The Asia-Pacific Antitrust Review
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India: Abuse of Dominance
Complementing our news coverage, The Asia-Pacific Antitrust Review 2019 provides an in-depth and exclusive look at the region. Preeminent practitioners have written about antitrust issues in eight jurisdictions, as well as one regional overview for merger control. The edition includes updates to 16 chapters and adds two new ones – overviews of antitrust in Malaysia and Korea. The authors are unquestionably among the experts in their field within these jurisdictions and the region. The volume includes contributions from the chairs of the Australian Competition and Consumer Commission and Korea’s Fair Trade Commission, as well as the chief executive of Hong Kong’s Competition Commission. Other experts look at a range of topics, including cartels and mergers in India and Japan and abuse of dominance in India and China. This annual review expands each year, especially as the Asia-Pacific region gains even more importance in the global antitrust landscape. It has some of the world’s most developed enforcers – in Australia, Korea and Japan, for example – but it also has some of the world’s newest competition regimes, including in Malaysia and Hong Kong.
# India: Abuse of Dominance

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## Summary

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The enactment of the Competition Act, 2002 (the Act), the principal legislation governing competition law in India, along with the establishment of the Competition Commission of India (CCI)\(^1\) as its chief enforcement authority, has been one of the biggest game changers in the Indian regulatory space. As with competition regimes in mature jurisdictions, India’s competition law covers the regulation of anticompetitive conduct, abuse of dominance and unilateral conduct, and combinations. This chapter focuses on the enforcement of provisions relating to abusive conduct of enterprises and explores the evolving trends in this area.

**ABUSE OF DOMINANCE UNDER THE ACT**

The regulation of abuse of dominance is enshrined under section 4 of the Act. The substantive test and benchmark for analysis under the Act is to prohibit practices that have an appreciable adverse effect on competition in India. The Act prohibits the abuse of a dominant position by any ‘enterprise or group’, and defines dominant position as a position of strength enjoyed by an enterprise in the relevant market in India that enables it to:

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

In India, the determination of dominance is based on a qualitative assessment of the prevalent market dynamics and the relative position of strength enjoyed by the market participant. While determining the abusive conduct of a dominant enterprise or group, a three-step analysis is required to be undertaken involving the determination of the relevant market, assessment of dominance and the assessment of abusive conduct.

There is no bright line market share test, and for the determination of dominance under the Act, the CCI is required to holistically consider several factors such as size and resources of the enterprise, size and importance of competitors, economic power, dependence of consumers on the enterprise, market structure, entry barriers and so on.

**THE CCI’S JURISDICTION**

The Act prohibits abuse of dominance by an ‘enterprise or group’. For the purposes of the Act, a person or a department of the government engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, would constitute an enterprise.\(^2\) The Act is ownership-neutral and is equally applicable to private enterprises as well as government bodies and departments, acting in their commercial capacity or when engaged in economic activities. Consequently, even when a public works department invites tenders for the award of contract for the construction of roads or bridges, for example, the public works department would constitute an enterprise given that it interfaces with the wider market of road and bridge construction services.\(^3\)

However, the CCI’s jurisdiction does not extend to the formulation of policies by the government (as this does not fall under the realm of commercial or economic activity)\(^4\) or to sovereign functions of the government.\(^5\)

The former Competition Appellate Tribunal (COMPAT)\(^6\) and the CCI have also clarified that ‘profit motive’ is not a sine qua non for qualifying as an enterprise.\(^7\)
The CCI has also recognised the applicability of the provisions of section 4 of the Act in markets that do not reflect the traditional buyer-consumer relationship. In a case against Google (Google), where the CCI imposed a headline fine of 1.4 billion rupees on the company, Google argued that in the absence of a purchase or sale of goods or services (as Google provides search to users for free), provisions of section 4 would be inapplicable. Emphasising the role of big data in the digital economy, the CCI held that the ‘eyeballs’ and the data that users provided Google facilitated the generation of revenue by Google through attracting advertisers. This rendered Google’s arguments on there being no sale or purchase irrelevant.

**RELEVANT MARKET**

It is only within the parameters of a correctly defined relevant market that dominance of an entity can be assessed. Therefore, delineation of the relevant market is imperative to any abuse of dominance analysis.

The relevant market is an aggregation of the relevant product market and the relevant geographic market. The relevant product market is defined as a market for all those products or services regarded as interchangeable or substitutable by the consumer, based on the characteristics of the product, its price and its intended use. The relevant geographic market is defined as a market comprising the area in which there exist distinct homogenous competitive conditions in terms of the demand and supply of goods or services that can be distinguished from the conditions prevailing in the neighbouring areas.

In the absence of specific guidelines for defining the relevant market and economic tests capable of being applied in the Indian market (on account of a lack of market data, challenges in conducting surveys and identifying a suitable sample group, for example), determination of the relevant market by the CCI is often guided by common perception and lacks adequate economic data or analysis. This is evidenced by the CCI’s decision in Surinder Singh Barmi v The Board of Control for Cricket in India (BCCI), where the CCI restricted the market for the organisation of professional domestic cricket leagues or events in India by ‘conceptually’ applying the small but significant non-transitory increase in price test and observing that the ‘alleged abuse plays an important role in identifying the focal product’.

In terms of the geographic market, based on the market structure and conditions, the CCI has restricted the relevant geographic market to particular suburbs or territories in some cases. For instance, in a case relating to the denial of market access to the terminalling infrastructure at Visakhapatnam Port, the CCI restricted the geographic market to the port as the hinterland it served could not be served by adjacent ports such as Haldia and Ennore.

Interestingly, in its order in Maharashtra State Power Generation Limited v Coal India Limited and Ors (Coal India), the CCI noted that defining a global market as the relevant market was contrary to the express provisions of the Act since the Act indicated that a ‘dominant position’ is a position of strength enjoyed by an enterprise in the relevant market in India. This approach was also mirrored in Google.

In terms of the product market definition, the CCI has primarily considered demand-side substitution to be a determining factor in delineating the relevant product market. In cases concerning abuse of buyer’s power (and not seller’s power), the CCI has applied the concept of demand-side substitutability ‘in reverse’ (i.e., from the perspective of suppliers and their ability to switch between various procurers when determining the relevant market). The CCI has also sparingly placed reliance on supply-side substitutability when
delineating the relevant product market, as evidenced in its decision in Bharti Airtel Limited v Reliance Jio Infocomm Limited.\textsuperscript{16} In the instant case, the CCI refused to delineate separate telecommunication service markets based on technology such as 4G or 3G by, among other things, considering that any new entrant in the telecommunication market would likely adopt the most advanced technology available at that moment and later upgrade its network to newer technologies from time to time.

In its analysis of innovation-centric or technology-enabled markets, the CCI has refrained from delineating the relevant market in an expansive manner. Analysing a complaint filed by an online sellers association against an e-commerce platform, the CCI defined the relevant market as that for the 'services provided by online marketplace platforms for selling goods in India' (Flipkart). While doing so, the CCI noted the distinction between online and offline channels, and between an online retail store and an online marketplace platform.\textsuperscript{17} Similarly, in Google, the regulator was of the view that online general web search services were not substitutable with either:

- typing the URL of websites directly, as users may often be unaware of the URLs; or
- specialised search services, since they permitted search on particular topics or areas only.

A recent decision of the CCI also brings to the forefront the question of whether a technological advancement or variation would itself imply a change in the characteristic of a given product, thereby warranting the identification of a separate product market. In a case involving abuse of dominance by a manufacturer of magnetic resonance imaging (MRI) machines, the CCI, through a majority order, found reason to define a separate relevant market for a specific type of MRI machine; namely, dedicated standing/tilting MRI machines (G-Scan machines). The CCI’s decision was based on factors such as the unique ability of these machines to scan the body in a weight-bearing position and its advantages over conventional MRI machines in terms of being less claustrophobic and effectively diagnosing ailments of specific portions of the body. However, the chairperson of the CCI disagreed with the majority order, finding that different technological features and functionalities do not constitute a separate product market.\textsuperscript{18}

\textbf{ASSESSMENT OF DOMINANCE}

While determining dominance, the CCI considers factors listed under section 19(4) of the Act. Although the CCI acknowledges that market shares are ‘the most important criterion/yardstick in the assessment of dominance’, there is no bright line market share test and the CCI has often adopted a holistic approach in concluding dominance. Reaffirming this view, in Mr Ramakant Kini v Dr L H Hiranandani Hospital, Powai, Mumbai,\textsuperscript{19} while assessing the dominance of Hiranandani Hospital in the relevant market for the provision of maternity services by super speciality and high-end hospitals within a distance of 12km from the Hiranandani Hospital, the CCI clarified that the market share of an entity is ‘only one of the factors that decides whether an enterprise is dominant or not, but that factor alone cannot be decisive proof of dominance’.

Going a step further, the former COMPAT, in Meru Travels Solutions Pvt Ltd v CCI,\textsuperscript{20} while admitting an appeal from the CCI’s order that dismissed an information of alleged abuse of dominance by Uber, specifically held that the CCI should have considered the larger picture in the radio taxi service market in terms of the status of funding, global developments,
statements made by leaders in the business, the availability of financial resources, the existence of discounts and incentives, and so on. Further, the former COMPAT observed that the availability of financial resources and the existence of discounts and incentives associated with the model of business adopted are good supporting reasons to suggest that the issue of dominance needs to be seen from a perspective that does not limit to the market share of the enterprise alone.

In Google, the CCI also considered Google’s scale advantage, noting the unlikely possibility of users switching to competing platforms if Google were to reduce quality or innovation. The CCI also factored the entry barriers and the absence of countervailing buyer power of users or advertisers, as well as Google’s market shares, which the CCI noted should ideally have been transient in innovation-driven high-technology markets.

Other factors that the CCI has recently considered when assessing dominance include the presence of competitors, such as in Flipkart, where the CCI took into account the presence of Amazon as a significant competitor; and the dependence of consumers, such as in Sony/Star, where the CCI noted that the fact that no distributor could offer a viable portfolio of channels to its consumers without including channels of Sony and Star reaffirmed their dominance.

ASSESSMENT OF ABUSIVE CONDUCT

Section 4 of the Act lists a number of practices considered to be abusive that can broadly be divided into two separate kinds of abuses: exclusionary abuses, which include practices of the dominant entity having the effect of excluding other players in the relevant market; and exploitative abuses, which include practices of the dominant entity that tend to exploit their position by imposing unfair or discriminatory restrictions on other players and consumers in the market.

Statutorily, an abuse of dominance is required to be treated as a per se violation, and the CCI has followed this approach in several cases, including in BCCI, where the CCI found BCCI to have allegedly denied market access in the organisation of professional domestic cricket leagues or events in India by virtue of a clause in the media rights agreement entered into by it.

However, the CCI has also adopted an effects-based approach in some of its decisions, where it has required that the abusive conduct lead to an anticompetitive effect or distortion in the market, or harm to consumers. Recently, in GAIL the CCI found ‘enough justification’ for execution of long-term regassified liquefied natural gas contracts by GAIL given the nature of the industry and the product involved. Moreover, regarding allegations of abuse for having imposed the Take or Pay liability (an obligation on the buyer to pay for quantities of gas not taken but agreed to be taken), the CCI expressly noted that the ‘effect based on evidence’ of such conduct would need to be examined.

Trends in the CCI’s recent orders also indicate the CCI’s willingness to extend findings of abuse to novel categories of conduct and markets; recent findings of search bias by Google is one example. In this case, the CCI found Google to have abused its dominance by:

- resorting to search bias in its universal search results, which were not strictly determined by relevance and thus unfair to users;
prominent placement of its own commercial flight unit, linked to its specialised search options, which deprived users additional choice; and

restrictive clauses under intermediation agreements that prevented partners from using search services of competing search engines.

Further, in Biocon Limited v F Hoffmann-La Roche AG,23 the CCI recognised the possibility, albeit in exceptional cases, of legal processes being pursued by a dominant enterprise as a tactic to exhaust smaller rivals' resources and delay or prevent their entry in the relevant market, which would amount to an abuse within the meaning of the Act.

Recently, the CCI has also reviewed protectionist conduct of dominant enterprises. For instance, in HPCL Mittal Pipelines Limited v Gujarat Energy Transmission Corporation Limited & Ors,24 the CCI considered allegations of denial of open access by the State Load Dispatch Centre, GETCO Gujarat (SLDC), which was required by consumers to source electricity through alternative suppliers. The CCI noted that every consumer hopeful of availing open access for the supply of electricity in Gujarat was required to obtain the approval of SLDC and therefore SLDC was found to be dominant. On assessment of the alleged abuse, the CCI prima facie found SLDC's conduct to be in contravention of section 4 of the Act. Additionally, the CCI also noted that SLDC was leveraging its dominance to adversely affect competition in the downstream market, where it was operating through a group entity.

PENALTIES AND SANCTIONS

The CCI has the power to impose the highest economic penalties in India among all Indian regulators. In case of contravention of section 4 of the Act, the CCI is empowered to levy a penalty of up to 10 per cent of the average turnover of the enterprise for the preceding three financial years or direct the division of a dominant enterprise.

The CCI has taken into account certain factors that may mitigate the size of the penalty. For instance, the CCI has considered the steps taken by the opposite parties in the interim period (between the informant filing information alleging an abuse of dominance and the CCI’s order), which may have the effect of reducing competition law concerns, while determining the penalty to be imposed.25 On the other hand, prolonged and severe abusive conduct, such as denial of market access, has been considered by the CCI to be an aggravating factor in determining the penalty. In Coal India,26 where the CCI found Coal India Limited (CIL) and its subsidiaries to have contravened section 4 of the Act, the original order of the CCI in 2013 imposed a penalty of 17.7 billion rupees. This order was remanded back to the CCI by the former COMPAT on grounds of violation of the principles of natural justice. While passing its order in 2017, the CCI reduced the penalty to 5.9 billion rupees in light of the transformative steps taken and effected by CIL, during the pendency of the proceedings and even post-passing of the original order by the CCI.

Additionally, the contentious issue of turnover to be taken into account while imposing penalties under the Act has finally been settled by the Supreme Court of India (Supreme Court) in its decision in Excel Crop Care,27 where it laid down a two-step approach to determine the size of the penalty, requiring that the penalty:

- should be based on the determination of the relevant turnover; and
- should be determined after considering the aggravating and mitigating circumstances relevant to each case.
The Supreme Court’s decision was adopted by the CCI in Google, which considered the revenue generated by Google from its Indian operations only. Given the nature of two-sided markets, where the search side is free and the other side is monetised through advertisements, the CCI regarded the revenues generated from the entire platform for the imposition of penalty.

Additionally, the CCI has frequently applied its powers under section 27 to direct modification of abusive clauses in agreements. This power has, however, been read down by the former COMPAT to only apply to those cases where there is a contravention of the provisions of section 3 of the Act pertaining to anticompetitive agreements. In DLF, the former COMPAT disapproved of the approach adopted by the CCI in directing the apartment buyers’ agreements (from which the abuse of dominance behaviour of DLF stemmed) to be amended, and noted that there was ‘absolutely no justification on the part of the CCI to change the language of the agreement altogether’. The CCI has appealed the former COMPAT’s DLF order before the Supreme Court and has continued its practice of requiring modification of abusive clauses. In fact, in GAIL, although the CCI found no contravention of section 4, the CCI required GAIL to provide suitable exit clauses in its long-term contracts.

TRENDS IN RECENT ORDERS

The shift in focal point globally to digital markets has been mirrored in India, with the CCI reviewing several cases in innovation and technology driven markets. As mentioned above, the CCI recently imposed a penalty on Google at the rate of 5 per cent of its average turnover, for abusing its dominance in online general web search and search advertising. Noting the rapid growth in innovation cycles in the digital economy, the CCI observed that public intervention in these markets should be targeted and proportionate. It also emphasised that intervention in markets marked by innovation should be calibrated to ensure that it does not restrain innovation.

Similarly, in Ola, the CCI refused to intervene in the online ride-hailing services market by finding that Ola was not dominant in the market for radio taxi services in Bengaluru. The CCI’s conclusion was primarily based on its unwillingness to view market shares in isolation to arrive at a conclusive finding regarding dominance. The CCI observed that ‘in case of new economy/hi-technology markets, high market shares, in the early years of introduction of a new technology, may turn out to be ephemeral’.

Separately, the CCI recently penalised a few entities for exclusionary conduct. The CCI imposed a penalty on South Asia LPG Company Pvt Ltd (SALPG), engaged in the business of providing terminalling services at Vishakhapatnam Port, for having abused its dominance in the ‘market for upstream terminalling services at Visakhapatnam Port’. The CCI held that, by restricting access to the infrastructure for terminalling services, SALPG had indulged in denial of market access. The CCI did not see any merit in the safety and efficiency justifications raised by SALPG for restricting access to the infrastructure. Specifically, the CCI observed that effective competition did not imply the ‘prevalence of the most efficient to the exclusion of relatively less efficient choices to consumers’.

The CCI also recently penalised the All India Chess Federation (AICF) for having abused its dominance in the markets for the organisation of professional chess tournaments and events in India and services for chess players. The CCI found that the imposition of harsh consequences (such as banning players from participating in future tournaments and cash penalties) on chess players for participating in tournaments not authorised by the AICF were
abusive in nature. The CCI also noted that these restrictions led to the creation of hurdles for the AICF’s rivals and held that the AICF had indulged in the denial of market access to other organisers of chess events and tournaments.  

CONCLUSION

This year will mark a decade of the CCI’s existence. A look back at the CCI’s enforcement prowess would clearly show that the CCI has become the regulator to watch out for. As an extremely empowered authority, it has imposed headline fines and required dominant enterprises to reform business practices and steer away from abusive conduct. While fulfilling its mandate of maintaining competition in the markets, the CCI’s orders evidence the reasoned approach that it has steadily sought to adopt in alignment with international best practices. The past year was significant for the number of competition law decisions passed (on appeal) by the Supreme Court; the apex judicial body in India. Given the lack of guidelines or guidance notes, the cases decided by the Supreme Court are likely to provide the much needed definitiveness to the Indian competition law jurisprudence.

Notably, the Act is also likely to witness an overhaul, as the government of India has constituted a committee to review the provisions of the Act. The committee’s suggestions, and the ultimate changes brought about in the Act, are something to watch out for in the near future.

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