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Legal Treatment of Abuse of Dominance in Indian Competition Law: Adopting an Effects-Based Approach

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Abstract

Abuse of dominance investigations around the world are often form-based, primarily centred on the pre-requisite of dominance. This may lead to false positives or restrict innovation in today's dynamic and complex markets. Accordingly, abuse of dominance enforcement requires a shift towards adopting an effects-based approach, weighing pro and anticompetitive effects and considering efficiency justifications. The European Union is increasingly moving in this direction, as is demonstrated by its case law that is analysed in this paper. The paper also explores competition law in India—traditionally a form-based jurisdiction for abuse of dominance investigations—and finds an encouraging trend towards an effects-based approach.

Keywords Abuse of dominance · Competition · Effects-based · Form-based · India

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1 Introduction

Competition law regulates the very manner in which enterprises conduct their business: what they produce, how they produce, how much they produce, at what price do they sell their products, how they distribute their products, how they interact with peers, how they enter into business collaborations, how they draft contracts, how they invest in other businesses, and so on. Almost every process of the normal functioning of a business is within the domain of competition law. Therefore, competition law has a behavioural dimension to it.

Nevertheless, like any other law, competition law attempts to codify—in this case conduct that is anticompetitive or procompetitive. Despite the codification, competition law enforcement is primarily driven by the way in which a competition authority reads and interprets the law and the liability standard that it adopts for establishing anticompetitive conduct. Some authorities might strictly follow the letter of the law and thus adopt a form-based approach, without actually extrapolating the effects of the transaction or conduct on competition and consumer welfare. However, other authorities might consider the spirit of the law and adopt an effects-based approach by balancing the procompetitive effects against the anticompetitive effects of the conduct or transaction on a case by case basis. It is important to note here that structuralist legal methods, which are essentially static in nature, are inadequate for analysing intrinsically dynamic competition phenomena.

Competition authorities adopt different legal standards for different types of transactions and conduct, depending upon their perception of its potential anticompetitive or procompetitive effects. For instance, mergers and acquisitions and certain horizontal agreements—such as those that are related to research and development collaborations and technology sharing—are assessed using an effects-based approach in most jurisdictions. This is primarily in recognition of their potential to create efficiencies and enhance innovation and consumer welfare. However, the abuse of dominance has yet to achieve firm ground in being placed within an effects-based approach across several jurisdictions, even though the net effect of an action that is undertaken by a dominant firm is not necessarily anticompetitive, and cannot be presumed.

In India, abuse of dominance is prohibited under Section 4 of the Competition Act 2002¹ and is predominantly enforced using a form-based approach. Section 4 of the Act defines ‘dominance’ and lists actions that are to be considered abusive, if undertaken by a dominant firm. Currently, the Competition Commission of India (CCI) mostly enforces this provision of the Act based on three key steps: (1) identifying the relevant product and geographic markets; (2) assessing the dominance of the concerned enterprise²; and (3) determining whether the dominant firm pursued an activity that can be constituted as an abuse of dominance under the Act. Under this form-based approach, the action of a dominant enterprise that falls in the categories that are defined in the provision of the Act is established as an

¹ Referred to as the ‘Act’ in this paper.

² There are some cases where the CCI has undertaken an investigation even when the firm was not dominant.

abuse. This in itself is considered to be a violation of the law, with limited or no attempt to identify any other possible objective justification for the action of the dominant firm.

Enforcement of competition law using a form-based approach often results in false positives: punishing actions that are procompetitive. For instance, while rebates that are offered by a dominant firm may lead to exclusion of present or potential competitors, it may also have procompetitive effects when lower costs and greater incentives to innovate due to economies of scale are passed on to consumers. Therefore, a form-based competition law enforcement may actually end up limiting consumer welfare. Further, a form-based approach is likely to create inconsistencies in outcomes of competition assessment, which results in the evolution of a muddled jurisprudence. Moreover, it may also become a hindrance to growth in today's fast moving, technologically evolving, and extremely complex and inter-linked markets, by unnecessarily restricting the freedom of firms to pursue strategies in their best business interest.

The current trajectory of India's economic development requires a competition law that focuses on promoting efficiencies and allowing firms freely to innovate, strategize, and reap profits. This will eventually enable them to create value and benefits for their customers and the entire Indian economy. At the same time, it is also important to check continuously for any kind of exploitation as the economy grows and new market structures emerge. Therefore, there is an increasing need for adopting an effects-based approach (over a form-based approach) to bring about a more effective balance in competition law enforcement in India.

Adoption of an effects-based approach requires a radical change in thinking and approach towards antitrust law on abuse of dominance in India. In order to meet the needs of the modern Indian economy, competition law in India underwent a significant shift in 2009, with the repealing of the Monopolies and Restrictive Trade Practices (MRTP) Act of 1969. This was because the focus of the MRTP Act was limited to restricting monopolies, and it was inadequate for a rapidly liberalising, privatising, and globalising India. The MRTP Act was replaced by the Competition Act (2002) (notified in 2009), which was much more specific in its formulation (including the abuse of dominance) and introduced a new focus of promoting competition in the Indian markets.³

Given the changing economic scenario and market dynamics today, there is once again a need to revolutionize India's antitrust enforcement on abuse of dominance into an effects-based approach. In fact, this approach has already been emphasised in the Raghavan Committee Report (2000), which formed the basis of India's Competition Act 2002. Specifically, the committee recommended in its report that while assessing an abuse of dominance case, key questions that must be evaluated include: How will the practice harm competition? Will it deter or prevent entry? Will it reduce incentives of the firm and its rivals to compete aggressively? Will it provide the dominant firm with an additional capacity to raise prices? Will it prevent investments in research and innovation? Do consumers benefit from lower prices and/or greater product and service availability?

³ Malik (2016), Patil et al. (2013).

While the Raghavan Committee Report did mention these aspects of competition assessment, there was no certainty as to whether the actual interpretation and implementation of the law would really adopt an effects-based approach. Such concern was shared by Rakesh Mohan and Sudhir Mujli,⁴ who cautioned that if the Act was not adjudicated in an effects-based framework, its impact would be restrictive for India's economic growth and entrepreneurship.⁵

Section 2 of our paper highlights the benefits of adopting an effects-based approach in assessing abuse of dominance cases, along with providing an economic framework for implementing the same. We also briefly discuss the special case of platform markets to show the need for adopting an effects-based approach in undertaking competition assessment in non-traditional markets. Further, in this section we analyse case law from the European Union (EU) to show the difficult but nevertheless positive transition of the EU towards adopting an effects-based analysis in assessing abuse of dominance cases, for at least certain types of practices.⁶ In Section 3, we provide an account of how the jurisprudence has developed for abuse of dominance cases in an emerging jurisdiction such as India. In Section 4 we conclude our paper.

2 Economics of an Effects-Based Approach to Competition Law Enforcement

A form-based approach to enforcement is very conservative, as it considers market power to be bad and hence aims at an unrealistic benchmark of perfect competition. In fact, the underlying theoretical framework and case law of an effects-based approach shows that standardised rules are ineffective in enforcing a modern competition law where markets are highly complex, often contestable, and rapidly evolving. In such a world, where survival of the fittest is key, apparent abusive actions of a firm may actually be driven by a plethora of legitimate factors and objective justifications to meet competition.

2.1 Form-Based Approach Vis-À-Vis an Effects-Based Approach

Traditional competition law focused on protecting competitors and was primarily enforced through a form-based approach. This is derived from the traditional view,

⁴ Members of the Committee.

⁵ Report of the High Level Committee on Competition Policy & Law, SVS Raghavan Committee (2000).

⁶ The discussion paper released in 2005 related to the application of Article 82 of the EC Treaty on exclusionary practices in the EU and the guidance paper released in 2008—'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings'—allow for objective justifications and efficiencies (Objective Necessity Defense, Meeting Competition Defense, and Efficiency Defense) to be put forward by the dominant firm. However, Article 82 of the EC Treaty does not contain any specific provision on this. The decision of accepting such justifications and related evidence or the weight given to them is left to the courts.

where perfect competition was assumed to be an ideal scenario and firms were price-takers with limited or no market power.⁷

However, adopting a form-based approach in undertaking abuse of dominance assessment is fraught with problems. A key reason for this is that the abuse of dominance provisions in competition law are formulated with a ‘pre-requisite’ of establishing dominance. This raises several concerns: First, determining dominance requires definition of relevant markets, and what the relevant market is can be contentious. While there are various tools and methods available to define relevant markets, they are all subject to their own criticisms and may not fit well in all market situations. For instance, the use of the “small but significant and non-transitory increase in price” (SSNIP) test (without any modifications) in non-traditional markets such as platform markets may cause a very narrow market definition, thereby leading to erroneous conclusions in anticompetitive assessments.

Second, there is also the issue of defining ‘dominance’. The most commonly used metric—market-shares—is an inadequate measure to establish dominance, and using only this can lead to significant inconsistencies as there is no accepted benchmark on the market share cut-off beyond which a firm will be considered to be dominant. Also, market shares may be an erroneous criterion in platform markets that are highly contestable. Moreover, platform markets by nature require economies of scale, and thereby tend to be characterised by a few large entities with relatively high market shares.

Third, the dominance pre-requisite may also provide an escape route to a firm pursuing the same anticompetitive practice as a dominant firm (to strengthen its market position), but may not yet be construed to be dominant by the law. Such a firm will typically have no legal liability. Further, a form-based approach ignores or undermines the possibility of alternate business or efficiency justifications for the dominant firm’s actions.

The effects-based approach rests on the more evolved view of competition, which recognizes that firms continuously look for new opportunities to maximize profits through innovation.⁸ Such innovation may range from raw materials and production processes to sales tactics, exploring new markets, and fulfilling continuously evolving needs of consumers. In order to achieve this, a firm may adopt strategies that enhance its market power or eliminate a competitor; however, its actions may actually result in more efficient processes and enhanced consumer welfare. For instance, a newly opened supermarket in a small town may eliminate several small vendors, but it may offer welfare-enhancing benefits to consumers: for instance, discounts and a one-stop solution for household needs. Therefore, this new view on competition—based on today’s evolving market structures and dynamics of competition—is urging the law to adopt an effects-based approach to antitrust enforcement. This approach, aims at weighing the procompetitive vis-à-vis anticompetitive effects of a firm’s action, rather than simply protecting competition.

The effects-based approach enhances the effectiveness and accuracy of competition law enforcement, and minimizes the probability of penalizing

⁷ Pera (2008).

⁸ Pera (2008).

procompetitive actions undertaken by firms.⁹ It takes into consideration the nature of the industry and the market structure in which the firm operates. It also attempts to understand the economic rationale for such actions and their relevance in the context of the firm's current competitive strategy.

For instance, in industries such as aviation where scale and large investments are of prime importance, there tend to be a limited number of firms in the market, each enjoying a certain degree of market power and sometimes even dominance on certain routes. The hub-and-spoke model of airline competition creates productive efficiencies for the airline by establishing near monopolies on routes with the hub as the origin or destination. Similarly, large price discounts by airlines may not necessarily be an abuse of dominance. They could simply be the firm's strategy to improve aircraft utilization (to recover a maximum portion of variable costs) or a part of its marketing/sales strategy where the firm could have set aside a budget to sell tickets at a lower price for a certain period of time. This in turn will enhance consumer welfare through lower prices. However, if one were to adopt a form-based approach in this case, such alternative justifications are likely to be ignored or left unexplored, and the firm would be held accountable for restricting market entry or driving out incumbents.

Further, an effects-based approach ensures that practices that are undertaken by firms, which have the same outcomes, are subject to similar legal treatments. Often, companies try to exploit loop holes in the law and adopt practices that enjoy a relatively lenient legal treatment but have the same effects as those that may be more strictly prohibited.¹⁰ For instance, instead of heavily discounting all its rooms—to a level below costs—and risking enforcement on grounds of predatory pricing, a large hotel could significantly reduce the price of its lowest category rooms (selective price cutting) in order to eliminate competition from the only small budget hotel in the vicinity. Thereafter, if the large hotel is able to increase prices and recoup its losses, it may harm budget consumers in the long run. Such harm will be equivalent to a full-scale predatory pricing case but may be lightly penalised as a selective rebate practice. Therefore, by adopting an effects-based approach, antitrust authorities will rule based on the impact of the action undertaken by a firm rather than using the action itself as a standard for establishing an anticompetitive abuse of dominance practice.

Below we present a specific illustration of platform markets to highlight the importance of adopting an effects-based approach in undertaking abuse of dominance assessments in such markets.

A simple example of a two-sided platform market is a shopping mall where the shops and shoppers form two user groups, whose interaction is facilitated through the mall. The shoppers and shops convey externalities for each other: The shoppers would like to visit the mall with maximum shops; and shops would like to set up their outlets in a mall with the maximum shopper traffic. Therefore, platform markets are those in which: (1) two (or more) distinct groups of users interact through a platform; (2) the user groups exhibit indirect network effects on each

⁹ Petit (2009).

¹⁰ Arezzo (2008).

other; and (3) the platform helps the user groups internalize these externalities, which is usually not possible through mutual interaction.¹¹

Economists have demonstrated several unique economic principles of platform markets. For instance, the platform must consider the impact on both user groups while making its pricing decision. This is because a price change for one user group will influence the demand for the platform by both user groups. In the shopping mall example, an increase in shop rent will lead to fewer shops in the mall, which in turn will lead to fewer shoppers coming to the mall for shopping due to network effects from having fewer shops in the mall.

Often, such economic principles are very different from those witnessed in the traditional one-sided markets, and may wrongly seem anticompetitive if assessed using the form-based approach, characterized by blanket standards for competition law enforcement. For instance, in platform markets firms may price their product or services below cost or even at zero on one side of the market.¹² It is common business practice for firms in two-sided markets to subsidize users on one side (which act as a pull factor for the other side) and charge a higher price to those on the other side. For instance, some newspapers are given for free to readers, but an advertisement fee is charged from advertisers. Further, network effects in platform markets tend to favour large entities that can attract a large number of users on both sides of the market, thereby making natural monopolies or high market concentration likely. Such scale is also necessary to make innovation and investment profitable for the companies. Further, if firms do not have some market power on both sides of the market, profits on one side will eventually get competed away on the side with limited market power. For instance, owners of a new operating system (e.g. Android, iOS) will have to acquire users and application developers simultaneously. This often poses a barrier to entry. Also, users in platform markets get locked-into the goods or services of incumbent players and face high switching costs (for instance, switching from a Windows to an iOS platform may involve compatibility issues and learning time), which further acts as a barrier to entry.

Therefore, unlike the ‘traditionalist view’, price discrimination, concentration, certain barriers to entry, and scale may be positively linked to innovation in platform markets.¹³ These are inherent to the structure of the market and cannot be presumed to be anticompetitive. Moreover, platform markets are characterised by product differentiation and multi-homing practices, which provide a strong countervailing power against potential anticompetitive practices.¹⁴ Further, platform markets are usually very dynamic in nature, and market leadership is highly contestable due to revolutionary and often disruptive innovations. This is evident from the migration of customers from Orkut to Facebook or the increasing shift from plastic money to digital payment platforms. Consequently, a static price-output competition analysis is much less relevant in platform markets.¹⁵

¹¹ Gurkaynak et al. (2016).

¹² Gurkaynak et al. (2016), OECD (2009).

¹³ Jhaku and Malik (2017).

¹⁴ Gurkaynak et al. (2016).

¹⁵ Jhaku and Malik (2017).

Therefore, characteristics and economic principles governing platform markets make the business strategies, incentives, and reactions of firms very different from those observed in one-sided markets. A typical form-based approach with pre-set standards, benchmarks, and tools can lead to erroneous results in assessments in platform markets. As a result, the effects-based approach must be the preferred legal standard for competition law enforcement in platform markets.

This has been recognized by the US Court of Appeals for the Second Circuit in *United States v American Express Co.* (2016), related to the use of ‘non-discriminatory provisions’ (NDPs) by payment card networks. NDPs prohibit merchants from encouraging customers to use cards that are preferred by the merchant due to lower costs or any other factors.

In 2015, a US District Court concluded that NDPs reduced competition by removing incentives for the payment card networks to offer discounts on merchant fees, thereby harming merchants. However, in 2016, the Second Circuit reversed this decision on the grounds that the District Court had defined an incorrect relevant market by considering only one side of the market (merchant side) and ignoring the payment card holder (customers) side. Consequently, the District Court had also ignored the interdependence between the two sides, which is likely to lead to erroneous penalization. For instance, the Second Circuit argued that American Express uses its revenue earned from high merchant fees to finance various customer benefits and any reduction in this revenue will reduce the optimal level of benefits provided to customers. Therefore, the District Court was required to define the market aptly and weigh the effects of imposing NDPs on both sides of the market.¹⁶ However, in October 2017 the US Supreme Court agreed to hear the case based on a petition filed by 11 states, alleging that the rules of American Express violate antitrust law.¹⁷

2.2 Economic Framework for an Effects-Based Approach in Abuse of Dominance Cases

The desired shift in thinking—the transition from a form-based to an effects-based approach—also requires modifications in the procedure to be adopted by antitrust authorities in undertaking abuse of dominance assessments. While the form-based approach only aims at assessing dominance in the relevant market and subsequently evaluating adoption (or not) of a pre-established abusive behaviour, an effects-based analysis calls for a more economic and holistic approach to antitrust enforcement. Most important, antitrust authorities must ensure that the procedure that is adopted to investigate the alleged abuse of dominance practice using an effects-based approach:

- Weighs competitive harm in terms of welfare vis-à-vis any possible efficiencies;
- Is rooted in sound economic analysis as well as facts;

¹⁶ Sidak and Willig (2016).

¹⁷ Wheeler (2017).

- Assesses the possibility of an alternate legitimate (competitive) reason for undertaking the practice;
- Ensures that all anticompetitive practices with the same harmful effects are treated equally for law enforcement; and
- Maximizes legal certainty.

Different measures of competitive harm have been proposed by economists and antitrust authorities—varying from assessing the impact of the practice on total welfare to focusing primarily on consumer welfare and resulting efficiencies (adopted by the EU).¹⁸ Similarly, a variety of tests and standards have also been proposed and adopted by economists, antitrust scholars, competition authorities, and courts around the world. These include the ‘profit sacrifice’ and ‘non-economic sense tests’, the ‘as efficient competitor test’, and the ‘discount attribution test’.¹⁹

While such standards and tests have been actively used by courts, they can be used only as one of the key indicators in undertaking effects-based competition assessments. If applied in isolation and as the only criteria for competition assessment, they raise several concerns and may lead to incorrect conclusions. First, many of the standards and tests are widely criticized for their shortcomings in terms of economic logic, variables, and parameters used. For instance, the profit sacrifice test is criticized because a situation in which price is greater than marginal cost may also represent a sacrifice. This is because in imperfect markets price must be reduced for all units to generate additional sales and marginal revenue is almost always below price when firms charge uniform prices. Moreover the marginal cost must involve the loss incurred by reducing the price of all units.²⁰ Second, standards and tests use pre-defined parameters of costs, profits and revenue. However, sometimes such choice of variables may be unsuitable for that industry and may lead to perverse results. For instance, the discount attribution test becomes ineffective in industries such as telecommunication, which have high fixed costs and low variable costs. In such industries, it is difficult to show below-cost pricing as a proof of anticompetitive behaviour. Instead, the key in such industries is to assess the restrictions to entry by new firms.²¹ Third, by focusing only on the observed behaviour and trends of certain specific economic variables, these tests are limited in their ability to assess the alleged anticompetitive practice from a holistic perspective, such as assessing the intent of the action or characteristics of the market or the actual impact on consumer welfare. For instance, below-cost exclusionary bundles can sometimes be welfare enhancing.

As a result, we recommend that competition authorities undertake holistic effects-based competition assessments using a mix of tools—tests (modified if necessary) and other data analysis—that are based on sound economic principles and that cover various aspects that are relevant to the specific practice and case being investigated. Here it is important to note that the burden of proof in adopting

¹⁸ Pera (2008).

¹⁹ OECD. (2006).

²⁰ Edlin (2012).

²¹ Pollina (2014).

an effects-based approach typically lies on competition authorities for establishing anticompetitive harm and on the firm that is being investigated for establishing efficiency gains.²²

Based on extensive literature review,²³ we outline a basic economic framework below to help competition authorities define their approach in undertaking antitrust investigations, based on which they may identify the most suitable set of tools to be used:

Step 1 Categorize the abuse of dominance practice being investigated based on the market in which it is likely to cause exclusionary effects—(1) in the same market, (2) in neighbouring markets, and (3) in a vertical market—as the line of questioning will be different for each of these markets.

This step helps to ensure consistency and uniformity in legal treatment of all practices that essentially have the same anticompetitive effect. It also ensures certainty, predictability, and timeliness of the legal process as the authorities will tend to work within the smaller framework of each of these exclusionary effects. Therefore, this enhances the overall effectiveness of competition law enforcement.

Step 2 Identify and weigh the anticompetitive and procompetitive impacts of the alleged abuse of dominance practices. The most prevalent abuses of dominance practices include: (1) price discrimination, (2) rebates, (3) tying and bundling, (4) refusal to deal, (5) exclusive dealing, and (6) predatory pricing. In the paragraphs below, we present several examples of anticompetitive and procompetitive perspectives that should be considered while undertaking an effects-based analysis for each of these practices:

2.2.1 Price Discrimination²⁴

Anticompetitive perspectives: (a) Is price discrimination reducing the cost of predatory pricing by targeting only selected customers, and foreclosing competition in the same/neighbouring markets? (b) Is price discrimination being used by a vertically integrated dominant firm to foreclose downstream competition by charging higher prices for inputs supplied to certain competitor downstream firms? (c) Is price discrimination reducing overall consumer surplus by charging very high prices to some customers?

Procompetitive perspectives: (a) Is price discrimination enhancing competition between firms and in turn improving consumer welfare (especially in oligopoly markets)? For instance, price discrimination can be used to poach the competitors' customers through lower prices (possibly lower than marginal costs), thereby enabling firms to compete for all customers instead of only marginal customers. (b) Is price discrimination leading to an expansion of output by enabling a firm to sell its product to a wider range of customers—at different prices—who might value the product differently? (c) Is price discrimination improving returns for firms in high-fixed-cost industries and encouraging them to continue investing as well as

²² Gual et al. (2005).

²³ Including work done in the EU through the EAGCP Report: Gual et al. (2005).

²⁴ Perrot (2005), Papandropoulos (2007), Gual et al. (2005).

innovating in the long-run (dynamic positive effect of price discrimination)? For instance, price discrimination can be used for efficient pricing (Ramsey pricing) using low elasticity customers to recover fixed costs.

2.2.2 Rebates²⁵

Anticompetitive perspectives: (a) Are rebates restricting entry or foreclosing competition in the same market, for instance by giving rebates only on the purchase of certain minimum quantities or offering rebates to only those customers who are likely to shift to a new entrant firm? (b) Are rebates restricting entry or foreclosing competition in the neighbouring market—for instance, by offering rebates only if customers buy the product of the dominant firm together from both the markets? (c) Are rebates restricting entry or foreclosing competition in the vertical market—for instance, by offering rebates to retailers who sell the dominant firm's products vis-à-vis the competitors' products? (d) Are rebates targeting a majority or large enough share of the consumers, thereby restricting entry/expansion?

Procompetitive perspectives: (a) Are rebates enhancing competition between firms? For instance, rebates can be used to enhance competition for customers who have a high elasticity of demand and easily switch across firms for buying their products. Rebates can also be used to enhance competition for the retail network by providing more focused incentives to retailers rather than possibly reducing the overall wholesale price. (b) Are rebates creating economies of scale or transaction costs for the dominant firm or for customers? (c) Are rebates improving returns for firms in high-fixed-cost industries and encouraging research and development, by adopting Ramsey pricing strategies (same effects as price discrimination)?

2.2.3 Tying and Bundling²⁶

Anticompetitive perspectives: (a) Are tying and bundling restricting entry or foreclosing competition in the tied market by reducing incentives of customers to buy from another producer even if the product is of better quality or produced at a lower cost (Offensive Leverage Theory)? (b) Are tying and bundling restricting entry or foreclosing competition in the same market by tying or bundling product of existing market to product of newly entered market, thereby removing competitors from existing markets and deterring their entry into new market (Defensive Leverage Theory, aimed at protecting market share of the dominant firm in the newly entered market)? Tying and bundling may also be making success of entry into new markets conditional on selling bundled/tied goods or entering many markets together, thereby increasing costs and risks for competitors and creating an entry barrier.

Procompetitive perspectives: (a) Are tying and bundling helping in the recovery of fixed costs, encouraging innovation (same effects as price discrimination and rebates)? For instance, increased market power in the markets for the both the goods

²⁵ Walckiers (2012), Frot (2016), Hildebrand (2009), Gual et al. (2005).

²⁶ Killezi (2009), Hildebrand (2009), Gual et al. (2005).

tied/buddle together, helps the firm to spread costs over a larger number of units. (b) Are tying and bundling enhancing consumer welfare by for instance reducing transaction costs for customers, especially if the goods are complementary; creating benefits in terms of compatibility, quality and informational asymmetry if the goods are technologically tied; and charging lower prices for the bundled/tied good (may sometimes even be zero)? (c) Are tying and bundling helping to price better for consumers (especially for complementary goods)? For instance, selling tied/bundled products helps the firm to assess the customers' preferences and price according to usage intensity (tying/bundling after-sales service with the main product). Further, tying and bundling also lead to competition on the entire package of the bundled/tied good rather than for components, thereby making a price cut easier to internalize for the suppliers.

2.2.4 Refusal to Deal²⁷

Anticompetitive perspectives: Is the refusal to deal foreclosing competition or restricting entry in the downstream market by for instance: refusing to supply an essential good or service to the downstream firm at a reasonable cost; making an essential good incompatible with the product of the downstream firm; or restricting access of a joint facility to incumbent or potential competitors?

Procompetitive perspectives: (a) Is the refusal to deal helping the upstream dominant firm protect its reputation? For instance, this may happen if the downstream firm is selling poor-quality final products and it is difficult for the upstream dominant firm to monitor/control them. (b) Is the refusal to deal a result of a rational business decision of the dominant firm such as restricting the downstream firm from free-riding on marketing by the dominant firm, inability to supply the desired quantity or quality to the downstream firm, or incompatibility between the products of the supplier and downstream firm? (c) Is the refusal to deal a result of intellectual property rights or recovery of investments that allow firms to earn necessary returns to encourage innovation and research in the long run?

2.2.5 Exclusive Dealing²⁸

Anticompetitive perspectives: (a) Is exclusive dealing deterring entry in the same or neighbouring markets by, for instance, ensuring that the majority of the downstream firms buy from the dominant firm exclusively? (b) Is exclusive dealing deterring entry in a vertically related market by, for instance, not providing an essential input to a potential new entrant firm?

Procompetitive perspectives: (a) Is exclusive dealing encouraging investments in partnerships, for instance, investing to create an improved input to be bought by a huge downstream firm? (b) Is exclusive dealing a strategy to protect the dominant firm's reputation in cases where downstream firms are selling poor quality final products? (c) Is exclusive dealing a strategy to protect the firm's profit from

²⁷ The Unilateral Conduct Working Group (2010), Neven and Mano (2006), Gual et al. (2005).

²⁸ Osterud (2010), Gual et al. (2005).

excessive entry? For instance, an existing incumbent firm may lose profits if its customers switch to new entrant firms. (d) Is exclusive dealing helping firms achieve economies of scale (necessary for profitability in the relevant industry) by ensuring a large dedicated customer base? (e) Is exclusive dealing enhancing competition? For instance, large buyers may encourage exclusive dealing so that they can implement competitive bidding by the suppliers.

2.2.6 Predatory Pricing²⁹

Anticompetitive perspectives: Is predatory pricing deterring entry or weakening competition in the market? For instance, the dominant firm may be using its financial resources to price the good or service very low until the existing competitors leave the market or to give a false signal of market pricing to potential market entrants.

Procompetitive perspectives: Are low prices a legitimate business strategy of the firm rather than a predatory intent? For instance, the firm may be trying to acquire a larger customer base in an industry with high switching costs or the pricing may be a valid response to market conditions such as overcapacity. Further, below-cost pricing may also be a means to promote a new product or a strategy to reduce prices and enhance production (and hence sales) to internalize benefits from learning by doing.

2.3 Moving Towards an Effects-Based Approach in the European Union

In spite of the various advantages of an effects-based approach, jurisdictions often tend to follow a form-based approach. This is primarily a result of the deeply embedded traditional view that market power is in general bad and actions that are undertaken by a dominant firm will in most likelihood have adverse effects on competition and consumer welfare.

The EU antitrust law has also long been influenced by the traditional “ordo-liberal” view,³⁰ which originated and drew greatly from the anticompetitive effects of economic power, seen through widespread cartels in Germany during the 1920s.³¹ According to the ordo-liberal view, competition has a prime role in the effective functioning of markets, where each market actor is treated equally under the law and enjoys full freedom to make operational decisions.³² As a result, EU’s antitrust law and its enforcement has been focused around factors such as market structure, concentration, market access, and dispersal of economic power, which are aimed to protect competitors and their freedom to operate in the market.

Further, the ordo-liberals assign a key role to regulations and institutional frameworks in protecting the competitive process and hence competition in the

²⁹ Bolton et al. (2000), Gual et al. (2005).

³⁰ View of lawyers and economists in Germany when the European competition law was enacted for the first time in 1923.

³¹ Felice and Vatiero (2014).

³² Behrens (2015), Pera (2008), Gerber (1995).

economy. They viewed dominance by a firm to be contradictory to a competitive market scenario and hence influenced the EU's antitrust law on abuse of dominance (Article 102 of the European Commission (EC) Treaty) to adopt a per se tenor and prohibit any practices that allowed dominant firms to use their market power, or adversely affect opportunities or freedom of competitors to operate in the market. The ordo-liberals argued that dominant companies should conduct business in a manner "as if" they are in competition.³³

Therefore, the early court decisions in the EU demonstrated a typical form-based approach, in which the courts often upheld incorrect presumptions about anticompetitive practices, market structures, and market share thresholds (around 40 percent) in establishing the abuse of dominance. The decisions were also primarily based on establishing that a firm was undertaking a presumed anticompetitive practice and thereafter concluding an abuse of dominance.³⁴ For instance, in *Hoffman-La Roche v Commission* (1979), the European Court of Justice (ECJ) stated that abuse of dominance is concluded based on a weakening/reduction of competition in the market as a result of the existence of a dominant firm and any action pursued by it that is different from what it would have undertaken in a situation of normal competition.³⁵

However, in the 1990s, these decisions invited significant criticism,³⁶ as they ignored considering the actual impact of the practices being assessed or evaluating the possibility of any efficiencies. Thereafter, the focus of competition law started moving towards an effects-based approach in assessing potential anticompetitive conduct, which called for a much greater role for economic analysis in reviewing antitrust matters.

The revolution in the approach of antitrust law in EU started (from 1989 onwards)³⁷ with guidelines and regulations³⁸ being issued in relation to merger control and anticompetitive agreements. This created a wave of change in the formulation and implementation of antitrust law towards a more effects-based approach, thereby reducing presumptions of illegality, recognizing efficiencies, and evaluating actual effects on consumer welfare. Further, court decisions also started changing their approach to assessing vertical and horizontal agreements (except for hard-core restrictions that are related to the fixing of prices or sharing of markets)

³³ Ahlborn and Evans (2009), Gerber (1995).

³⁴ Arezzo (2008), Ahlborn and Evans (2009).

³⁵ Behrens (2015), Colomo (2016).

³⁶ Jones and Townley (2014).

³⁷ The introduction of merger control regulations (1989) that focused on undertaking an ex-ante assessment of any potential anticompetitive effects of a merger or an acquisition, primarily based on market conditions and structure.

³⁸ For instance, the Block Exemption Regulations and Guidelines on Vertical Restrictions (1999); guidelines on horizontal cooperation (2000) and transfer of technology (2004)—exempting agreements in the field of research and development, specialization and transfer of technologies from an application of Article 81(1); regulations on the application of Article 81 (2004)—adopting an effects-based framework for interpreting Article 101(1) and undertaking an efficiency assessment under Article 101(3); and new merger regulation and horizontal merger guidelines (2004).

from per se illegal to evaluating the economic reasons for adopting those practices.³⁹

Following these changes, the EU's approach to assessing abuse of dominance cases (under Article 102 of the EC Treaty) also started evolving towards adopting an effects-based approach that is grounded in economic analysis. This is evident from the release of two discussion papers by the EC in 2005, in favour of adopting an effects-based approach. The first paper—'An Economic Approach to Article 82'—was prepared by the Economic Advisory Group on Competition Policy (EAGCP), and presented arguments in support of adopting an effects-based approach and its various positive implications for competition policy enforcement.⁴⁰ The second discussion paper was related to the application of Article 102 of the EC Treaty on exclusionary practices based on a more economic approach. It put forward the 'as efficient competitor' benchmark and the 'defence argument'.⁴¹ This was followed by the publication of a guidance paper in 2008—'Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings'—which adopted the 'as efficient competitor' test and the defence arguments and proposed different criteria based on economic analysis for assessing the various types of exclusionary practices.⁴²

While the EC has been making a marked effort to move towards an effects-based approach through the issue of various discussion papers and guidelines, it has left the interpretation and implementation of the law up to the courts. As a result, the EU has not yet fully built-in the use of an effects-based approach in undertaking abuse of dominance enforcement, similar to many other jurisdictions (except the United States) around the world. This is likely attributable to (1) the predominance of the ordo-liberal or traditional mind set; (2) the ease with which courts can adjudicate as the acts deemed to be anticompetitive are codified, thereby minimizing grey areas and scope for discretion; and (3) convenience, as there is no need to measure anticompetitive and procompetitive effects in a form-based approach, which can in fact be quite cumbersome, time consuming, and technically challenging.

However, while being tilted towards the per se or form-based approach, the EU courts have demonstrated an encouraging shift towards adopting an effects-based approach in undertaking abuse of dominance assessments. The diagram below (Fig. 1) and the paragraphs that follow demonstrate this trend. Using selected EU case law we highlight the predominant approach adopted by the EU in assessing different types of abuse of dominance practices, including an effects-based analysis, at least for certain practices.

The EU used an effects-based approach to rule on predatory pricing in *AKZO Chemie BV v. Commission* (1991). The ECJ stated that if the price is above the

³⁹ Alback (2011), Pera (2008).

⁴⁰ Marty (2015), Gual et al. (2005).

⁴¹ The Commission proposed that a firm could be exempted from the application of Article 82 of the EC Treaty if it could put forward a defence argument justifying its behaviour, or show that efficiencies created by its conduct outweigh any anti-competitive effects: DG Competition, European Commission. (2005).

⁴² European E&M Consultants.

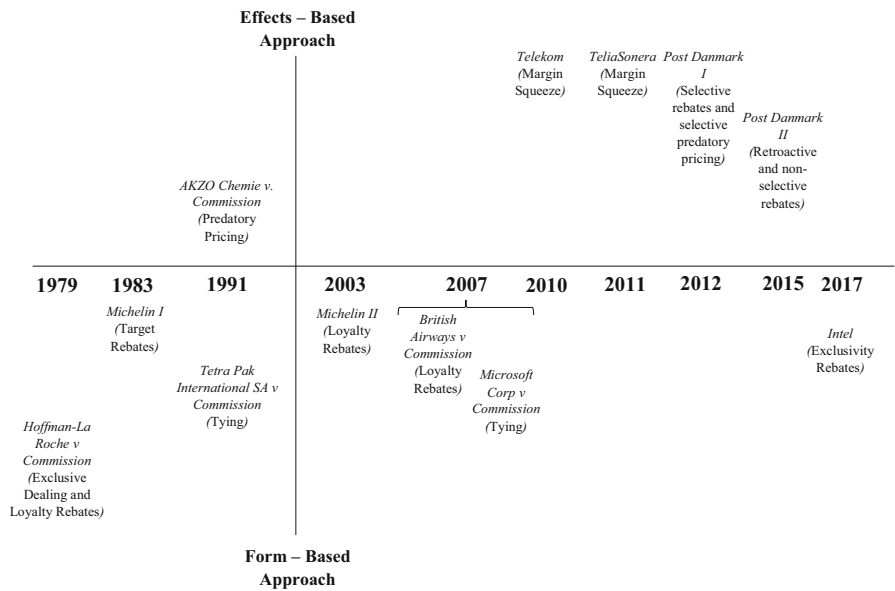


Fig. 1 Legal standard adopted for abuse of dominance practices in the EU

average variable costs (AVC) but below average total costs (ATC), a violation of the law will be considered only if an intention to exclude competitors can be established. The Court found that AKZO priced benzoyl peroxide (for use by the plastic industry) between AVC and ATC and its exclusionary intent was established—as AKZO was found to target customers of its competitor (ECS) to drive ECS out of the market.⁴³

Exclusive dealing and ‘loyalty-inducing’ rebates are subject to a fairly strict standard in the EU.⁴⁴ For instance, in *Hoffman-La Roche v. Commission* (1979)—related to exclusive dealing and loyalty rebates in the vitamins market—the ECJ stated that if a dominant firm attempts to push a purchaser to make all or most of its purchases from the firm, by offering the purchaser rebates and discounts, then the firm will be charged for abusing its dominant position.⁴⁵

In *Michelin v. Commission* (1983)—a case that related to target sales rebates in the replacement tyre market—the ECJ once again adopted a form-based standard—though slightly relaxed—by stating that all circumstances that were related to the structure and operation of the rebate must be examined.⁴⁶ Based on such examination, it was concluded that the target rebate set up restricted dealers from taking advantage of competition between tyre manufacturers and incentivized them

⁴³ Mandorf and Sahl (2013), Gormsen (2013), Edlin (2012).

⁴⁴ Colomo (2016).

⁴⁵ Judgment of the Court of 13 February (1979)—Hoffmann-La Roche & Co. AG v Commission of the European Communities - Dominant position - Case 85/76. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61976CJ0085>.

⁴⁶ Colomo (2016).

to purchase only Michelin tyres to achieve their targets.⁴⁷ However, no analysis on other possible procompetitive effects or efficiencies was considered necessary. Similarly, in *Michelin v. Commission* (2003)—related to loyalty rebates—the ECJ focused on determining whether the nature of the practice undertaken by the firm was loyalty-inducing, and then considered if it could be presumed that it would have anticompetitive effects.⁴⁸

In *British Airways v. Commission* (2007), also related to loyalty discounts, the ECJ said that loyalty inducing discounts have anticompetitive effects and therefore there is no need to assess any effect on consumers. Further, the ECJ accepted the analysis of the Court of First Instance (CFI) on the prevalence of exclusionary effects based on the favourable financial implications for travel agents selling British Airways tickets to meet their targets, and did not assess whether the discount scheme actually created a competitive disadvantage for the competitors or not.⁴⁹

Most recently, in the Intel judgement (2014), which related to exclusivity rebates given by Intel to original equipment manufacturers (OEMs) in the computer chips industry, the General Court (GC) disregarded the need for an effects-based analysis and the as-efficient competitor test that was undertaken by the EC. This was done on the premise that exclusive rebates by dominant enterprises are inherently competition restricting. However, following an appeal by Intel, the ECJ recently referred the case back to the GC in order for it to examine the arguments put forward by Intel with respect to the capacity of the rebates at issue to restrict competition.⁵⁰ This judgement is an important development towards considering justifications and assessing actual harm in abuse of dominance assessments related to ‘loyalty inducing’ rebates.

⁴⁷ Rokita (2015).

⁴⁸ Rokita (2015), Colomo (2016).

⁴⁹ Reckon (2007). *British Airways v. Commission* [2007] EUECJ C-95/04. Retrieved from <http://www.reckon.co.uk/item/a9cb4c25>; Judgment of the Court (Third Chamber) of 15 March 2007, *British Airways plc v. Commission of the European Communities*. Case C-95/04 P. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CJ0095>.

⁵⁰ Court of Justice of the European Union. Press Release No. 90/17. Luxembourg, 6 September 2017, Judgment in Case C-413/14 P Intel Corporation Inc. v Commission.

Box 1 Shift towards an effects-based approach in the United States⁵¹

The US jurisdiction is leading the way in adopting an effects-based approach for competition assessment of anticompetitive practices, inspired by the Chicago and Post Chicago schools of thought, starting in the 1970s. This has been demonstrated in several decisions of US courts. For instance, in *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977)—related to the sale of televisions (that were manufactured by Sylvania) at only locations that were defined by contract, the US Supreme Court—based on a rule of reason analysis—recognized the efficiencies that were achieved in distribution from non-price vertical restraints and that the benefits from inter-brand competition were greater than the loss from limiting intra-brand competition. The Court rejected a per se approach to the case.

Regarding abuse of dominance cases, in *Brooke Group, LTD v. Brown and Williamson Tobacco Co.* (1993)—related to volume rebates as part of a predatory pricing strategy for sale of cigarettes—the US Supreme Court's ruling established that pricing below cost of the dominant firm is not anticompetitive if the firm does not have the ability to recoup losses, which did not seem likely for Brown & Williamson. In *Verizon Communications, Inc. v. Trinko* (2004)—related to discriminatory provision of operations support systems to competitors—the US Supreme Court established that 'insufficient assistance to competitors' is not abuse of dominance through refusal to deal.

In the context of rebates given to selected customers, the EU courts have demonstrated an effects-based approach, which is a significant digression from the approach adopted in exclusivity and loyalty rebates. In the decision of *Post Danmark A/S v. Konkurrencerådet* (2012), relating to selective rebates (selective price cutting to customers) given by Post Danmark to attract its competitors' customers in the unaddressed mail market, the ECJ adopted the 'as efficient competitor' test laid out in the AKZO case. In the investigation, the prices that were charged by Post Danmark were found to be between AVC and ATC; however, exclusionary intent could not be proved. Hence, the ECJ recommended the Danish Court to use cost parameters to assess exclusionary effects.

The ECJ also recommended that if anticompetitive effects were to be found from the cost analysis, Post Danmark would have the chance to provide a justification for its actions as objectively necessary or creating balancing efficiencies. This judgment also marks a noteworthy shift from simply determining anticompetitive intent to assessing an actual risk of foreclosing competition.⁵²

In *Post Danmark A/S v. Konkurrencerådet* (2015)—related to retroactive rebates to customers in the direct mail market—the ECJ adopted an effects-based approach by stating the need to assess all circumstances that were related to the rebate scheme and considering the extent of customers/market affected by the practice. It also dismissed the relevance of the usually applied as-efficient competitor, because the market was characterized by a statutory monopoly, high barriers to entry, and economies of scale. However, it did create a little set-back by stating that establishing a probable anticompetitive effect of a rebate scheme was enough, and there was no need to show a serious harmful effect.⁵³

⁵¹ Crane et al., Gesmer (1978), Gohari (2016), OECD. (2005), Sandicchi (2005), Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP (02-682) 540 U.S. 398 (2004). 305 F.3d 89, reversed and remanded

⁵² Rosenblatt et al. (2013).

⁵³ Oxera (2015).

Tying is considered to be abusive according to EU case law irrespective of actual harmful effects on competitors or consumers. The fact that the dominant firm may enjoy a competitive advantage by tying is given prime importance in such cases.⁵⁴

For instance, in *Tetra Pak International SA v. Commission* (1991)—related to tying in the milk packaging market—Tetra Pak had tied the sale of its cartons and repair and maintenance services with its packaging equipment. The EC ruled against Tetra Pak as it found that there was no connection between selling/leasing machines and the tying obligations set out by Tetra Pak. It is also important to note that Tetra Pak was not dominant in the market (non-aseptic market) where tying took place, and in fact was dominant in the aseptic market. However, the EC stated that since these markets are closely linked, it doesn't matter where Tetra Pak is dominant. It also ignored the fact that Tetra Pak was dominant in the aseptic market due to its innovation and not as a result of any anticompetitive behaviour. Further, the EC assessed all of the three practices involved in the case together: predatory pricing, tying, and exclusion of competitors through acquisitions. Therefore, the EC only theoretically pointed out potential harmful effects of the tying part without actually assessing and weighing pro and anticompetitive effects.⁵⁵

In *Microsoft Corp v Commission* (2007), the CFI found Microsoft guilty by adopting a rather formal approach to analysis. The case was regarding refusal to supply certain computer protocols by Microsoft to competitors and the tying of the Microsoft Media Player to Microsoft's Windows operating system. In this case, the CFI limited 'competition on merits' to only quality, ignoring other possible parameters such as efficiencies in the distribution system (as in the case of Microsoft). The CFI also concluded that Microsoft had a high market share in spite of inferior products compared to competitors (based on a consumer survey) and hence abused dominance. The need for an effects-based analysis with regard to the tying part of the case was rejected by the CFI on the grounds that establishing a tying practice—such that it was not possible for other media players to achieve this level of distribution penetration—was enough to conclude that a disadvantage had been created for competitors.⁵⁶

In cases that are related to margin squeeze, the EU courts demonstrate through their decisions that it is necessary to establish anticompetitive effects and hence adopt an effect-based analysis. For instance, in *Deutsche Telekom AG v. Commission* (2010)—related to a margin squeeze in the network access services market—the ECJ showed that the price difference between Telekom's wholesale price for local loop services that were charged to competitors and its retail price to end consumers was impeding retail competition and an as-efficient competitor could not have sold at Telekom's retail price without making a loss.⁵⁷ In *Konkurrensverket v. TeliaSonera Sverige AB* (2011)—related to margin squeeze in the asymmetric digital subscriber line (ADSL) input services—the ECJ stated that when

⁵⁴ Colomo (2016).

⁵⁵ Gustafsson (2007).

⁵⁶ Ahlborn and Evans (2009).

⁵⁷ Skadden (2010).

determining anticompetitive behaviour, the effects of each case ought to be determined rather than the degree of dominance enjoyed by the firm.⁵⁸

Furthermore, while the EU competition authorities and courts are trying to move towards an effects-based analysis, adoption of an effects-based approach in the EU has sometimes been limited due to the common market approach where freedom of trade between member states is given utmost priority and restrictions on parallel trade are often considered as restrictions by object. For instance, in *British Leyland v. Commission* (1986), the company was found guilty because it refused to issue left-hand certificates to prevent a re-import of its vehicles from other member states (with right-hand drive), where the vehicles were priced lower.⁵⁹ However, such a strategy undertaken by a firm is not necessarily anticompetitive just because it restricts parallel trade. Instead, the firm could be undertaking geographic price discrimination to extract maximum rent based on willingness to pay and other factors across locations. It could also be competing on a more targeted basis in response to local conditions. Such price discrimination is usually not restrictive and cannot be presumed to reduce competition between firms or cause consumer harm.⁶⁰

Therefore, the case law discussed above provides evidence that the EU—essentially a form-based jurisdiction—is gradually adopting an effects-based approach through changes in regulations and issuance of guidelines, and based on the precedence set by the EU courts. Except for exclusivity rebates, loyalty rebates, and tying, the EU case law has demonstrated relaxation of the form-based analysis and a movement towards the effects-based analysis for most other practices including predatory pricing, margin squeeze, and other forms of rebates.

3 Development of Jurisprudence in India in Cases Related to Abuse of Dominance

Section 4 of the Indian Competition Act 2002 defines ‘dominant position’ as a “position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.” The dominance of an enterprise or group is established based on several factors that are identified under Section 19(4) of the Act. It is important to note here that the Act does not prohibit dominance or the presence of market power per se, but prohibits only an ‘abuse’ of the dominant position. Under Section 4(2) of the Act, the action of a dominant enterprise is considered to be an abuse of dominance if it: (a) imposes unfair or discriminatory conditions or prices (including predatory

⁵⁸ Judgment of the Court (First Chamber) of 17 February 2011. *Konkurrensverket v. TeliaSonera Sverige AB*. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=CELEX%3A62009CJ0052>.

⁵⁹ Judgment of the Court (Fifth Chamber) of 11 November 1986. *British Leyland Public Limited Company v. Commission of the European Communities*. Retrieved from <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61984CJ0226>.

⁶⁰ Zenger and Walker (2012).

prices) in the purchase or sale of goods or services; (b) limits or restricts production and supply of goods and services or market or technical or scientific development to the prejudice of consumers; (c) undertakes practice(s) denying market access; (d) makes contracts conditional on supplementary obligations unrelated with the subject of the contracts; or (e) uses its position of dominance in one relevant market to enter into or protect another relevant market.⁶¹

The competition law on abuse of dominance in India is primarily enforced using a form-based approach where in most cases the emphasis is on assessing dominance of the firm in the relevant product and geographic markets and then assessing if the action that has been pursued by the dominant firm falls into one or more of the five categories mentioned above. However, this is not an effective approach to competition law enforcement, especially for a developing country like India where it may be too premature to have a competition law that does not give sufficient importance to efficiencies, as the countries' markets are still quite young and rapidly evolving. Therefore, the Indian competition law's enforcement of Section 4 of the Act calls for an effects-based approach, that lets firms innovate and operate freely to maximize economic growth and consumer welfare.

The effects-based approach is also consistent with the objective of the Indian competition law as stated in the Preamble of the Act—“[A]n Act to provide, keeping in view of the economic development of the country,”—thereby implying that competition is not the final destination by itself, but is rather a means to achieve economic goals. This, along with the mandate that is laid out for the CCI in the Preamble—(a) to prevent practices having adverse effect on competition; (b) to promote and sustain competition in markets; (c) to protect the interests of consumers; and (d) to ensure freedom of trade carried on by other participants in markets—together imply that consumer welfare should be the focus of antitrust enforcement in India, with economic development as the standard for consumer welfare.⁶²

Furthermore, even in a general context, if the substantive standard of an authority is only consumer welfare and efficiency (without special attention to economic development), the effects-based analysis is still naturally the more effective legal standard to be adopted by the competition authority. This is because an effects-based standard results in: (1) lower costs of decision errors whenever such actions cannot be considered to be per se harmful or per se beneficial for sure; (2) improved deterrence from undertaking anticompetitive behaviour by drawing a better discrimination between the harmful and benign effects of anticompetitive behaviour; and (3) better legal certainty, especially given the ability of competition authorities to adjust their penalty policies.⁶³

Further, similar to the EU case law, while the Indian law on abuse of dominance adopts more of a per se tenor in its formulation, certain clauses in the act open up the scope for undertaking an effects-based analysis. For instance, to determine if the firm is able to ‘operate independently’ or ‘affect its competitors or consumers or the

⁶¹ Competition Act (2002).

⁶² Malik (2016), Patil et al. (2013).

⁶³ Katsoulacos (2016).

relevant market’, as the measure for assessing dominance, the CCI will have to undertake an effects-based analysis to some degree,⁶⁴ and not just rely on market shares and firm size. Further, Section 19(4) of the Act which must be used in assessing dominance of a firm includes an analysis of several factors such as market structure, dependence of consumers on enterprise, countervailing buying power and vertical integration, and is also a non-exhaustive list (“any other factor which the Commission may consider relevant for the inquiry”), therefore calling for an effects-based approach.

In terms of determining an ‘abuse’ of dominance, the explanation to Section 4 (a) of the Act excludes from its purview unfair or discriminatory conditions or pricing if they are adopted to “meet the competition”: to match rival offers. Modern economic theory recognizes that price discrimination may not always be bad. It can in fact sometimes be welfare-enhancing, by allowing cross-subsidization of low-income consumers, who otherwise may not be served at all. If, despite this, discrimination is to be made an offence, then perhaps it is sensible to allow pricing to meet the competition as a defence. The wording of the explanation to Section 4 explicitly includes predatory pricing.⁶⁵ Further, Section 4 (b) (ii) of the Act—related to the practice of harming or restricting technical or scientific development—emphasizes the need for showing a “prejudice to consumers”, which is a fundamental point in an effects-based approach.

Encouragingly, the Indian case law on abuse of dominance, while still at a nascent stage (and historically adopting a form-based approach), has demonstrated several instances of an application of an effects-based analysis:

3.1 Assessing Dominance

In assessing dominance, the CCI has heavily relied on the market share of the enterprise in *Belaire Owner’s Association v. DLF Ltd* (2011) and *Kapoor Glass Pvt Ltd v. Schott Glass India Pvt Ltd* (2012). However, in *MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd* (2011), the CCI held NSE to be in a dominant position in the currency derivative segment of stock exchange services—primarily due to NSE’s relatively large size and resource base in the Indian capital market as a whole. In doing so, the CCI linked the test of determining dominance to the ability of an enterprise to act independently of its competitors, consumers, or the relevant market. In *Indian Competition Review v. Gateway Terminals India Pvt Ltd & Others* (2017),⁶⁶ where the market share of Gateway Terminals India Private Limited (GTPL) was in excess of 40 percent, the CCI observed that the presence of four other terminals and 33 other container freight stations in the market would act as a competitive constraint upon GTPL from acting independently in the relevant market. The evolution in the view of the CCI reflects their effort to attain global standards.

⁶⁴ Franczyk (2016).

⁶⁵ Bhattacharjee (2003).

⁶⁶ Competition Commission of India, Case No. 47 and 56 of 2016.

3.2 Assessing Abuse of Dominance

In assessing abuse of dominance, the CCI has used more of an effects-based approach in cases such as *Dhanraj Pillay v. Hockey India* (2013)⁶⁷ and *Kapoor Glass Pvt Ltd v. Schott Glass India Pvt Ltd* (2012). In *Dhanraj Pillay v. Hockey India* (2013), while determining abuse of dominance, the CCI assessed restrictive conditions that were imposed by a sporting organization. The CCI noted that the conditions were inherent and proportionate to the objectives of the sport, and that they could not be held liable on a per se basis. In this manner, the CCI suggested that the restrictive conditions of the sporting organization would only qualify as abuse of dominance, where its effects were anticompetitive.

Similarly, in *Kapoor Glass Pvt Ltd v. Schott Glass India Pvt Ltd* (2012), the Competition Appellate Tribunal (COMPAT) assessed the discounting practices to determine whether they were a form of discriminatory pricing. The COMPAT quoted with approval the minority order of the CCI in the same case, which alluded to the effects doctrine in the assessment of the discount practices of Schott Glass. The COMPAT noted that the facts of the case should have been enough for the CCI to hold that there was no effect on the downstream market, and that the consumers did not suffer on account of the pricing practices of the company. Additionally, the COMPAT noted that Article 102 of the EU Treaty and the provisions of the Robinson-Patman Act of 1936 of the United States endorse intervention where competition is harmed or is likely to be harmed, and that the CCI ought to have adhered to this principle.

In *REC Power Distribution Company Ltd* (2016), the Rural Electrification Corporation (REC) and the RECPDCL were investigated for abuse of dominance on two fronts: (1) whether they had leveraged REC's dominant position in the market for financing rural electrification projects in India to enter or protect RECPDCL's position in the market for preparing detailed project reports (DPRs); and (2) whether their conduct denied market access to other consultancies that were competitors of RECPDCL for preparing detailed project reports (DPRs) under the rural electrification schemes in India. Adopting an effects-based analysis, the CCI dropped these allegations against REC and RECPDCL, stating that the leveraging doctrine does not apply in this case as no evidence (e.g., faster approvals of DPRs prepared by RECPDCL) was found of any explicit 'conduct' by the parties, which demonstrated that they 'used' their dominance in the upstream market to enter or protect themselves in the downstream market.

The CCI further added that simply the awarding of work on a nomination basis cannot be presumed to be anticompetitive. Given the lack of any explicit evidence of anticompetitive conduct, the CCI also undertook an analysis of data related to DPRs in terms of rejection rates and amount sanctioned to assess prevalence of any anticompetitive conduct. A similar analysis of availability of direct evidence and data on number of DPR preparation assignments given to the various competitors of RECPDCL was also undertaken by the CCI before reaching its conclusion.

In *MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd* (2011), MCX asserted that NSE abused its dominant position through predatory pricing in the form of waivers of transcription fees, admission fees, and data feed fees. The

⁶⁷ Competition Commission of India Case No. 73 of 2011.

Director General (“DG”), in an investigation into the information provided by MCX, found NSE’s pricing to be predatory in nature as similar waivers had not been extended to the other segments of the stock exchange market by NSE. The CCI found NSE to be abusing its dominant position as well, in concurrence with the view of the DG. First, the CCI pointed out that the segment was no longer in its nascent stage—so there was no need for the zero pricing policy. NSE’s claim that it didn’t need to charge any price as its variable costs were zero was found to be unacceptable, in light of the DG’s findings regarding the sources of variable costs which NSE could not deny incurring.

NSE’s pricing was found to be beyond promotional and was considered penetrative. However, the CCI did not consider the pricing to be predatory. Instead it was considered to be unfair. The CCI noted that if even zero pricing by a dominant player cannot be interpreted as unfair, while its competitor is slowly bleeding to death, then the CCI would never be able to prevent any form of unfair pricing including predatory pricing in the future.

The CCI—while laying down the test for predatory pricing in the NSE Case—stated,

before a predatory pricing violation is found, it must be demonstrated that there has been a specific incidence of under-pricing and that the scheme of predatory pricing makes economic sense. The size of Defendant’s market share and the trend may be relevant in determining the ease with which he may drive out a competitor through alleged predatory pricing scheme-but it does not, standing alone, allow a presumption that this can occur. To achieve the recoupment requirement of a predatory pricing claim, a claimant must meet a two-prong test: first, a claimant must demonstrate that the scheme could actually drive the competitor out of the market; second, there must be evidence that the surviving monopolist could then raise prices to consumers long enough to recoup his costs without drawing new entrants to the market.

The dissenting order to the majority opinion, however, allowed for an objective justification for the alleged anticompetitive conduct of unfair pricing on part of NSE. Though not articulated in the dissent opinion, the theory of multi-sided markets can offer an objective justification to the conduct. Skewed price structure can arise when a stock exchange is in its infancy and has to deal with the ‘chicken and egg problem’: designing strategies to get both sides on board and obtaining a critical mass so as to attract agents on all the sides.^{68, 69} In platform markets, it is common practice to supply services for free on only one side of the market. This

⁶⁸ An important characteristic of two-sided markets is that the demand on each side vanishes if there is no demand on the other—regardless of what the price is. Men will not go to dating clubs that women do not attend because they cannot get a date. Merchants will not take a payment card if no customer carries it because no transaction will materialize. Computer users will not use an operating system that does not have applications they need to run. Sellers of corporate bonds will not use a trading mechanism that does not have any buyers. In all these cases, the businesses that participate in these industries have to figure out ways to get both sides on board: Evans (2003).

⁶⁹ Weyl (2010).

helps the platform owner to obtain critical mass on that side and thereafter exploit network effects to increase participation in the other side of the platform. Additionally, it is certainly possible that a waiver would be welfare enhancing, as it could stimulate trading and liquidity on one segment, which in turn would enhance the liquidity standing of the stock exchange as a whole.

In two subsequent cases that involved predatory bidding—*Transparent Energy Systems Pvt Ltd v. TECPRO Systems Ltd* (2013)⁷⁰ and *HLS Asia Ltd, New Delhi v. Schlumberger Asia Services Ltd, Gurgaon & Others* (2013)⁷¹—the CCI held that predatory pricing had to be assessed on the basis of an appropriate cost benchmark (i.e., average variable cost), as reduction of prices was actually the essence of competition. The CCI also observed that predatory pricing must be assessed on the basis of actual prices and not projected prices.

However, the CCI has in certain cases—such as *Faridabad Industries Association v. Adani Gas Limited* (2014)⁷² and *GHCL Ltd v. Coal India Ltd* (2015)⁷³—disregarded the effects resulting from conduct, and preferred to employ the form-based approach. In *Faridabad Industries Association v. Adani Gas Limited* (2014) and *GHCL Ltd v. Coal India Ltd* (2015), the stipulation of certain terms in the supply agreements, which the CCI viewed as unfair, was sufficient for it to arrive at the finding that the parties in question were abusing their dominant positions. Such a finding was arrived at, irrespective of the implementation of these terms and any actual harm resulting from these terms.

3.3 Objective Justification of Anticompetitive Practices

The Act imposes a strict liability on an enterprise that has been found to abuse its dominant position. It makes no mention of adopting an effects-based approach, except a limited defence of actions undertaken to meet competition. However, this limited defence is available only with respect to the imposition of unfair or discriminatory prices or conditions and not in relation to any other types of abuses.

Despite their views as discussed above, the CCI has passed judgements where they have accepted objective justifications. A finding of the CCI in *Kapoor Glass Pvt Ltd v. Schott Glass India Pvt Ltd* (2012), which has further been upheld by the COMPAT, held that Schott Glass was within its rights to cease supplies to a customer in order to protect its trademarks and that its refusal to supply to such customer was objectively justified. In *Faridabad Industries Association v. Adani Gas Limited* (2014), the CCI held that a restriction that was imposed by a dominant enterprise may not be abusive if such dominant enterprise is imposing such restriction because it is subject to the same restriction by a third party. In *Prasar Bharati v. TAM Media Research Pvt Ltd* (2016),⁷⁴ the CCI allowed an objective justification against the allegation of discriminatory pricing. In *Ghanshyam Das Vij*

⁷⁰ Competition Commission of India Case No. 09 of 2013.

⁷¹ Competition Commission of India Case No. 80 of 2012.

⁷² Competition Commission of India Case No. 71 of 2012.

⁷³ Competition Commission of India Case No. 08 of 2014.

⁷⁴ Competition Commission of India Case No. 70 of 2012.

v. Bajaj Corp Ltd & Others (2015),⁷⁵ the CCI has observed that exclusive distribution agreements can be objectively justified on certain grounds, such as protection from free-riding, efficient management of product sales, and economic efficiencies.

The case law that has been discussed in this section demonstrates that the CCI has adopted an effects-based analysis in several instances, albeit in a piecemeal fashion. The CCI still predominantly follows a form-based approach, with its theoretical underpinning being the structure-conduct-performance (SCP) paradigm, now disregarded by antitrust scholars around the world. An effects-based approach based on sound economic analysis is the right way forward for the modern Indian economy as it will enhance the effectiveness and accuracy of law enforcement. At the risk of overstatement, the CCI needs consistently to integrate an effects-based analysis into the enforcement of Sect. 4, or else the economic basis of the law will be diluted and the coherence with the other sections of the law will be undermined. Moreover, similar to the EU, the CCI also needs to demonstrate certain predictability about the legal standard that it adopts for each type of abuse of dominance practice. Once a legal standard that is grounded in modern economics has been established for various provisions of abuse of dominance, the ease of administration will be automatic and will prevent the authority from being opportunistic in the enforcement of this section.

4 Conclusion

The role of competition law is to ensure that the process of competition in the market works efficiently. Given that competition benefits consumers, competition law in effect promotes consumer welfare. In principle therefore, competition authorities that enforce the law have to consider whether a business practice, conduct, or transaction alters the dynamics of competition in the market, and as a result negatively affects consumer welfare.

However, such an effects-based approach to competition law enforcement is not necessarily the norm, including in advanced jurisdictions such as the EU, especially in abuse of dominance cases. Instead, a form-based approach which is formulaic is used, and the effect of a conduct or practice is not even a part of the calculus.

The success of a form-based approach in abuse of dominance cases depends heavily on the accuracy of market definition and assessment of dominance in the relevant market. False positives and negatives—where a firm is found to be dominant/not dominant due to a wrong definition of the relevant market and/or an inaccurate determination of dominance—can very easily result in a muddled jurisprudence and uncertainty that would set-back a competition authority and its credibility. Furthermore, with rapid technological change and innovative business models, the traditional tools of market definition and concepts of market power are no longer valid. In such circumstances, an effects-based approach produces more reliable assessments of anticompetitive behaviour than would a form-based

⁷⁵ Competition Commission of India Case No. 68 of 2013.

approach. Further, procompetitive effects are not considered at all in a form-based approach, and this can be problematic when some of the restrictions/behaviours might result in efficiencies that ultimately benefit the consumer and promote innovation and economic growth.

Like the EU, India has followed a form-based approach in abuse of dominance cases. While there are instances when what can in effect be categorized as an effects-based approach has been used in both majority and minority opinions, the general acknowledgement is that the Competition Act (2002) has to be interpreted as suggesting a form-based approach when it comes to abuse of dominance. Given that India is a fast-growing economy with an increasing role for the private sector, clear understanding of what constitutes a contravention of the competition law and recognition of possible efficiencies and business justifications is very important. Otherwise, innovation and the growth of the private sector will be stifled, and this will in turn have a detrimental effect on economic growth and consumer welfare.

While some would argue that rules bring in a certain element of certainty, what we have seen in India is that there is fair amount of ambiguity and subjectivity even with a form-based system. For instance, the issue of whether an entity is dominant or not itself is subjective—what are the market share and Herfindahl–Hirschman Index (HHI) thresholds, and how do these thresholds change by industry (for instance, such thresholds might not make sense in a platform market). Further, the rule-based system also ignores any possible procompetitive effects. Therefore, we believe that an effects-based approach will in fact lead to a more consistent and predictable competition law regime: grounded in principles of economics, weighing pro and anticompetitive effects, and allowing for like practices (i.e., practices with the same effect) being treated alike.

Last on the issue of the ease of administration of a form-based approach, we believe that it is a flawed argument. It is not obvious that a case-by-case approach to determine the likely impact of a practice is difficult or impossible to administer as economic science brings with it a set of rules and principles that bring coherence to the administration of the law. Moreover, given that an effects-based analysis is readily undertaken in merger and acquisition assessment, it is safe to assume that a similar approach can easily be adopted by the CCI in undertaking abuse of dominance assessment as well. Nevertheless, for the purposes of assisting adjudication, and bringing clarity to the stakeholders, we suggest that the CCI should establish certain guidelines for undertaking abuse of dominance assessments, similar to what has been done in the EU. These guidelines can highlight the admissible justifications for each of the conduct that may not constitute an abuse (which we discussed in Section 2 above). We do understand that guidelines are not legally binding, but they will go a long way toward providing a structured approach to the implementation of the law. We also suggest putting in place certain safe harbours to help administration further and reduce processing time.

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