NEED OF COLLECTIVE DOMINANCE UNDER INDIAN COMPETITION ACT 2002

Written by ***Ripal Gupta***

Research Scholar, Institute of Law, Nirma University

INTRODUCTION

The Competition Act was enacted in 2002 as a result of India's pursuit of globalization and liberalization of the economy. Introduction of the Act was a key step in India's march towards facing competition – both from within the country and from international players. The Act is not intended to prohibit competition in the market. What the Act primarily seeks to regulate, are the practices that have an adverse effect on competition in the market in India. In addition, the Act intends to promote and sustain competition in markets, protect consumer interests, and ensure freedom of trade in the market in India.[1] . Despite having been enacted in 2002, the substantive provisions of the Act were only partly brought into force on 20 May 2009.[2]

At the heart of the Act are various activities that will be prohibited as being anticompetitive. The activities comprise:

(a) Anti-competitive arrangements;

(b) Abuse of dominant position; and

(c) Mergers and acquisitions that have an appreciable adverse effect on competition in India.

In light of the experiences gained in its operation and the working of the CCI, the Government of India, in June 2011, constituted an Expert Committee to examine and suggest modifications to the Act. The amendments, approved by the Cabinet in October, are aimed at fine-tuning the regulations to bring rules on par with the prevailing scenario and in light of the experiences gained over the past years.

---

1 "Introduction of the competition amendment bill, 2012 in India" available on http://www.kochhar.com/pdf/Rationale%20For%20Competition%20Laws%20%20SALIENT%20FEATURES%20OF%20THE%20BILL%20AND%20THE%20IMPLICATIONS%20THEREOF..pdf visited on 6/3/2014 at 5:47p.m

2 Shroff Cyril and oberoi nisha "India: Abuse of Dominance" by available on http://globalcompetitionreview.com/reviews/60/sections/206/chapters/2342/india-abuse-dominance/ visited on 6/3/2014 at 6:09 p.m

Accordingly, on 7 December 2012, the Central Government introduced the Competition (Amendment) Bill, 2012[3] in the Lower House (Lok Sabha). Typically, a bill has to be passed by both the Houses (Lok sabha and the Rajya Sabha) before it is sent to the President for his assent, pursuant to which, it becomes law.[4]

The proposed amendment in section 4 is as below, which is inclusive of some words which may interpret as 'collective dominance'.

"*No enterprise or group, **jointly or singly**, shall abuse its dominant position*".

This is what change has been made in the present Act. The present section 4(1) says that:

"No enterprise or group shall abuse its dominant position."

LEGAL FRAME OF SECTION 4 OF THE ACT:

Abuse of dominance or unilateral conduct refers to the conduct of an enterprise that holds sufficient market power in a particular relevant market, such that it can operate independently of market forces and the competitive constraints imposed by its competitors. In keeping with the objective to promote free markets and the freedom of trade and business of enterprises and individuals, the Act does not prohibit any enterprise from actually holding a position of dominance or having substantial market power. However, what is sought to be restricted by the Act is the abuse of such market power or dominance, which would have a detrimental effect not only on competitors, but most importantly, the consumer.

[3] Here in after referred as Bill 2012

[4] Shroff Cyril and oberoi nisha "India: Abuse of Dominance" by available on http://globalcompetitionreview.com/reviews/60/sections/206/chapters/2342/india-abuse-dominance/ visited on 6/3/2014 at 6:09 p.m

Section 4 of the Act prohibits the abuse of dominance by any enterprise or group[5]of enterprises[6]. The act prescribes a three test for the determination of abuse of dominance:

1) Defining the relevant market
2) Assessing the dominance in the relevant market
3) Establishing abuse of dominant position

Each of these steps is key to establishing liability under section 4 of the Competition Act[7]. The dominance of an enterprise is always determined with respect to a particular relevant market. The concept of the 'relevant market[8]' is critical to competition law, and in the case of an abuse of dominance investigation, sets the parameters for the determination of 'dominance'. Further the Act has bifurcated the Relevant Market in two kinds of Market. First is Relevant Product Market[9] and second is Relevant Geographical Market[10].

Relevant market definition is an important factor in establishing whether an enterprise is dominant or not. A classic example is the case of real-estate major, *DLF Limited in Belaire Owners' Association v DLF Limited*[11]. The CCI had defined the relevant market in extremely narrowed

[5] 'Group' under the Act read with the notification of he Ministry of corporate affairs dated 4th march 2011, has been defined to mean two or more enterprises which, directly or indirectly are in a position to exercise 50 percent or more of the voting rights in the other enterprise or appoint more than 50 percent of the members o the board of directors in the other enterprise or control the management or affairs of the other enterprise.
In m/s Kansan news private limited v m/s fastway transmission private limited and others (case no. 36/2011) the CCI considered abuse of dominance by a group of enterprises. The CCI noted that all the opposite parties were related enterprise and formed part of the same group in terms of section 5 of the Act. Therefore, the CCI considered the collective market shares and economic resources of the five opposite partes determining that the opposite parties abused their dominance. A plenty of 80 million rupees was imposed on the dominant enterprises which amounted to 6 per cent of their average turnover from 2009-2011

[6]Enterprises according to the Competition Act 2002, section 2(h) "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or
division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

[7] Here in after referred as 'Act'

[8] Section 2(r):" "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets"

[9] Section 2(t): "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use"

[10] Section 2(s): "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas"

[11] Case no: 19/2010

manner, to be the market for 'high-end residential apartments in the city of Gurgaon'. By restricting the product scope and the geography of the relevant market to a particular suburb, the CCI's decision that that DLF was dominant in the relevant market was but a given[12].

INDIAN CASE STUDY

1: Banks pre-payment charges case

The case filed by the *Niraj Malhotra*[13] against leading Indian banks. The case has been filed under section 19(1)(a)[14] against banking and non-banking financial companies. The decision of CCI held by majority of 4:2 and holding that the pre-payment charges levied on retail home loans by banks are neither anti-competitive nor amount to abuse of dominant position.

CCI in its majority held that there was no agreement or any action in concert which led to levy of pre-payment charges[15]. CCI in its majority decision observed that there was no agreement or action in concert on the part of banks/HFCs which led to levy of PPCs. It also gave detailed reasoning to justify its decision that PPCs are not anti-competitive, simply on the basis of lack of evidence to establish that the banks acted in concert and compulsion of asset-liability management. CCI non-chalantly brushed aside the ground of appreciable adverse impact by highlighting that retail home loan market is flourishing and has been growing with a CAGR of 24.9% between the period of 2004-

[12] In this case CCI has imposed the penalty of 630 crore on DLF for against its dominant position, under the provisions of Section 4 of the competition act. Commission in its order dated 12th august 2012, has given decision that DLF has a dominant position in the Gurgaon. It has also abuse its dominant position and violated the provision of section 4 of the competition act. The case information has been given by the Sanjay Bhasin who himself is one of the allottees in the complex. The informant alleged that DLF has abuse its dominant position and imposed highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the housing complex. They also alleged that DLF has violated the provision of various statues including Haryana Apartment Ownership Act 1983, restriction of unregulated development act 1963 and Haryana Development and Regulation of Urban Area rules, 1976. According to informant each building was consist of 19 floors which was increased to 29 numbers without information. According to the allegation was made by the informant DG had stated his investigation in the matter. He studied that DLF is the biggest real estate player in terms of size and resources. He also study that DLF has more market share and size in the Gurgaon than its competitors so it has been seen that it has a dominant position in the Gurgaon. For determining the dominant position and relevant market DG read section 4 with section 2(r), 19(6), 19(7). After study them they come to conclusion that DLF is the most favourable choice in Gurgaon. Further conditions put by DLF are arbitrary in nature and also restricting the new entry in the market. It also contended in his report that impunged of such condition to meet competition is also not acceptable. Finally commission conclude that he has violated section 4(2)(a) of act and order them remove and modify the condition in its agreement under section 27(a) and also imposed penalty using power under section 27(b) which comes to around 630 crore.

[13] Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd., (2011) 106 SCL 62 (CCI)Case no 5 of 2009

[14] Section 19(1)(a) "The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—
(a) [receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association;

[15] Here in after referred as PPC

2009[16]. The Director General[17] in its report concluded that levy of PPC is in contravention to Section 3(3)(b)[18] of the Competition Act. It also observed that levy of PPC creates a barrier to new entrant in the market in way that if the new entrant is providing competitive interest rates, better services, etc. Levying of PPC by banks makes the exit expensive thus acts as a deterrent for a borrower in availing the best prevailing interest rate of other banks/HFCs. However, considering the number of players and evenly divided market share of the companies the levy of PPC was held not to be abuse of dominant position.

The finding of CCI, which formed the bedrock of the majority decision, that there was no agreement between banks/HFCs to levy PPC on retail home loans is *per se* questionable. There can be only two ways to decide if there was an agreement between the banks. First, to examine the history and reasons for levy of PPC and second to test whatever evidence available on the touchstone of Section 2(b) [19] of the Act.

The history of home loan market of India can be traced back to late seventies when Housing Development and Finance Corporation[20] was the sole player. In the year 1993, Life Insurance Corporation[21] Housing Finance Ltd. joined the home loan market. It is significant to note that, HDFC never levied PPC till the year 1993, when LIC Housing Finance forayed into the business. However, interestingly September 2003 onwards, all the banks/HFCs which were part of this investigation started charging PPC, pursuant to meeting of Indian Banks Association[22] dated 28-8-2003, which culminated into a circular dated 10-9-2003, wherein it was noted that PPC in the range of 0.5%-1% would be reasonable, and left the matter to be finally decided by the banks themselves. Immediately thereafter, all the banks started levying PPC at the rate of 1%-2%.[23]

---

[16] See the details of case on http//www.supremecourtcase.com
[17] Here in after referred as DG
[18] Section 3(3): Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or
association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—
(a) directly or indirectly determines purchase or sale prices;
(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition
[19] Section 2(b): “"agreement" includes any arrangement or understanding or action in concert,—
(i) whether or not, such arrangement, understanding or action is formal or in writing; or
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;
[20] Here in after referred as HDFC
[21] Here in after referred as LIC housing finance
[22] Here in after referred as IBA
[23] See case details on http//www.cci.gov.in

This uniformity in practice clearly reflects a common understanding. In the dissenting opinion the learned Member of CCI, observed as follows:

(i) Prior to the meeting of IBA, there was no consensus amongst the banks for levying PPP;

(ii) Prior to the meeting of IBA, there existed no policy guidelines of banks and HFCs nor was there any uniform practice for levying PPP;

(iii) In the meeting of IBA, a concerted decision to adopt a common approach was arrived at by the banks for the first time. Thus the meeting of members of IBA can be treated as meeting of minds of the members for taking a concerted action against the home loan borrowers who opt to prepay the loan.

(iv) As very clearly stated in the circular of Punjab National Bank and implicit in the circulars of the other banks, the decision to levy a PPP was taken (a) in pursuance of the circular of IBA; and (b) to prevent the switching over by the consumers.

Though this IBA circular was not binding on the banks, but the same could sufficiently be taken to be the basis of action in concert and common approach adopted in levy of PPC.

The definition of an agreement [24] under the Competition Act includes any arrangement or understanding or action in concert whether or not formal or in writing or legally enforceable. Thus, the provision itself contemplates any tacit agreement which shall also qualify under the definition of agreement.

The majority judgment also concludes that the levy of pre-payment charges is not violation of Section 3(3)[25] of the Competition Act. It is significant to note that horizontal agreements, including cartels, which, directly or indirectly adversely affect the Competition Act, hold a presumption for horizontal agreements (like the agreement in this case). Price fixation is one such element under Section 3(3)[26], which refers to an agreement amongst the competing firms to rise, fix or maintain the price of goods or services they are selling. A collusive behaviour of price fixation conspiracy can be inferred from the following factors:

(a) Prices stay identical for long periods of time; or

(b) Prices previously were different; or

(c) Price increases do not appear to be supported by increased costs.

---

[24] Section 2(b): "'agreement" includes any arrangement or understanding or action in concert,—
(i) whether or not, such arrangement, understanding or action is formal or in writing; or
(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings

[25] Supra note 18

[26] *Ibid*

It would be interesting to recall at this stage that PPCs were virtually absent till 2003, but immediately after that all the banks/HFCs started levying PPC. It was not the case of banks that there was no issue of asset liability management before 2003. Moreover, the said charges are not even contingent on the variable cost of funds. Even in a scenario where interest rates are heading southwards, no benefit of declining cost of funds is extended to customers. The majority judgment also bears a deafening silence about the practice of part-payment of retail loans.

The Director General in his report had pointed out that many private banks allow part pre-payment of home loans and levy no charges on the same. It is only when the customers intend to repay the complete facility, that PPC is levied. Thus, the majority judgment has conveniently ignored a situation of asset liability mismatch caused by part pre-payment. They told that they are not in any kind of agreement, there was a lack of evidence which tells that they have formed the cartel and their market share is also not led to give them dominant position in the market.

According to the view of dissenting opinion of members of CCI[27] , there is a cartelization of fixing PPC[28] between the banks. Not only the one case where CCI has rejected the case of PPC in another case in *Yashoda hospital and research center v India Bulls Financial Service LTD*[29]*and in Usha Vaid v Sate Bank of India*[30] where also CCI had given the order in favour of Banks. According to the researcher in bank's PPC cases where CCI find itself in trouble to identify whether the Banks are dominated or not. According to the market share they are not dominating, that is the place where CCI found ambiguity in giving decisions. To solve this problem may be the clause 'collective dominance' will help to the CCI. CCI's task would have been much easier has there been only one bank with large market share. By, adopting of PPC clauses by almost all known commercial banks together brings the issue of "collective dominance" under Competition Act.

2: Dominance by real estate in Gurgaon, A Case Study

The real estate industry in India was said to be worth $12 billion in the year 2007 and is estimated to be growing at the rate of 30 per cent per annum. Previously, the governments support to housing had been centralized and directed through the State Housing Boards and development

[27] P.N.Parashar and R.Prasad
[28] The concept of PPC (the foreclosure charges): A clause in mrtgage contract that says if the mortgage is prepaid within a certain time period, a penalty will be levied. The penalty is usually based on percentage of remaining mortgage balance or a certain number of months' worth of interest. A prepayment penalty that applies to both the sale of a home and a refinancing transaction is called a "soft" prepayment penalty.
[29] CCI case no. 12 of 2010
[30] RP No.2466/2007

authorities. In 1970, the Government of India set up the Housing and Urban Development Corporation[31] to finance housing and urban infrastructure activities and in 2002 the government permitted 100 per cent Foreign Direct Investment [32] in housing through integrated township development. The residential real estate industry now is driven largely by private sector players. This increase in activity has led to several issues in the sector, which mostly include problems being faced by the buyers.[33]

The researcher would like to discuss one of the famous case of CCI that is *Belair owner's association v. DLF limited*[34]. In this case CCI has imposed the penalty of 630 crore on DLF for against its dominant position, under the provisions of Section 4 of the competition act.

Commission in its order dated 12th august 2012, has given decision that DLF has a dominant position in the Gurgaon. It has also abuse its dominant position and violated the provision of section 4 of the competition act. The case information has been given by the Sanjay Bhasin who himself is one of the allottees in the complex. The informant alleged that DLF has abuse its dominant position and imposed highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the housing complex. They also alleged that DLF has violated the provision of various statues including Haryana Apartment Ownership Act 1983, restriction of unregulated development act 1963 and Haryana Development and Regulation of Urban Area rules, 1976. According to informant each building was consist of 19 floors which was increased to 29 numbers without information.

According to the allegation was made by the informant DG had stated his investigation in the matter. He studied that DLF is the biggest real estate player in terms of size and resources. He also study that DLF has more market share and size in the Gurgaon than its competitors so it has been seen that it has a dominant position in the Gurgaon. For determining the dominant position and relevant market

[31] Here in after referred as HUDCO
[32] Here in after referred as FDI
[33] Bhadwar Shagun "abuse of dominance in the reals estate sector" by available on http://www.cci.gov.in visited on 8/3/2014 at 1:49 p.m
[34] Case no: 19/2010

DG read section 4 with section 2(r)[35], 19(6)[36], 19(7)[37]. After study them they come to conclusion that DLF is the most favourable choice in Gurgaon. Further conditions put by DLF are arbitrary in nature and also restricting the new entry in the market. It also contended in his report that impunged of such condition to meet competition is also not acceptable. Finally commission conclude that he has violated section 4(2)(a) of act and order them remove and modify the condition in its agreement under section 27(a)[38] and also imposed penalty using power under section 27(b)[39] which comes to around 630 crore.

In this case the CCI is on the opinion that in Gurgaon the DLF is dominant and abuse its position that is why it is penalised. In another case of *Jagmohan Chhabra*[40] which is similar to the DLF case but the decision of the CCI has been contradict to the DLF and it has also dissenting opinions. It has also raised a question against researcher and academician to examine the provisions of the competition act. The informant has filed complaint against Unitech ltd who is real estate firm and situated in Gurgaon. They alleged that opposite party has violated the provisions of section 4(1) of the act. In their complaint they alleged that the opposite party has a dominant position in the Gurgaon and they put unfair and unreasonable conditions in their agreement and they with malafide intention use the money of their consumer.

---

[35] Section 2(r):" "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets"

[36] The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:—
(a) regulatory trade barriers;
(b) local specification requirements;
(c) national procurement policies;
(d) adequate distribution facilities;
(e) transport costs;
(f) language;
(g) consumer preferences;
(h) need for secure or regular supplies or rapid after-sales services.

[37]The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:—
(a) physical characteristics or end-use of goods;
(b) price of goods or service;
(c) consumer preferences;
(d) exclusion of in-house production;
(e) existence of specialised producers;
(f) classification of industrial products.

[38] Section 27(a) "direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;"

[39] section 27(b) "impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse"

[40] Mr. Jagmohan Chhabra & Ors vs M/S. Unitech Ltd. Case no 27 of 2011

According to the informants, the terms and conditions of the agreement are one sided and favorable to Unitech. For instance, for delay in delivery of the apartments to the buyers, Unitech is to compensate Rs.5 per Sq ft/ per month, while if there is a delay in installment payments towards the cost of the apartments, the buyers have to pay at the rate of 18% per annum on quarterly compounded basis. The informants have submitted that such one sided terms and condition are not acceptable to them and have also claimed that the compensation for delay in delivery from Unitech should be same at the rate of 18% per annum. As the informants stopped further payments, Unitech sent a letter on 02.05.2011 to the informants warning them to pay the subsequent installments towards the cost of the apartments on calendar interest at the rate of 18% per annum compounded quarterly which the flats allotted to the informants would be cancelled.

The informants have alleged that because of its dominant position Unitech is diverting/misusing the funds collected from the buyers for the construction projects because of which the project has not been completed in due time. lt has also been submitted that Unitech had malafide intentions right since the inception of the project and for this very reason it compelled the buyers to make payment on the basis of time period i.e. calendar basis rather than the "construction linked basis" which is a normal industry practice.

But in this case DG held that in Gurgaon DLF is dominant as declared in *Belaire Owners case*[41], so respondent cannot be held dominant in the said relevant market. It has also been seen in the Gurgaon that all the real estate builders follow the policy of DLF. They are not dominated but there is concerted action adopted by them. In that way somewhere they create collective dominance in the Gurgaon. If we consider Gurgaon case as a Collective Dominated by the real estate industry then CCI can put radar on all builders, after that all the cases comes under the purview of section 4.[42]

The researcher would like to discuss another case of Gurgaon, where CCI's judgement was a dubious. In *DLF Park Place Residents vs. DLF Limited*[43] DLF announced a Group Housing Complex in Phase-V, Gurgaon, Haryana. It was to consist of 13 towers which comprised of 19 floors each with the total number of apartments in the complex not exceeding 950. DLF promised that possession would be handed over within 30 months to the allottees.

However the sequence of events that followed was contrary to the promises made. DLF scrapped the above mentioned project without informing the allottees and instead launched a new project on the

[41] Case no: 19/2010
[42] See case details on http//www.cci.gov.in/menu/OrderOfCommission.pdf
[43] Case 18 of 2010

very same land comprising of 29 floors and 1560 apartments in total. This not only led to a substantial reduction in the size of the apartments but also an abnormal delay in the completion of the project. Huge financial losses were suffered by the allottees as most of them had already paid 80%-85% of the total consideration.[44]

The informants were of the opinion that since DLF was a dominant player they had devised a standard "Apartment Buyers Agreement" which was onerous and one-sided but the informant was required to accept it in toto. This agreement was signed months after the booking of the apartments and by that time large investments had already been made by the allottees, therefore they did not have any other choice but to adhere to the dictates of DLF. Once the allottees had entered into the agreement there was no turning back. DLF had imposed upon the buyer's terms and conditions which would exempt DLF from any liability under the agreement.

The CCI after considering all the relevant facts and information formed an opinion that a prima facie case exists and directed the DG to further investigate then matter under Section 26(1)[45].

To determine abuse it needs to be established that the enterprise enjoys a position of economic strength in the relevant market with reference to relevant product market and relevant geographic market.

In the present case the relevant product market is said to be services provided by developers for providing high end apartments to the customers. The relevant geographical market is the area of Gurgaon, Haryana. Once the relevant market is established the factors under Section 19(4)[46] need to

[44] Case details see on http//www.cci.gov.in

[45] Section 26(1): "On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter:
Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

[46] The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—
(a) market share of the enterprise;
(b) size and resources of the enterprise;
(c) size and importance of the competitors;
(d) economic power of the enterprise including commercial advantages over competitors;
(e) vertical integration of the enterprises or sale or service network of such enterprises;
(f) dependence of consumers on the enterprise;
(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(i) countervailing buying power;
(j) market structure and size of market;
(k) social obligations and social costs;

be considered. The DG after an exhaustive analysis concluded that DLF has the highest market share and has a clear advantage over the other players in terms or size, resources and the fact that it has been in business since the last sixty years.

The DG examined four representative cases to understand the conduct of DLF and whether it has in fact been abusing its dominant position. After a comprehensive analysis the DG held that, construction for the apartments commenced in 2007 and was still in progress as a result of which possession had not been handed over even till today. There have been a number of events such as commencement of the project without sanctions, increase in number of floors mid-way, delay in construction and handing over possession etc, all these bring to the fore the fact that DLF has been in violation of the provisions of Section 4 (2)(a)(i)[47] of the Act.

No penalty was imposed, as the nature of contravention was identical to that in case no. 19 of 2010[48], CCI said that DLF already punished for the same reason so no penalty was imposed by the CCI. This reason was unanticipated by the CCI. In Gurgaon the real estate agents have been disregarding the rights of the consumer. It is the need of our in Gurgaon is strict enforcement of provisions of section 4 by including Collective Dominance provisions in it, so that all the builders come in to the radar of CCI.

In all these case one of the members[49] in the CCI has given the dissenting opinion. He was on the opinion that real estate agents are dominated in the aftermarket. He describe this situation as aftermarket where after contract consumer has no choice to go anywhere except that contracting party, in this situation the seller becomes its market which called as aftermarket by him.[50]

(/) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;
(m) any other factor which the Commission may consider relevant for the inquiry.

[47] There shall be an abuse of dominant position 4[under sub-section (1), if an enterprise or a group].—-
(a) directly or indirectly, imposes unfair or discriminatory—
(i) condition in purchase or sale of goods or service; or
(ii) price in purchase or sale (including predatory price) of goods or service.

[48] Belaire owers v DLF

[49] Mr.R.Prasad

[50] Aftermarket: This concept refers to the existence of two markets, one which exists before the agreement between the buyer and the seller comes into being and the second which exists once the buyer has made a choice and enters into an agreement. This is regarded as the 'aftermarket'. If the seller enjoys a monopoly power in the aftermarket and is using it to the seller's detriment then this will be characterised as an abuse of dominance. The concept of aftermarket abuse was applied by Mr. R. Prasad in the present case. He stated that once the informant had entered into an agreement with the builder, the latter acquired a dominant position over the former as he was locked in with all the terms and conditions of the agreement. Not only was he oblivious to the clauses in the agreement but because of lack of options there was nothing he could do about it. This not only led to information asymmetry but high switching costs as well and this was an abuse of dominance in contravention to the provisions of Section 4(2)(a)(i) of the Act. This judgement was the first step taken to prevent unscrupulous builders from taking advantage of small time buyers

But according to the researcher's outlook these cannot be portray as aftermarket, otherwise all the contract between seller and buyer would come under the purview of CCI. After that we increase burden of CCI as we had done with consumer courts. So its researchers view that we should take Gurgaon cases as collectively dominate according to that CCI should take steps.

3: Dominance by Oil Companies

CCI is going to be investigated in the matter of price fixing by the oin companies. According to the CCI, they have investigate in to the matter of price fixing by the oil companies and looking in to the prima facie case they have send the report to the DG to investigate in to the matter. The DG already has started investigation in the said matter and judgement is pending.

Here the researcher wants to connect the price fixing of oil companies with the provision of collective dominance. According to the reports of CCI, they have order a DG investigation in to the alleged cartelisaton of state owned oil marketing companies[51] for fixing petrol prices. CCI reckons the three state-owned OMCs — Indian Oil Corp Ltd[52], Bharat Petroleum Corp Ltd[53] and Hindustan Petroleum Corp Ltd[54] — not only revise petrol prices by same amount, these companies often do this on the same day.[55] The investigative wing of the competition watchdog will soon serve notices to these companies, seeking their response on the matter, a senior official said, and requesting anonymity.

According to the official, CCI had earlier written to the ministry of petroleum and natural gas on the issue. However, the ministry has cut corners saying petrol is no longer a regulated product and the companies determine the prices based on a pricing formula. Following the ministry's response, CCI has referred the case to DG for further investigation. The Commission refers cases for investigation only when it is convinced that there is prima facie evidence of violating competition norms. "It appears that there is a coordinated pricing strategy adopted by state-owned oil marketing companies. This approach is not only impacting consumer interest, it is also likely to create entry barriers for private players in the sector," another CCI official told Business Standard. Since June 2010, when petrol prices were decontrolled, OMCs have revised the prices in tandem for 34 times,

[51] Here in after referred as OMC
[52] Here in after referred as IOCL
[53] Here in after referred as BPCL
[54] Here in after referred as HPCL
[55] "Oil companies under scanner for price fixing" published in 22 may of 2013 in business standard available on http://www.taxmann.com/topstories/222330000000000744/oil-companies-under-cci-scanner-for-price-fixing.aspx visited on 9/3/2014 at 11:53 a.m

which has seen a 23 per cent hike in prices from Rs 51.43 per litre on June 26, 2010 to Rs 63.09 on May 1, 2013. Even as allegations of prices cartelization continued to exist, the three state-owned companies revised even diesel prices together for five times since January 17 this year, when the Central government decided to go for phased decontrol of the fuel price. Diesel prices have gone up from Rs 47.65 a litre in Delhi on January 17 to Rs 49.69 as on May 11, when prices were revised for the last time.

However, OMCs say the coordinated pricing strategy is in favour of consumers as the fuel is available at the same price in all pumps in a particular city."Anyone can allege us for cartelisation. But do you think it would do justice to consumers, if they get petrol and diesel at one price in an IOC fuel station and a varied price at HPCL station in the same city? It would affect the consumers badly," said a top IOC official, who also did not want to be named. According to the Competition Act, 2002, a cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sales quotas, or to engage in collusive bidding or bid-rigging in one or more markets.

In this case CCI has take suo motu action against OMC. But they have filed the case in the Delhi High Court[56] replied that CCI has power to take suo motu action against the OMC. They have power to stop any anti-competitive activity going on in to the market in India.

The suo motu action was taken by the CCI as well as the Petroleum and Natural Gas Regulatory Board[57] against the oil companies. The public sector units[58] have challenged the jurisdiction of CCI to look into petrol pricing of the oil companies on 21 October 2013. The CCI had been looking into suspected unfair trade practices by state run oil companies while setting petrol prices.

The oil companies were on the opinion that they have no power to fix the price of petrol. They have to fix price according to the formula. The CCI had sought information in this regard from the Petroleum Ministry. The Ministry had told the regulator that it was not responsible for fixing petrol prices and that oil marketing companies set the rates directly using a formula.[59]

If we study their activities in the price fixing of petroleum price, we come to know there is a tacit coordination between them and they are collectively dominated in the market. According to the

[56] Here in after referred as Delhi HC
[57] Herein after referred as PNGRB
[58] Herein after referred as PSUs
[59] "Delhi HC stays CCI proceedings against IOCL, BPCL and HPCL" available on http://businesstoday.intoday.in/story/delhi-hc-stays-cci-proceedings-against-iocl-hpcl-and-bpcl/1/200813.html visited on 9/3/2014 at 5:52 p.m

researcher CCI may connect the activity of the OMC with the collective dominance and take strict step against their anti competitive activities.

SUGGESTIONS:

We need to include the Collective Dominance in the Indian Competition Act 2002. Our current provisions relating to anti-competitive agreements are not dealing with Collective Dominance. If we see the provisions of Cartel and Horizontal Agreements, it clearly states that there should be written contract between the parties to prove the anti-competitive agreements. If we read the dissenting opinion they portray this situation as Cartel or as Aftermarket. But in both the situation they find themselves with lack of evidence to prove their case. That means to prove such situation as anti-competitive CCI has limited jurisdiction or they cannot interpret it with current laws of competition act. Collective Dominance may fill in the gap in such situations. These two terms will be interpreted as Collective Dominance. So that now onwards CCI also has the power to check firms activity whether they follow each other or not without any required written agreement.

But the debatable issue is whether amending the section 4 by these two terms give extra power to CCI to impose penalty to firms or not. There is no clarity in proposed amendment bill that if firms are abusing the collective dominance then what would be the penalty for them. We need to amend penalty also for the collective dominance to make it more powerful command in the hands of CCI. We need separate penalty for abusing of dominant position and collective dominance. Otherwise why should we need to amend the collective dominance, if the firms would not get special penalty for the special action taken by them?