With regard to this finding of the CCI, there is an ambiguity because in the first place the Commission denied the IPRs of the OEMs, but here it noted that the restrictions were not necessary, thus recognizing the existence of IPRs.

Further, the order making the spare parts available in the open market strikes directly at the rights of the patent holder granted under Section 48 of the Indian Patents Act, 1970 according to which a patent holder has no obligation to deal with its competitors. Moreover, the Commission stated that sale to these independent repairers would not infringe their IPRs because these repairers are the customers of the OEMs. It is anomalous because these independent service providers, being customers of the OEMs in the aftermarket, would further compete with the OEMs in the repairs and maintenance service aftermarket.

B. *Abuse of dominance under section 4 and IPR Protection*

It is often the case that ownership of IPRs makes an entity dominant in a particular market, thus, giving it opportunities to exploit the market to its own benefit. The present jurisprudence on this aspect is that an entity will not be allowed to abuse its dominance under the guise of IPR protection. The Delhi High Court in the case

of *Hawkins Cookers Limited v Murugan Enterprises*,[27] held that a well-known mark cannot be permitted to create a monopoly in the market on the basis of being a well-known mark by controlling the ancillary and incidental market. This is to be considered an abuse of dominant position and is prohibited. Further, the Commission in *Shamsher Kataria* has rightly observed as follows:

"...unlike Section 3(5) of the Act, there is no exception to Section 4(2) of the Act. Therefore, if an enterprise is found to be dominant pursuant to explanation (a) to Section 4(2) and indulges in practices that amount to denial of market access to customers in the relevant market; it is no defense to suggest that such exclusionary conduct is within the scope of intellectual property rights of the OEMs."

Thus, an IPR holder will get the protection of Intellectual property rights if the acts done are sustainable in law. If the acts amount to abuse of dominance, it will constitute violation of Section 4 of the Act.

With respect to the conduct of OEMs the Commission concluded that the manufacturers did in fact abuse their dominant position in terms of Section 4(2)(c) and Section 4(2)(a)(ii) by denying market access to independent repairers and charging escalated prices from consumers.

Therefore, under competition law, IPR exemptions can be claimed if firstly, the entity holds IPRs under statutes as contemplated by Section 3(5)(i) and secondly, that the conditions imposed are necessary to protect the IPRs. Further, even if both the requirements are fulfilled but, the conduct results in abuse of dominance, the same would be questionable under Section 4 of the act.

[27] Hawkins Cookers Ltd. v Murugan Enterprises, 2008 (36) P.T.C. 290 (Del.).

V. CONCLUSION

Thus, it is concluded that vertical arrangements are not illegal per se, as for declaring them to be anti-competitive they have to satisfy the rule of reason test. If the anti-competitive effects outweigh the pro-competitive effects, the arrangement can largely be held to be anti-competitive and thus illegal as per Section 3(4) of the Act read with Section 3(1) of the Act. The decision of the Competition Commission of India in *Shamsher Kataria* in this regard lays down the law precisely. It is a welcome decision so far as it observes that an agreement cannot be decisively held valid merely because it has pro-competitive effects, if the actual essence and consequence of the agreement is hindrance to free competition and curtailment of choices of consumers.

Also the illegality of an agreement is subject to the exception provided under Section 3(5)(i) of the Act, which deals with the IPR exemption clause. If a particular restraint is included in an agreement to protect or avoid the infringement of an IPR, the restraint comes within the purview of legal restraint. However, such restraint to be protected under the clause has to be reasonable and necessary for the alleged protection of IPRs. If, however it is found that the protection is a restriction which greatly hampers the competition in the market and is merely a guise to take the anti-competitive agreement outside the scope of agreements causing appreciable adverse affect on competition, then the Commission can declare it to be outside the scope of the exception. Also, the pre-requisite of applying the exception is that the IPR claim should be as per Section 3(5)(i) of the Act, otherwise the protection would not be available.

Shrinidhi Rao, *Indian Competition Law Perspective on Cartels with Special Emphasis on the Cement Cartelisation Case.*
1(2) ALEXIS J. PUB. POL'Y & L. 139 (2014)

INDIAN COMPETITION LAW PERSPECTIVE ON CARTELS WITH SPECIAL EMPHASIS ON THE CEMENT CARTELISATION CASE**

Shrinidhi Rao*

The CCI in the case of Builders Association of India v. Cement Manufacturers' Association and Others has given a commendable decision by curtailing cement manufactures from further practicing oligopolistic pricing. This decision is not only important from the perspective of a person in the cement industry but it is one which also impacts consumers to a great extent. If a cartel between cement manufactures were to persist it would only be driven by profit motive and consumer welfare would be tossed out of the window. On the basis of the case the author would be discussing the Indian legal perspective on cartels.

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I. INTRODUCTION

The Stock Market dip in October of 2013 was caused, according to numerous experts, as a result of general market reactions to the Competition Commission of India (*hereinafter,* CCI) cracking down on major cement conglomerates in the country forming cartels who also stand accused of indulging in unfair pricing.[1] This is seen as an excellent case study to best understand cartelisation since; the CCI's decision to this regard was widely hailed as progressive and well reasoned. Thus this paper will discuss the case of *Builders Association of India*[2]. The author will first trace the definition of cartels, an example of the first types of legislation enacted to deal with cartelisation and will furnish applicable theories of competition law to explain these concepts. It will then move on to an analysis of the relevant section

1. NDTV PROFIT REPORT, *What is Cement Cartelisation Issue All About?,* Oct 16, 2013, *available at:* http://profit.ndtv.com/news/corporates/article-what-is-cement-cartelisation-issue-all-about-306552. (*NDTV Profit reports the Stock Market in the week leading up to CCI's imposition of a fine on the major Cement Companies*).

[2] Builders Association of India v. Cement Manufacturers'Association and Others, Order passed by Competition Commission of India on 20.06.2012, *available at* http://www.cci.gov.in/May2011/OrderOfCommission/292011.pdf

of the Indian Legal Framework enacted to combat such practices, following such enumeration the paper will analyse the CCI's decision with respect to other decisions made in other jurisdictions and this will hopefully enable a clear analysis of the position followed in India with regards to cartelisation and other similar anti-competitive practices.

Cartels can be best defined as an agreement between independent, private firms acting in concert to control pricing strategies. The main requisite is that all these firms fall under the same industry and this agreement branches out to not only just pricing in tandem but also following similar production practices, marketing strategies and other business essentials. What this eventually leads to is the creation of an unfair monopoly in the market for such product that is being cartelised, so to speak.[3] The creation of cartels benefits only the firms, it wreaks havoc on the economy for numerous reasons, primarily the imbalance created in competition within the market since a single entity controls every major aspect of business right from development and manufacture to pricing and marketing. This imbalance extends further to create barriers for newer entrants thus denying them the chance of entering into business and reaping a decent profit. A second and important stakeholder in this entire scenario is of course, the consumer. In a cartel situation consumer welfare is tossed out the window since the only driving market force is the profit motive for the firms within the cartel.

The sources used in this paper will primarily be Competition Commission Reports on cartelisation, acts within the legal framework for competition law and the order

3 COMPETITION COMMISSION OF INDIA, *Provisions Relating to Cartels under the Competition Act, 2002*, *available at:* http://www.econlib.org/library/enc/Cartels.html#lfHendersonCee2-021_footnote_nt048, *see also*, EUROPEAN COMMISSION, *An Overview of Cartels Procedures and Anti Competitive Practices*, *available at* http://ec.europa.eu/competition/cartels/overview/index_en.html?ld=ASDESOADefault

issued in the Building Contractor's Case in 2011. The comparative analysis will utilise judgments from the EU (European Union) and the USA (United States of America).

II. METHODS TO IDENTIFY A CARTEL

A. Evidence To Prove existence of Cartels

Allegations that there may be formation of cartels are proved using a combination of circumstantial and direct evidence. Such evidence is conclusively proven by sifting through agreements, minutes of meetings, office memos and other physical documents, in later years the trend has migrated to including even the more unconventional forms of evidence.[4] What drives most cartels is the secret nature of such agreements, therefore to properly establish cartels it is of utmost importance to comb through all available evidence.

Evidence is of two types, as previously mentioned, Indirect evidence also called circumstantial evidence is as the name implies not something that directly shows any specific conclusions but can be something that leads to the alleged conclusion. Examples of circumstantial evidence are further subdivided into communication evidence and economic evidence. Communication evidence is telephone conversations between members that could give evidence of meetings, discussions about the cartel and similar pieces of evidence. economic evidence is more technical in nature and means all evidence collected surrounding the firms and their market history, competition law violations, a close analysis of their trading patterns on the stock market and other clues as to suspicious activity that one may

4 Shriya Luke, *Role of Circumstantial evidence in the Prosecution of Cartels*, (2012), available at: http://www.cci.gov.in/images/media/ResearchReports/Role%20of%20Circumstantial%20evidence%20in%20the%20Prosecution%20of%20Cartels.pdf

derive to be in furtherance of a goal to create a cartel.[5] Preference is given to direct evidence, however this is not possible to be followed given the increasing practice of entering into verbal agreements as opposed to agreements in the traditional sense of the word.[6]

B. *The Per Se Illegality Rule*

Per Se illegality approach as mentioned first in the case of *Northern Pacific Railway v. United States*[7] has often been used as a standard to determine establishment of a cartel. The per se illegality approach states that if agreements are unreasonable, they may be presumed to be illegal. The approach therefore focuses on that aspect of a cartel that renders its existence as anti-competitive in the market. The core idea followed here is that gauging the unreasonableness of an agreement is an implication of illegal activity underfoot and the manifestation of this "illegality" is the creation of a cartel.[8]

The Supreme Court in *Northern Pacific Railway* looked at Tying arrangements as being unreasonable.[9] Tying arrangements are agreements where there is a promise in the sale that for exchange of one service or sale of one product, there is an obligation to take another unrelated product or service. In a tying arrangement, the fulfillment of the contractually agreed upon sale is conditional on the additional buying of the second unrelated product. In more simpler terms, an excellent example of tying arrangement in practice is the tie-up between US telecom service

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5 DIETER SCHMIDTECH, MOHR SIEBECK ED. THE MORE ECONOMIC APPROACH TO EUROPEAN COMPETITION LAW, (2007).
6 *Id.*
7 *Northern Pacific Railway Co. et al. v. United States,* 356 U.S. 1 (1958)
8 *See generally*, INTERNATIONAL COMPETITION NETWORK, *Building Blocks for effective Anti-Cartel Regimes*, Vol. 1, (2005). Report prepared by ICN Working Group on Cartels.
9 *Id.*

provider AT&T and Apple's iPhones.[10] The Phone is sold only through the AT&T platform and are "locked" to the service provider[11] their Railway Service puts them in a position where they are forced to.[12] The burden of proof here rests on the Cartel to prove there is no illegal practice being followed and this is accepted as the position to date. Since no reasonable explanation was offered in *Northern Pacific Railway,* the court stated that this unreasonable practice constituted as an illegal one.[13]

The elements of a *per se* illegality are therefore listed as under[14] -

i. Market Power

If a certain product holds a significant market share, there is no doubt that such product holds a large market power and such unusually high market power gives rise to suspicious competitive practices being followed to acquire this market share. This position is echoed and in fact borrowed from the Supreme Court in *Northern Pacific Railway* itself when it states that if a firm has sufficient power so as to effectively "restrain" competition then there is undeniably some anti-competitive practice that is being followed. Substantial commerce in the impugned product is also a factor, there has to not just be *de minimis* and threshold clearance of commercial activity surrounding the product but a considerable market share for the product. This is connected to the initial factor dealing with market power.

ii. Tying arrangements

As we have seen previously, it would appear that the very definition of Tying Arrangements are tainted by unfair and restrictive trade practices. The practice is

10 *See Generally*, Jeffrey Paul Jarosch, *Reassessing Tying Arrangements at the End of AT&T's iPhone exclusivety*, COLUMBIA BUSINESS L. REV., VOL. 2, P. 297, 2011
11 *Id.*
12 Ahlborn, Evans & Padilla, *The Anti-Trust Economics of Tying : A Farewell to Per Se Illegality*, The Antitrust Bulletin, Spring – 2014
13 *Id.*
14 *Id.*

seen as purely profit making and in most cases such as the example provided above of the iPhone and AT&T tie-up it appears to only serve the firms' best interests with no greater justification to the practice.

III. INDIAN COMPETITION LAW ON CARTELS

The CCI is the official watchdog for competitive practices in the country, they act in tandem with the legal framework currently in place to combat anti-competitive activities.

A. MRTP Act, 1969

Even from the very early stages of jurisprudence regarding competition law, there was always the opinion of cartels as an anti-competitive practice. The *Hindustan Development Corporation* case of 1994[15] makes mention of this when they state the following :

"[...] formation of a cartel by some of the manufacturers which amounts to an unfair trade practice [...]" [16]

Under Section 33(1)(d) of the Monopolies and Restrictive Trade Practices Act[17], cartels are explicitly mentioned as being restrictive. The MRTP Act specifies conditions under which the agreement may subsist despite proven allegations of cartel formation. It has the power to issue cease and desist orders against suspected firms pending investigation.

B. Competition Act, 2002

Section 3(1) of the Competition Act, 2002 prohibits agreements between parties relating to production, supply, storage control or distribution of goods or services

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15 *Union of India v. Hindustan Development Corporation*, 1994 CTJ 270 (SC).
16 *Id.*
17 Monopolies and Restrictive Trade Practices Act, 1969, (hereinafter MRTP Act).

that has an appreciable adverse effect on competition. Three conditions for the existence of a cartel is mentioned in the section and this is widely regarded as the most comprehensive legislative backing for the proof of a cartel. The conditions mentioned in S 2(c) are as follows[18] -

First, there should necessarily be an agreement or anything that can be construed as an agreement;

Second, the parties to this agreement should operate in the same trade;

Third, this agreement should have the express or implied aim to create an anti-competitive environment, in the sense that it should make for the allowance of unfair trade practices, unfair market shares and powers, unfair and strategic pricing strategies etc. All with the aim of driving a profit motive which will benefit the firms and put the market at a stage of stagnation.

The burden of proof is on the firm to show that the trade practices under fire isn't restrictive and that it is in fact reasonably restrictive in the larger interest of creating healthy competition. Section 3 of the Competition Act establishes Cartels as non-competitive.[19]

IV. A LOOK AT THE RATIONALE FOLLOWED IN THE CEMENT CARTEL CASE

The CCI has been keeping track of the activities of Indian Companies since 2007 [20] . The problem gradually intensified through 2009-2010 when more allegations of price fixing arose.[21] In 2012, the CCI fined major cement companies a total of Rupees 6300 crores based on the conclusions of investigations carried out in 2011.

18 The Competition Act of 2002.
19 *Id.*
20 Cartels in the Cement Industry in India, Working Paper Series No. 133 of 2012.
21 *Id.*

In the *Cement Cartel Case*[22], the CCI held that circumstantial evidence could be used where direct evidence is not applicable. It classified circumstantial evidence into communicative evidence and economic evidence, i.e. evidence that showed circumstances were parties could have communicated and formed on an agreement and circumstances that showed that the market conditions were most likely the result of an agreement.

The CCI decided in the *Cement Cartel case* that it found that cement manufacturers had formed a cartel controlling price and supply of goods. The CCI acknowledged that there was no direct evidence, but found circumstantial evidence in the following forms: (a) exchange of price, production and dispatch information through the trade association and public announcements (b) meeting between firms as part of the trade association, and rise of prices in some cases after meetings were held, (c) parallel increase in price, (d) parallel decrease in production utilization despite spare capacity (e) high profit margin of the companies.

An oligopoly is a market structure characterized by a small number of sellers, in which no one firm has significantly higher market power than all the others. In such a market, in making decisions regarding their market behaviour, each firm has to take into account its competitors' current actions and possible future responses to its actions.[23] This is the condition of 'oligopolistic interdependence'. This interdependence may result in a market where firms charge supra-competitive prices. Assuming that a few 'leading' firms have a relatively higher market power than others, it is possible to implement a parallel market-wide price increase by a phenomenon called 'price leadership'. Leading firms increase price to a level above competitive prices, and other 'followers' observe (assuming conducive market conditions) that raising their own prices would increase their profits as well without

22 Builders Association of India v. Cement Manufacturers' Association , Case No. 29/2010.
23 OECD Roundtable Policy Report, *Oligopoly* (2006).

affecting sales, while a reduction or maintenance of competitive prices would result in the leader 'rolling back' the price increase, leaving the firms at *status quo.* Thus, there could be an overall increase in the price, without any explicit agreement between the firms. However, such a result could also be achieved by an agreement between the firms. The issue then is whether conduct of firms in a market reflects independent but interdependent decision making or is a result of an agreement.

At various parts in the order in the *Cement Cartel Case,* the CCI cites the conduct of parallel change in price, production, dispatch and price leadership in support of its finding of an agreement. The CCI also accepts at the same time, that the industry is characterised by oligopolistic interdependence.[24]

It is necessary to distinguish between the parallel conduct that is the direct consequence of interdependence, and evidence of an agreement (plus factors). eU and US antitrust law is clear that mere oligopolistic interdependence and parallelism does not constitute proof of an agreement. It is clear from the EU Commission's decision in the *Zinc Producer case*,[25] and US courts' decisions in *Market Force v. Wauwatosa Realty*,[26] and *Glen Wilcox v. First interstate Bank of Oregon*,[27] that price leadership was not evidence of an agreement. It is merely a natural consequence of an oligopolistic market. Therefore, the CCI should distinguish between the parallel conduct in relation to prices, production and dispatches, and evidence that suggests that the parallel conduct is the result of an agreement.

In addition, as held in *In Re: Flat Glass Antitrust Litigation case*[28], a high price does not constitute evidence of an agreement. Such a holding does not exclude the

24 *Id.*
25 Re the Zinc Producer Group: The Community v. Rio Tinto Zinc Corporation Plc & Others, OJ [1984] L 220/27, ¶ 75; [1985] 2 CMLR 108.
26 Market Force v. Wauwatosa Realty, 906 F.2d 1167 (7th Cir. 1990).
27 Glen Wilcox v. First interstate Bank of Oregon, 815 F.2d 522.
28 In re Flat Glass Antitrust Litigation, 288 F.3d 83, 86 (3d Cir. 2002).

possibility that prices were the consequence of interdependent but independent conduct. In *Blomkest Fertilizer v. Potash Corp. of Saskatchewan,*[29] also the court found that prices in an oligopolistic market tend to be higher than those in purely competitive markets, and will fluctuate independently of supply and demand. These are therefore, consequences of an oligopolistic market, and not independent plus factors to be considered as evidence of an agreement.

29 Blomkest Fertilizer v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1033 (8th Cir.) (en band), cert. denied 531 US 815 (2000) ("*An agreement is properly inferred from conscious parallelism only when certain 'plus factors' exist"*).

Dr. Souvik Chatterji, *A Brief Note on the Abuse of Dominance and Relevant Market with Reference to the case of DLF v. Belaire Owners' Association*
1(2) ALEXIS J. PUB. POL'Y& L. 150 (2014)

A BRIEF NOTE ON THE ABUSE OF DOMINANCE AND RELEVANT MARKET WITH REFERENCE TO THE CASE OF DLF V. BELAIRE OWNERS ASSOCIATION

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This note compares the concept of a relevant market in various jurisdictions with a special emphasis on how relevant market has been defined in the Competition Act, 2002. In India, Belaire Owner's Association v. DLF &Ors (Case No. 19/2010, CCI decision 2013). is a landmark judgment given by the CCI on the scope of determining relevant market in respect of abuse of dominance. Thereafter, this note analyses the dynamics of relevant market laid down in this case with reference to the concept of 'after market abuse'. Further, this note renders a few suggestions to improve the Indian stance on the issue of relevant market and abuse of dominance in light of the position followed in other jurisdictions.

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Please note that the case of *Belaire Owner's Association v. DLF &Ors* was initially decided before the Competition Commission of India (CCI) in 2013 and was later appealed before the Competition Commission Appellate Tribunal (COMPAT) *in DLF & Ors. v. Belaire Owner's Association the order by the COMPAT was given in 2014, available at:* http://compat.nic.in/upload/PDFs/mayordersApp2014/19_05_14.pdf.

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I. INTRODUCTION

The first step towards an examination of abuse of dominance and anti-competitive activity under the Competition Act, 2002 (hereinafter "the Act") and the competition laws of various jurisdictions is the determination of relevant market.[1]Section 2 (s) of the Act defines relevant geographic market to mean "the inclusion of a market comprising of the area in which the conditions of competition for supply of goods or provision of services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring area." Additionally, according to Section 2 (t) of the Act, relevant product market is considered to be 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."

Different jurisdictions define relevant market in their own way. However, it is imperative to note that, in determining relevant market it is common to use certain economic tools. The Hypothetical monopolist test also known as the Small, but Significant, Non-transitory Increase in Price (SSNIP) test is one such tool used for determining the same. For instance in Malaysia, relevant market is defined as the smallest group of products (in a geographical area) that hypothetical monopolist

[1] Relevant Product Market and Relevant Geographical Market is defined under section 2 of the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007.

controlling that product group (in that area) could profitably sustain a price above the competitive price.[2] It was in the case of *United States v. E.I.Du Pont de Nemours and Co.*[3] (hereinafter "Du Pont Case")that the "Hypothetical Monopolist test" was used and the question asked was that; if the price of the product were increased by a factor of around 5 to 10 per cent, which other products would the customer switch to; all such products would be covered by the relevant product market.[4]

In addition to the definition of relevant product market, there are specific criteria like physical characteristics or end uses, consumer preferences, price of goods or services, etc under section 19(7) of the Act. Similarly, there are specific criteria for relevant geographic market under section 19(6) like regulatory trade barriers, transport costs, language, consumer preferences, etc. Physical characteristics or end users have huge relevance across the globe.

In *Aerospatiale-Alenia/de Havilland case*[5], the European Competition Commission (hereinafter "ECC") decided that commuter turboprop aircraft with more than 20 seats occupied three distinct markets: aircraft with 20-39 seats; with 40-59 seats and with 60 or more seats.[6] By identifying the differences in the seating capacities, the ECC was able to the define separate markets because this determined the type of routes on which these aircrafts could be used.

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[2] Malaysia Competition Commission, *Guidelines on Market Definition*, paragraph 2.2 at 4, available at: http://www.apeccp.org.tw/doc/Malaysia/Decision/Guidelines20103.pdf
[3] United States v E. I. Du Pont de Nemours and Co., 351 U.S. 377 (1956).
[4] *Id* at 377.
[5] Aerospatiale-Alenia/de Havilland, [1991] OJ L334/42.
[6] *Id* at 9.

II. INDIAN POSITION ON RELEVANT MARKET AND ABUSE OF DOMINANCE

The CCI made a significant decision in the case of *Belaire Owners Association ("Informant') v. DLF Limited &Ors. ("Opposite Parties").*[7], Acting on a complaint filed by the Owners' Association of one of the DLF building "Belaire" in Gurgaon, the CCI pronounced DLF Limited guilty for grossly abusing its dominant market position in the concerned relevant market. Furthermore, the CCI held against DLF for imposing unfair conditions in the sale of apartments to home buyers. The CCI imposed a penalty of INR 6,300 million (USD 140 million), at the rate of 7% of the average turnover of DLF for the last three financial years and issued a 'cease and desist' order against DLF from imposing unfair conditions in its builder-buyer-agreements for residential buildings to be constructed in Gurgaon.

DLF Case is a landmark case marking the success of CCI in addressing abuse of dominance with reference to real-estate. The conditions that CCI found abusive in DLF's Belaire Project agreement were as follows:-

First, - Unilateral changes could be made by the builder without the buyers' consent. Herein, DLF unilaterally decided to increase the size of the building from 19 floors to 29 without the consultation of the buyers and allottees. The allottees were made to pay additional amounts or accept a reduction in the size of the area of the building bought by them.

Second, Allottees had no exit option except when the builder failed to deliver possession within the agreed time, but even, in this case, they would get refunds without interest and only after the apartment is sold.

[7] Hereinafter "the DLF Case".

Third, Penalties were imposed on the allottees in case of defaulting to pay the money on time, however, the same did not apply to the builder.

Lastly, DLF took crores of rupees from the allottees, even before construction began. The CCI found all these conditions along with sixteen others as being unfair and abusive.

In this connection, it is necessary to examine the concept of 'after-market abuse' as explained by the U.S. Supreme Court in *Eastman Kodak Co. v. Image Tech*[8]. Kodak, in this case, was the seller of photocopying machines, but it was not a dominant player in the market of photocopying machines. In terms of the services and the repair market for photocopiers, Kodak was primarily selling and supplying spare parts to various dealers who used to service the photocopiers.

Later, Kodak found that some of these service dealers started developing their own spares to service the photocopiers and some gave better service than Kodak itself. Therefore, Kodak changed its business model and asked equipment manufacturers to supply the equipment solely to it. Kodak would then sell the spares to those who bought its photocopiers and they would service the product themselves or service the photocopiers within Kodak's premises. Thus, by using this business model Kodak had control over 100% of the spares and around 85% of the service itself. This caused many of the earlier Kodak dealers who used to service Kodak photocopiers out of business. The dealers affected by this filed an antitrust suit against Kodak, wherein the District Court ruled in favour of Kodak. The case further went on to the court of Appeals for the Ninth Circuit. The Appellate Court held that Kodak's approach was anticompetitive, exclusionary and involved a specific intent to monopolise. Aggrieved by the Appellate Court's judgement Kodak moved the case to the U.S. Supreme Court.

[8] Eastman Kodak Company v. Image Technical Services Inc., 504 U.S. 451 (1992).

In the opinion of the Supreme Court, it identified that there were two markets catered by Kodak the first one being the primary market selling photocopiers and the second being the aftermarket consisting of service after sales. In this aftermarket, there was a tie in scenario as spares would be given with the service. The Supreme Court then relied on its own decisions on market power. In the case of Jefferson Parish[9], the Supreme Court had held that market power is power "to force a purchaser to do something that he would not do in a competitive market".

In another case *U.S. v. E.I. du Point de Nemours & Co.*[10], the U.S. Supreme Court had defined market power as "the ability of a single seller to raise price and restrict output". The existence of such power is ordinarily inferred from the seller's possession of a predominant share in the market.[11]The Supreme Court held that Kodak enjoyed monopoly in the aftermarket. Further, it also held that a customer had a limited choice but to use Kodak's services after the purchase of the equipment because the switching costs are high. Hence, this can subject a customer to abuse by the seller cum service provider (who is one and the same). The Supreme Court held that Kodak's practice gave the customer the assumption that; the equipment and service market acted as pure complements to each other. Therefore, on these grounds, Kodak's behaviour was held to be anticompetitive.

In this particular case also, there are two markets. The first market is where a consumer enters into an agreement with builder and the second market is the aftermarket after he has entered into an agreement with the builder, and then the consumer is governed by the agreement which he has entered into with the builder. By the virtue of the agreement, the builder acquires a dominant position over the consumer. This issue is covered under Section 19(4)(g) of the Act. The word "otherwise" mentioned in Section 19(4)(g) is very pertinent. In this particular case,

[9] Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2 (1984).
[10] *Supra*, Note 3.
[11] *Supra*, Note 7.

dominance is established in the agreement. The Section is inclusive and, therefore, has to be given a wide interpretation.

In fact, Section 19(4)(m) talks of any other factor which the Commission may consider relevant for the inquiry. Therefore, while determining abuse of dominance, the Commission is entitled to consider any other factor which shows that the enterprise is in a dominant position to affects its competitors or consumers or the relevant market in its favour. In this particular case, the informant became a

captured consumer, and he could be discriminated against and abused. Therefore, in this case, abuse of dominance was held to be established due to the presence of high switching costs and information asymmetry. In fact, the decision of the U.S. Supreme Court in the Eastman Kodak Case has been incorporated in the explanation to Section 4 read with Section 19(4) of the Act.

In the DLF Case, relevant product market includes services by developer / builder in respect of 'high-end' residential building in Gurgaon and CCI held that although there can be no hard and fast rule to determine what constitutes 'high-end', the same needs to be determined on the basis of facts and circumstances of each case.[12] 'High-end' is not a function of size alone but includes a complex mix of factors such as size, reputation of location, characteristics of neighbours, quality of construction and actual customers and their capacity to pay.[13]

Further, the CCI in this case also held that the relevant geographic market includes the market for services of developer/builder in respect of high-end residential accommodation in Gurgaon. A decision to purchase a high-end apartment in

[12] The DLF Case 12.30.
[13] The DLF Case 12.32.

Gurgaon is not easily substitutable by a decision to purchase a similar apartment in any other geographical location.

The CCI's scope was limited to the extent of purchasing power of average citizens, and small increase in prices was immaterial in such cases. The CCI relied on the Centre for Monitoring Indian Economy (CMIE) data which said DLF had the highest market share (45%), [14] vis-a-vis the market share of the nearest competitor (19%) which was more than twice of its competitor, leading to hardly any competitive constraints.[15]

The question of relevant market again was examined by the CCI in Ajay Devgan Case. *Ajay Devgan v. Yash Raj Productions*.[16] It was alleged that Yash Raj Films (YRF) had put a condition to single screen owners that if they wanted to exhibit movie A(bound to be blockbuster) at the time of Eid, they would have to agree simultaneously to exhibit movie B at the time of Diwali. Any single screen theatre which did not agree to booking of his theatre for both the films would not get the right to exhibit the single film. Out of 1407 single screens, 821 agreed to show A (EkTha Tiger), and B (Jab Tak Hai Jaan).However, the informant failed to establish how the 'film industry in India' was the relevant market and how YRF was a dominant player in this particular market. Bollywood is itself a mammoth industry, in the judgment, it states that 107 and 95 films were released in 2011 and 2012 respectively.[17] Out of this, YRF produced only 2-4 films each year. The court stated that this cannot amount to dominance even in the Bollywood industry.[18]

In the scheme of the Competition Act, tie-in arrangements per se are not violative of section 3(4)(a) of the Act. Whether such an agreement is prohibited under the

[14] The DLF case 5.31.7.
[15] The DLF case 5.31.7.
[16] Ajay Devgan Films v. Yash Raj Films Pvt. Ltd., Case No. 66 of 2012, Competition Commission of India (Decided on 5.11.2012).
[17] *Id* 9.
[18] *Id* 9.

Act depends upon its actual or likely appreciable adverse effect on the competition in India.

The CCItook the view that the agreement has neither created entry barriers for new entrants nor drove existing competitors out of the market, nor is there any appreciable effect on the benefits accruing to the ultimate consumer viz. the viewers. Single screens contributed to 35% of revenue while multi-screen theatres contributed to 65% of revenue. Ajay Devgan appealed in Competition Appellate Tribunal (hereinafter "COMPAT"), for stay of Jab Tak Hai Jaan, but COMPAT rejected the stay petition.

III. CONCLUSION

After analysing the DLF Case in India, the following recommendations can be made. In the determination of relevant market, just like in case of abuse of dominance, CCI should also look into sub-markets in the cases of the anti-competitive agreements.

In the determination of relevant geographic market in cases of anti-competitive agreements India should consider the relevant geographic area rather than entire India.

India should give importance to "intent" in the determination of abuse of dominance and anti-competitive agreements like Competition agencies of Japan, UK, and if the intent is to exclude competitors in the relevant market the alleged party should be prevented from continuing the activity.