HOW 'SPECIAL' IS THE 'RESPONSIBILITY' OF DOMINANT ENTERPRISES?[1]

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Introduction

In various jurisdictions across the globe, the general principles governing competition regime are either aligned or have been endeavoured to be aligned. This is primarily for two main reasons—*Firstly*, a common primary purpose of competition law (*i.e.* welfare maximization through protecting and promoting competition) runs through almost all competition regimes, despite different countries having varied other goals[4], depending upon their socio-economic and political development. *Secondly*, the international boundaries that divide nations are blurring more than ever before as a direct upshot of international trade and growing global supply-chains, implying international dimension to many competition cases. Thus, there is an inherent incentive globally to align competition law principles.

However, despite the intent and expected efficiencies in having internationally aligned competition law principles, some areas of divergence divide both sides of the Atlantic. One such area of competition law enforcement is the policy/principles governing the abuse of dominant market positions, which is known for enforcement frictions owing to substantive disagreements amongst nations.

The main focus of this paper is the approach with regards to the obligation often cast upon dominant entities, often referred to as the 'Special Responsibility'. Simply put, special responsibility implies that a dominant firm/entity has a special/added responsibility to ensure

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[4] For example, Consumer welfare (United States), overall welfare (Australia), economic integration (European Union), competitiveness, protecting competitive process etc. are some of the common goals that countries seek to achieve through their respective competition statutes.

that its actions and commercial decisions do not distort genuine competition in the market. Thus, in essence, special responsibility prohibits some practices when adopted by a dominant firm while considering them otherwise lawful if adopted by non-dominant firms.

This paper descriptively outlines the evolution of the above concept in the EU, and its observance in some select countries, and prescriptively suggests ways to make it more in sync with the modern competition philosophy.

Evolution of 'Special Responsibility' and its adoption

Generally, every entity, whether dominant or not, has the freedom to compete on its terms on all commercial aspects *viz.*, pricing, choosing trading partners, deciding on conditions of trade, *etc.* However, as soon as such entity becomes dominant, this freedom is circumscribed by the overarching 'special responsibility' concept which casts a duty on the dominant entity to behave more responsibly, in the market in which it is dominant and also in other related markets.

This concept of 'special responsibility of a dominant firm' was first coined by the European Court of Justice in the *Michelin I* judgement of 1983[5]. The Court observed ... "*a finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market*"[6]. This observation was the Court's response to an argument by the French Government that finding an undertaking to hold a dominant position would be punishing that undertaking. While supporting the claims of Michelin NV, the French Government submitted that the European Commission has treated the application of a discount system such as that in question as an infringement *per se* without demonstrating that

[5]Michelin v. Commission, [1983] ECR 3461, ⁋ 57.
[6] *Id.*.

such a practice might have adverse effects on competition and such an application would amount to penalising Michelin for the quality of its products and services. The Court, however, clarified that holding a dominant position is not in itself an issue, but once an undertaking holds a dominant position, it has a special responsibility, irrespective of how such position is attained.

This concept was, thereafter, invoked in various cases in the EU post *Michelin I*, namely, *Irish Sugar*, *British Gypsum, ITT Promedia*, *Tetra Pack II, etc.* In almost all these cases, the entities were held to be liable without much enquiry into the effects of their respective impugned conduct, indicating a tendency to hold them liable because of their dominant position plus invoking of special responsibility—essentially adopting a form-based approach. Along with the special responsibility, the concept of super-dominance also attained relevance, as per which more dominant firms were perceived to have more obligations or responsibilities.

All these cases were prior to the issuance of European Commission's Guidance note[7] on Article 102 (*ex Article 82 TEC)* of the Treaty on the Functioning of the European Union (**TFEU**) in 2009, wherein it was categorically clarified that "*Article 82 of the Treaty establishing the European Community prohibits abuses of a dominant position. In accordance with the case-law, it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market*"[8]. Further, the Guidance Note unambiguously indicated an inclination towards an effects-based approach by stating that the focus of the European Commission would be only on those types of conduct that are most harmful for the

[7] Communication from the Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, (2009/C 45/02).
[8] *Id.*, ¶1.

consumer. The Guidance Note further clarified that 'what really matters is protecting an effective competitive process and not simply protecting competitors' and that the dominant firms are 'entitled to compete on the merits'.

However, despite this philosophical/theoretical clarity provided by the Guidance Note, there are cases that hints at the practical inclination towards a form-based approach by holding entities/undertakings liable if they hold a dominant position for not meeting the special responsibility cast upon them. In *Post Danmark I* case[9] however, the ECJ relied on the effect's analysis[10]. While assessing lower prices being offered by Post Danmark to a select group of customers, the European Court of Justice (ECJ) observed "*Article 82 EC must be interpreted as meaning that a policy by which a dominant undertaking charges low prices to certain major customers of a competitor may not be considered to amount to an exclusionary abuse merely because the price that undertaking charges one of those customers is lower than the average total costs attributed to the activity concerned but higher than the average incremental costs pertaining to that activity, as estimated in the procedure giving rise to the case in the main proceedings. In order to assess the existence of anti-competitive effects in circumstances such as those of that case, **it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect**, to the detriment of competition and, thereby, of consumers' interests*".[11] Clearly, the reliance was on whether the conduct results in anti-competitive effects.

In contrast, in the *Intel* judgement[12] in 2014, the European Commission as well as the General Court relied on a more form-based approach while holding Intel liable for indulging in abusive conduct. It was observed, "*the question whether an exclusivity rebate can be*

[9] Post Danmark A/S v. Konkurrencerådet (Post Danmark I), EU:C:2012:172 (March 27, 2012).
[10] *Id*, ⁋⁋ 36, 42 & 44.
[11] *Id*, ⁋ 44.
[12] Intel Corp v. Commission, EU:T:2014:547 (General Court, June 12, 2014).

categorised as abusive does not depend on an analysis of the circumstances of the case aimed at establishing a potential foreclosure effect"[13]. The General Court held that there need not be an analysis of actual effects or consumer harm to determine the anti-competitive effects of discounts conditioned on exclusivity or quasi-exclusivity. While countering Intel's argument that its conduct formed part of normal competition, the General Court agreed with the European Commission's stand that "*an undertaking in a dominant position has a special responsibility*". However, in appeal, the ECJ reiterated the effect-based approach by necessitating the assessment of foreclosure effects before the conduct of an undertaking is held to be anti-competitive.

Juxtaposed to this, the US generally follows a non-interventionist approach when it comes to dealing with the conduct of dominant entities. It follows the philosophy that the entities (even the dominant ones) having been urged to compete, should not be turned upon[14] just because they won in the competitive process. Thus, as long as the position of dominance or monopoly has been achieved on merits, the courts in the US do not impose any special responsibility/duties on such entities under Section 2 of the Sherman Act with respect to other market participants.[15] Rather, the US Supreme Court specifically observed that the possession of monopoly power is an important part of the free market system and will not be tampered with unless accompanied by harm to consumer welfare.[16]

Indian Position

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[13] *Id*, ⁋ 80

[14] US v. Aluminium Co of America, 1948 F 2d 416.

[15] Dieter De Smet, *The Diametrically Opposed Principles of US and EU Antitrust Polic*y, 29(6) EUR. COMPET. LAW REV., 356 (2008).

[16] Phumudzo S. Munyai, *A Critical Review of the Treatment of Dominant Firms in Competition Law - A Comparative Study*, (2016) (Doctoral Thesis, University of South Africa) (hereinafter "Phumudzo"); observations made in context of US case law *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004).

The unilateral conduct of dominant entities is dealt with under Section 4 of the Competition Act, 2002. Section 4(1) provides that "*[n]o enterprise or group shall abuse its dominant position*". This formulation depicts a legislative departure in approach towards dominant entities under the competition law from its erstwhile market legislation, *namely* the *Monopolies and Restrictive Trade Practices Act, 1969* (repealed *w.e.f.* 01st September, 2009). The erstwhile MRTP Act provided for control of monopolies, derived from the basic philosophy of prohibition ingrained in the Constitutional Directive of 'prevention of concentration of economic power to the common detriment'. However, the Competition Act, 2002 made a paradigm shift from 'monopoly being *per-se* bad' to 'abuse of dominant position' being bad in law. Further, Section 4(2) of the Act lays down the eventualities in which such abuse can be occasioned. All those sub-sections have an effect-oriented formulation *e.g.* Section 4(2)(c) states that there shall be an abuse of dominant position if an enterprise '*indulges in practice or practices resulting in denial of market access in any manner*'. The usage of the word '*resulting in denial of market access*' indicates that the conduct should have an effect of resulting in denial of market access. Similarly, Section 4(2)(b)(i) states that there shall be an abuse of dominant position if an enterprise limits or restricts the production of goods or provision of services or market therefor. Instead of specifying nomenclatures or conducts, the legislature has specified the outcome of such conduct which is prohibited under the Act. Thus, any conduct that results in (*i.e.* has the effect of) limiting or restricting the production of goods or provision of services or market therefor will fall foul of the Act, irrespective of what the conduct is and in which form it takes place.

Though there can be a theoretical discussion, and there appears to be a divide, on whether the Indian regime with regard to the assessment of abuse of dominant position cases is per se or effects-based, the provisions of the Act, as illustrated supra, indicates the relevance of effects-

based assessment. Further, some of the case laws also suggest that CCI takes into account the objective justification, if any, that exists in favor of the dominant entity while assessing conducts under Section 4 of the Act. Thus, to say that Section 4 is per-se in application may not be correct.

As regards invoking special responsibility, CCI has made observations in some cases, similar to those made in *Michelin I*, that a dominant enterprise is endowed with a special responsibility not to allow its conduct to impair undistorted competition in the relevant market.[17] Also, the defence that the conduct, for which the dominant entity is under scrutiny, is in conformity with the industry practice and are being followed by other entities has been rejected by the Commission holding that '*….in terms of the section 4, the responsibility of the dominant player has been made more onerous and if such practices are also adopted by a non-dominant player it may not fall within the ambit of section 4*'[18]. This seems logical for three reasons, *firstly*, the statute creates this distinction by holding certain conduct anti-competitive/abusive only when adopted by the dominant entities; *secondly*, the conduct of dominant entity is more capable of distorting the market or leading to adverse impact *vis-à-vis* the same conduct being adopted by a small player; and *thirdly*, the fact that the dominant players generally set the market trends which are followed by the small competitors may justify attributing liability on the dominant entity for the same/similar conduct for which the non-dominant ones go scot-free. In one of the dissent notes, the dissenting member opined that the dominant entity perpetrated its '*undesirable industry practices causing substantial*

[17] Biocon Limited & Ors. v. F. Hoffmann-La Roche Ag & Ors, Case No. 68 of 2016 (Competition Commission of India, April 21, 2017); these were the *prima facie* observations of the Commission. Currently, the investigation in the matter has been stayed by the operation of the Delhi High Court order.

[18] Belaire Owners' Association v. Dlf Limited, Huda & Ors, Case No. 19 of 2010 (Competition Commission of India, August 12, 2011). https://www.cci.gov.in/sites/default/files/DLFMainOrder110811.pdf.

harm to the competition and to consumers, ignoring its responsibility as a dominant player to set fair standards of industrial practices for other players in the market to emulate'.[19]

However, despite the aforesaid logic, it is necessary that the concept of special responsibility is not applied indiscriminately on all entities holding a dominant position and that the same is guided by objective criteria to ensure careful application. The ensuing section analyses the flipside of indiscriminately applying the special responsibility concept and provides for certain guiding criteria in this regard.

Analysis and Way Forward

The special responsibility concept has been adopted in various cases across the globe, especially those competition regimes that follow the EU competition principles. Though the EU, since *Michelin I*, has adopted various principles and laid down the Guidance Note which guides its enforcement priorities, the concept of special responsibility has been invoked in various other countries indiscriminately.

Ostensibly, holding dominant firms to a higher behavioral standard finds its logic in the already weakened competition owing to the presence of a dominant firm in the relevant market. Thus, any further 'distortion' of the 'undistorted competition' is perceived to be detrimental to the already weakened competitive pressures that remain in such a market. However, in practice, the doctrine of 'special responsibility' may distort the analytical assessment framework, by shrinking the effects-based analysis[20]. In the EU[21], and in jurisdictions inspired by the EU competition principles, cases where this doctrine was

[19] Sunil Bansal & Others v. M/S Jaiprakash Associates Ltd. & Ors, Case No. 72 of 2011 (Competition Commission of India, October 26, 2015).https://www.cci.gov.in/sites/default/files/722011_0.pdf.
[20] Under the EU law on unilateral conduct cases (i.e. Article 102), particularly post modernisation, the focus is more on the effects-based analysis with 'harm to consumer' being the underlying principle that permeates the whole assessment.
[21] Probably, Post Danmark A/S v. Konkurrencera ˚*det* was the only exception.

invoked led to a finding of abuse on the basis of the 'special responsibility' of the dominant firm, rather than focusing on the effects of the conduct on consumer harm. In many cases, the competition authorities have explicitly recognized that the condemned practice/conduct by a dominant entity would not have fallen foul of the competition statute but for dominance. For example, in *ITT Promedia vs. Commission*, it was observed that '*[....] in specific circumstances, undertakings in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings*'.

While there may be some merit in attributing 'special' responsibility on a dominant firm (as highlighted in the previous section), such attribution in cases where dominance is solely by virtue of merit generates philosophical inconsistencies. Though it is an accepted theoretical position that competition law aims at protecting the competitive process in the market, not individual competitors, the adoption of special responsibility in various cases has practically defied this position by penalizing efficient commercial conduct of dominant entities merely because such conduct makes '*life difficult for competitors*'[22] Thus, if special responsibility is invoked without having regard to the '*disincentives it places on dominant players*', it may result in false positives. For example, the South African Competition Tribunal has adopted special responsibility of dominant undertakings while dealing with abuse of dominant position cases.[23] Some commentators observe that such adoption has been done in a manner which shows unfair bias against dominant firms and sympathetic attitude towards small firms, *e.g.* in one of the cases[24], the South African Competition Tribunal observed that the

[22] GUNNAR NIELS ET AL, ECONOMICS FOR COMPETITION LAWYERS, 153 (2nd Ed. 2016).
[23] Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another. [2009] ZACAC 1; Also Phumudzo, *Supra* note 16. \ https://pdfs.semanticscholar.org/6a74/d4f2a14828bd34a5681b8a146fab6da1df65.pdf.
[24]. Nationwide Poles v. Sasol Oil (Pty) Ltd, [2005] ZACT 17.

presence of dominant firms in markets is inconsistent with the ideal of a 'level playing field', in which small firms can also compete freely as required by the Competition Act.

Thus, the dilemma is whether to tilt the scales in favor of the dominant entity or smaller players. Tilting in favor of the smaller players, albeit through the charade of 'protecting the process of competition', may hinder the dominant entity's initiative to compete further due to the sanctions associated with special responsibility, besides protecting the smaller players at the cost of efficiency. Since 'protecting the process of competition' is not an end in itself, but a means towards a greater end *i.e.* protecting consumer welfare; how appropriate would it be for a competition regulator, while invoking special responsibility doctrine, to give disproportionate weightage to the inconvenience caused to the smaller players, especially in cases where consumer harm is not evident.

In light of the aforesaid, there is a need to revisit the contours of 'special responsibility' concept and find ways to modify the principles governing its application, to align them with the foundations and structure of the unilateral conduct assessment framework. Below stated are some of the criteria which may be employed while exercising discretion in invoking special responsibility.

Firstly, a distinction can be based on whether dominance is achieved through merits or through some government grant/concession *etc.* For example, while deciding a case of denial of market access or refusal to deal in respect of an essential facility, invoking special responsibility may make more sense when the facility is granted through some government concession or license, instead of when it is built/made through private investment.[25] Private investment and dynamic efficiencies may get discouraged when there is a threat of mandatory

[25] That does not mean to imply that in case of private investment, essential facilities doctrine cannot be invoked at all. This, obviously, remains a case specific question.

access.[26] As rights are accompanied by responsibilities, attributing special responsibilities in the absence of a grant of special rights may be too onerous. Thus, in case of grant of special rights concessions *etc.*, responsibilities can be cast. However, if such special responsibility is cast on firms indiscriminately merely on the basis of their dominance, without a detailed effects-based assessment, this may put disincentives on such firms on competing aggressively in the market to garner a higher market share, especially when they have achieved their market position by competing on merits, because such possession of high market share may lead to attribution of special responsibility.

Secondly, a distinction can be made based on the degree of dominance possessed by an undertaking. Though generally, the statutes do not differentiate between the degrees of dominance held by undertakings while assessing the conduct, such distinction can be helpful as it accounts for effects analysis to some extent. This is especially relevant in the context of competition regimes where ascertaining dominance is based on quantitative thresholds. Intuitively, the more dominant an undertaking is, the higher would be the chances of its conduct being harmful to the consumers. The concept of super-dominance emerged as an extension of the principle of special responsibility in the EU where the more dominant a firm is, the more obligations or responsibilities are imposed on it. The following observations of UK's Competition Commission Appeal Tribunal in *NAPP Pharmaceutical Holdings Limited and Subsidiaries vs. Director General of Fair Trading*, are interesting in this regard:

> *"In our view, these principles are implicit in the "special responsibility" of a dominant undertaking, and even more so when it is a question of "super dominance" amounting to a virtual monopoly. By virtue of the Chapter II prohibition there is thus a certain limit beyond which a dominant undertaking may*

[26] OECD, Essential Facilities doctrine, 1996, available at http://www.oecd.org/competition/abuse/1920021.pdf.

not go when reducing its prices, purportedly to "meet" competition, particularly when it is defending a market share of around 95 per cent."

Thus, the degree of dominance a firm possesses should have a bearing on the freedom it may have to take its commercial decisions and also restrictions which can be imposed upon it by competition authority by invoking special responsibility.

Thirdly, the competition authorities may differentiate, while applying special responsibility, on the basis of who the aggrieved party is. Thus, it may become relevant to decipher as to whom the dominant entity is responsible— to the market in general or to the consumers/customers (exploitative conduct) or its competitors or customers who are also competitors in some other market (exclusionary conduct). Generally, the invoking of special responsibility in many cases in the EU and other jurisdictions has led to shrinking of analysis into the effects, thus, in some sense presuming the effects instead of inquiring the same.[27] Since the effect (or consumer harm) is generally direct in case of exploitative conduct occasioned to end consumers, invoking special responsibility in such cases may be less problematic, as even otherwise effects may not be required to be seen in great depth.

In this context, the CCI's ruling in the *ONGC* case[28] makes interesting remarks, though there was no explicit use of the 'special responsibility' concept in the said decision. While examining ONGC's conduct for the alleged imposition of unfair terms/conditions in an agreement, the Commission observed that '*[w]hile dealing with a case involving exploitative conduct inflicted upon a consumer, the mere existence of such conduct may fulfil the criterion embedded under Section 4(2)(a)(i) of the Act. Thus, the existence of an unfair condition may amount to a contravention of the provisions of Section 4(2)(a)(i) of the Act.*' This in a way

[27] Ekaterina Rousseva & Mel Marquis, *Hell Freezes Over: A Climate Change for Assessing Exclusionary Conduct under Article 102 TFEU*, 4(1) J. EUR. COMPET. LAW & PRAC. 32 (2013).
[28] Indian National Shipowners' Association (INSA) v. Oil and Natural Gas Corporation Limited (ONGC), Case No. 72 of 2011 (Competition Commission of India, August 02, 2019).

suggests that, in case of exploitative conduct occasioned to the end-consumer, the effects can be presumed, because the harm is inflicted directly on the consumers as opposed to exclusionary conduct where the harm is indirect.[29] '*However, examination of exploitative conduct which involves imposition of an unfair condition by a dominant enterprise in a B2B transaction is essentially to undertake a fairness or reasonability test, which requires examining both how the condition affects the trading partners of the dominant enterprise as well as whether there is any legitimate and objective necessity for the enterprise to impose such condition. Appreciation of the context and rationale becomes all the more important in the cases of buyer power, lest it increase the risk of large industrial buyers being penalised for what may be an attempt to negotiate competitive terms with suppliers or simply a prudent business decision having pro-competitive effects in the market for the final product in terms of lower prices, larger availability, greater choice etc.*' Applying the reasonability test, the Commission found that though ONGC had a unilateral right of termination in its agreements with the ship vessel owners for last 30 years, the said clause was invoked for the first time in an unprecedented market situation. Further, such clause was invoked in good faith and only in response to an exceptional change of circumstances. On an assessment based on these guiding principles, the Commission found the conduct of ONGC to be objectively justified. This case, in some sense, reassures that assessment under Section 4 of the Act will adopt a reasonability test and not a form-based assessment.

Fourthly, the nature of the conduct should also be considered. Although no objective criteria can be laid down for making an assessment on this aspect, the conducts which generally do not harm the end consumer may be kept outside the scope of applying special responsibility. Otherwise, finding dominant entities responsible for a conduct in which non-dominant

[29] However, this does not mean to suggest that special responsibility should not be invoked in exclusionary conduct cases. Rather, in cases where the leveraging is evident from one market to another, special responsibility may be imperative to invoke.

entities can usually indulge without impunity will amount to a discrimination without any basis. Probably for this reason, the special responsibility principle has been often criticized for being 'a burden on dominant firms', 'a political choice', and 'an unhelpful and unclear concept which prevents competition on merit'.[30] This is a bigger problems in jurisdictions where dominance is determined based on market share thresholds because holding a market share slightly above the defined threshold may make the conduct abusive while a slightly lesser market share may not attract scrutiny[31]. Contrastingly, in countries where assessing dominance is not a quantitative test but a qualitative assessment (*e.g.* India), this may not be that problematic as the assessment of dominance and abuse would tend to influence each other. To take an example, the cab-aggregators market around the world features aggressive price competition. Even in India, several cases were analyzed by the CCI for alleged predatory pricing by the cab aggregators. Since, the Indian competition regime do not prescribe quantitative thresholds for ascertaining dominance, the cab aggregator (against whom the case[32] was filed) was not found to be dominant despite it having a high market share.[33] However, if this case was analyzed in another jurisdiction following a quantitative threshold for ascertaining dominance, the entity might have been found to be dominant, making it subject to special responsibility. As a result, such entity could have been prohibited from indulging in aggressive price competition while its competitor would have escaped scrutiny. In such a situation, if the dominant firm, by virtue of its status is kept under the limits, the other players, who may indulge in similar conduct might benefit for being perceived as posing a threat. Such indiscriminate treatment can potentially distort the level

[30] Phumudzo, *supra* note 16.
[31] *E.g.* if a competition statute prescribes for 50% market share threshold for determining dominance, an entity holding 51% market share may be subject to special responsibility while those holding 49% may not be. This is despite the fact that qualitatively they may be having similar position *vis-a-vis* their buyers or other small competitors.
[32] Fast Track Call Cab Pvt. Ltd. v. ANI Technologies Pvt. Ltd, Case No. 6 & 74 of 2015 (Competition Commission of India, July 19, 217).
[33] This is because the qualitative competitive constraints put by the other competing cab aggregator was found to be sufficient to keep the market competitive.

playing field in the market and put the dominant firm in a worse-of position *vis-a-vis* its competitors.

Conclusion

To conclude, though the concept of Special Responsibility is relevant, as acknowledged in this article, its indiscriminate application may do more harm than good. There should be some guiding criteria while exercising discretion in invoking special responsibility in abuse of dominance cases. *Firstly*, it ought to be evaluated on what basis has the dominance been achieved. Is the dominance a product of 'competing on merits' or is it established by way of state grant/concession? *Secondly*, the importance of the 'degree of dominance' should not be undermined. For a super-dominant firm, the implications and obligations under the special responsibility may vary when compared to dominant firms, especially in competition regimes where ascertaining dominance is based on quantitative thresholds. *Thirdly*, to whom the dominant entity is responsible should also form the basis of exercising discretion. As discussed, invoking special responsibility in cases where the harm to the consumer is evident may make more sense. *Fourthly*, while deciding whether a case for invoking special responsibility is made out or not, the nature of the conduct should also be considered.

Thus, there is a need to revisit the contours of 'special responsibility' concept in light of the aforesaid and find ways to modify the principles governing its application to align it with the foundations and structure of the unilateral conduct assessment framework.

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