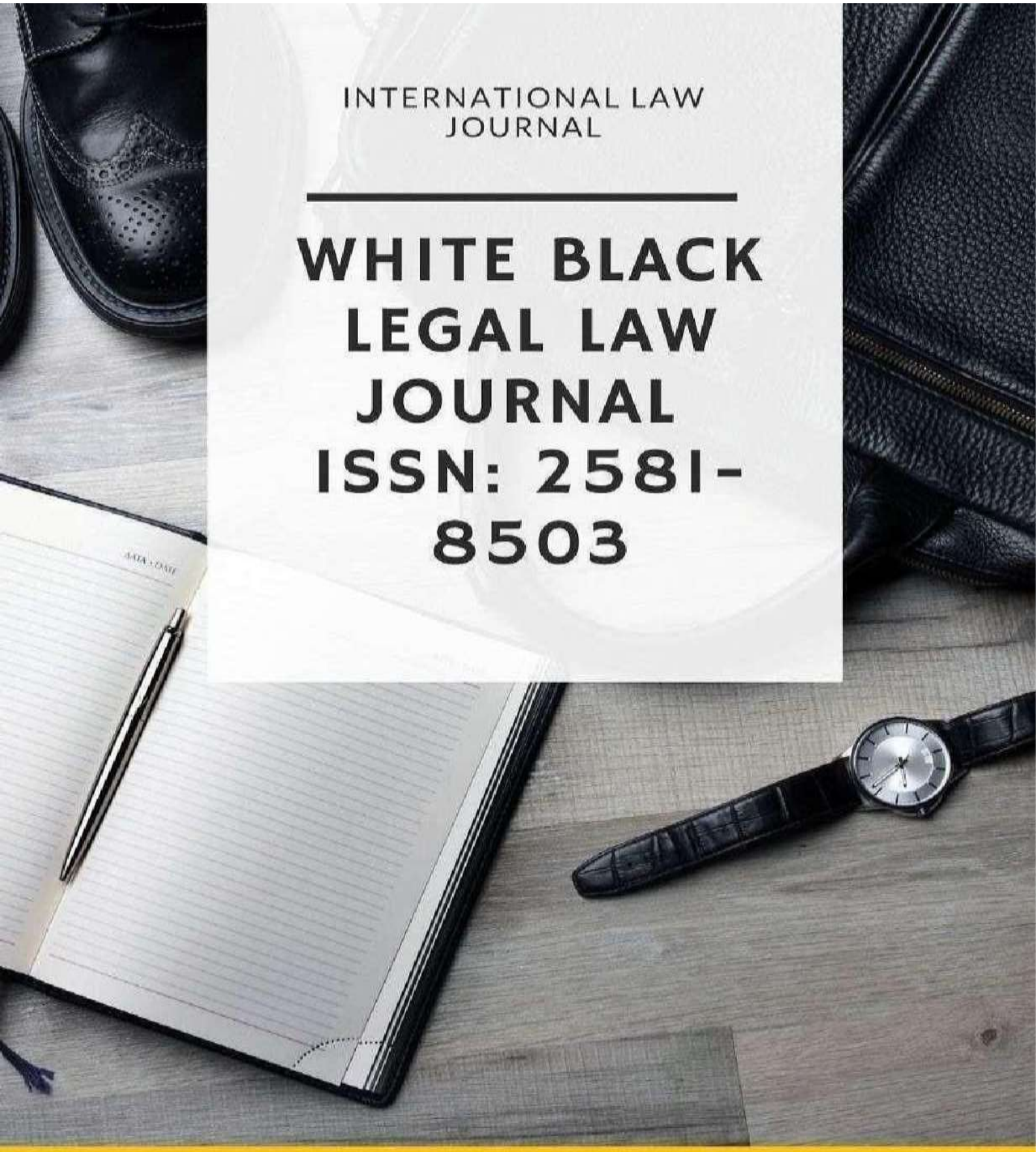

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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

JUDICIAL RESPONSE TOWARDS ABUSE OF DOMINANCE DOCTRINE IN US, EU AND INDIA

AUTHORED BY - AARYAN SHARMA

I. IMPORTANCE OF JUDICIAL ROLE IN COMPETITION LAW

It is imperative for an effective functioning of market economies to have an efficient competition policy. With the rising approach of networked economies under globalization and deregulations the importance of competition legal framework is on increase. The judicial branch has a key role to play in implementation of competition law and policy. As antitrust laws of the US and the EU are written in very broad terms, the case laws are milestones as precedents and legally binding, even in non-common law system in continental Europe.

The critical role of judicial branch in implementation of competition law can be classified in two broad categories:

(i) Ensuring adherence to due process of law in the procedural aspects of a case by implementation authorities; and

(ii) The applied central tenets of competition law are right and in a consistent fashion.

Under the first category the judicial authorities ensure the basic principles of natural justice like right to a fair trial, right to be heard etc. are observed by the implementing authorities. While in the second category the consistency and correct application of substantive provisions of competition law the judicial bodies bring the economic policy under the "rule of law."

Highlighting the importance of procedural appropriateness the erstwhile Competition Appellate Tribunal of India went on pass number of judgments to set aside the Orders of Competition Commission of India for lack of adherence of principles of natural justice and procedural fairness. In one case the COMPAT observed that, "...the law on the issue can be summarized to the effect that very person/officer, who accords the hearing to the objector must also submit the report/take decision on the objection and in case his successor decides the case without giving fresh hearing, the order would stand vitiated having been passed in violation of the principles of natural justice." Likewise in

an abuse of dominance case the dismissed the Commissions order on procedural fairness ground alone. These procedural safeguards are essential for achieving the goals of competition law in an accountable and objective manner. However, it must be pointed out that procedural fairness is not absolute, as the courts must permit necessities of economic policy while executing antitrust laws.

The members of judicial forums are in a unique position in competition enforcement as they strike a right balance between procedural and substantive principles. One, the judiciary is free from other branches of govt. allowing them to uphold an impartial and coherent legal analysis of competition law. Two, the members of judicial branch are knowledgeable in this practice – in judicious understanding of central purposes of an act and integrating these with the necessity of reasonable and clear application of the act. Beside these issues the judicial forums impart an amount of elasticity to the process of implementing the competition law and thereby increasing the evolution of law and making use of contemporary economic theory. This last characteristic of judiciary is most crucial in the new competition jurisdictions like that of India, where there is yet to have a critical maturity level in competition jurisprudence.

II. JUDICIAL REVIEW OF ABUSE OF DOMINANCE CASES

The role of judicial forums in competition case in different competition jurisdictions varies from each other. Like in the US and the EU the courts are playing an effective role in abuse of dominance cases as the judicial precedents is an important source of legal principles. For example in EU the legal precedents about share of an entity in market help in determining dominance of that entity in the market. Like in US[1] also the relevant market definitions also flow from the decision of US Supreme Court in Antitrust cases. But in this matter in India the act in itself contains the explicit directions in determining abuse of dominance. One major issue in the judicial review[2] of abuse of dominance cases is distinction between a question of fact and a question of law.

Mostly the Abuse of Dominance issues are complicated and thus can't be easily categorized as questions of either fact or law. For illustration, the defining of relevant market, which is an initial point in Abuse of Dominance cases, could be one such issue where both law and fact are intertwined. As it's on one side factually intensive exercise but the appraisal of relevant facts necessarily be

[1] Associated Cement Com. Ltd. & Ors. v. CCI & Ors. Appeal No.108 of 2012 (COMPAT 11th Dec 2015)
[2] Coal India & Ors. v. CCI & Ors. 2016 CompLR 716 (CompAT)

undertaken as per a thorough methodology of analysis that could itself be a rule of law. Few scholars have a view that issues in abuse of dominance cases like defining relevant market, analyzing entry barriers, existence of market power, and assessment of an act that could be said to be an attempt of monopolization or abuse of dominant positions, have two subparts: one being selection of the "analytical framework" for settling the issue at hand is a question of law and the practical application of this selected methodology to the factual matrix of the issue in the hand is a question of fact. However, this is not an absolute criterion and mostly in abuse of dominant position cases are mixed question of fact and law.

The main aspects of application of abuse features by judicial members could be best understood by analyzing the leading judgment in each of the three jurisdictions – US, EU and India. For the sake of brevity only three such judgments of these three jurisdictions are selected on the criteria of important legal principles are established in doctrine of abuse of dominance.

The discussed cases are taken up with one small overview to explain the factual matrix of the case. Then the key issues involved in those cases are individually been discussed to explain the application part of the substantive part of competition laws of the respective jurisdictions. In the end, where it is feasible, the critical analysis of the concerned judgment will also be incorporated to highlight the over reliance or lapses if any are being noted by the jurist.

III. Leading cases of the India on Abuse of Dominant Position

In India following three cases have been selected for a detailed analysis:

i. Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors

ii. MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & Ors

iii. Competition Commission of India v. Fast Way Transmission Pvt. Ltd. & Ors.

i. Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors.

In 2011, Informant named Shamsher Kataria filed information against three car manufacturers i.e. Honda, Fiat, and Volkswagen (OEMs), alleging that the OEMs imposed restrictions on their original equipment suppliers[3] (OES) forcing them to restrict availability of genuine spare parts, diagnostic tools, software, and other technical information in the open market to the independent repair

[3] Under Section 19(1)(a) of the Competition Act

workshops. Further, OEMs in conjunction with their authorized dealers/service stations had indulged in determining the sale price of spare parts and repair/maintenance services. Such agreements had resulted in denial of market access to independent repair workshops, who were usually micro, small, and medium enterprises that generate employment to 45% of industrial workers, and further undermining the rights of consumers.

The informant noted that the car repair services were permitted only through authorized service centres of the car manufacturers (OEMs) that are limited in number and mainly located in big towns that again created a problem for the customer to avail the services. Further, the informant alleged that the cost of repair of a car, being a durable good, in an independent workshop is cheaper by about 35-50% as compared to the authorized service centres of the OEMs. The CCI after concluding a prima facie case directed the DG to conduct an investigation by its order dated April 26, 2011. The DG submitted its report on July 11, 2012, and broadened the investigation to include 14 car manufacturers (OEMs) involved in similar practices namely - ford, Hindustan motors, fiat, Nissan, General Motors, Premier, Mahindra, Maruti Suzuki, Tata Motors, Hyundai, Skoda, Toyota, Mercedes, and BMW. DG concluded that activities of OEMs were in violation of sections 3 and 4 of the Act.
A penalty of approx. INR 25 Billion (2% on total turnover) was imposed on 14 car manufacturers for creating anti-competitive effects through agreements for spares and after-sales services. Presently, the Madras High Court[4] has stayed the fine levied against Maruti Suzuki amounting to INR 4.71 Billion. Erstwhile Competition Appellate Tribunal (COMPAT) upheld the CCI order but remanded the matter back noting an injury to the principles of natural justice. It was noted that only three members as against seven members who constituted and heard the matter in the CCI only had signed the order. The case is sub-judice in High Court of Delhi and Supreme Court.

Issue

The major issues related to the delineation of the relevant market in the case. Further, after taking into consideration the secondary market as the relevant market for the case, the CCI took into consideration the agreements in questions under Sec 3(4)(d) of the Act. Issues related to the abusive agreements under Section 3(3)(a), Sec 3(4)(d) and 3(3)(b) of the Act were taken into account by the CCI. The position of dominance and abuse under Section 4(2)(a), 4(2)(b) and 4(2)(c) of the Act were further recorded. Lastly, the regulator dealt with concerns related to protecting the intellectual

[4] By its order dated December 9, 2016,

property rights.

Relevant Market

It was noted in the CCI order that the automobile sector in India is one of the bright performers of Indian economy and India is home for about 95% of workshops estimated to over three lakh people working in automobile aftermarket. Unavailability of spare parts/diagnostic tools to such independent repairers has resulted in the development of an industry of spurious spare parts causing death/ injuries besides causing revenue and employment loss. Over 35% of counterfeited spare parts are seen in the Indian market. CCI concluded that the determination of the relevant market is not an end by itself but is a means to analyze the position of strength enjoyed by an enterprise in a market, as per the provisions of explanation (a) to section 4(2) of the Act, to determine if such an enterprise is in a dominant position in such a relevant market.

In order to determine whether an entity is in a dominant position, determination of the relevant product market and the relevant geographical market is essential. Section 2 (r)

(s) and (t) define the relevant market, the relevant geographic market and relevant product market. The CCI concluded that there exist two separate relevant markets; one for manufacture and sale of cars and the other or the sale of spare parts and repair services in respect of the automobiles market in the entire territory of India. It was noted that the aftermarket i.e. the sale of spare parts was considered as the relevant market that does not exist in every instance where a primary and a secondary product are involved. The Commission noted, "*The complexities of car industry make essential regular service which is highly monopolistically priced. The non-access of spare parts in the open market allows the OEM to create a monopolistic situation wherein OEMs becomes the sole supplier of original spare parts in aftermarket resulting in a denial of market access to independent workshops which are micro, small and medium enterprises (MSMEs) employing 45% of industrial workers in India*." It is in the aftermarket for automobile spare parts and repair services, where each OEM are being alleged to operate independently of competitive constraints allowing them to affect their competitors, i.e., independent repairers and their customers.

As there exists almost nil interchangeability of OEM in-house produced spare parts and limited substitutability for body parts procured from local OESs and other overseas suppliers. OEMs restriction the authorized dealers through agreements and most foreign suppliers being parent companies of the OEMs internally prohibit supply in the open market. Therefore, once the primary product has been purchased, the consumer's choice is confined to those aftermarket products or

services compatible with that primary product. Consumers are to a greater or lesser extent locked into certain aftermarket supplies and the feasibility of switching over to another primary product was limited. Eventually, The Commission declared that there existed a primary market for the sale of cars in India and two aftermarkets for sale of spare parts and repair and maintenance services respectively.

Dominance

Each OEM was found to have a monopolistic status in the aftermarket for its own brand of spare parts and diagnostic tools and was the sole supplier of such spare parts and diagnostic tools to the aftermarket. Each OEM severely limits the access of independent repairers and other multi-brand service providers to genuine spare parts and diagnostic tools required to effectively compete with the authorized dealers of the OEMs in the aftermarket. CCI noted that such practices amounted to a denial of market access by the OEMs under section 4(2)(c) of the Act.

As far as the dominance of OEMs in the supply of aftermarket for spares is, concerned it is quite clear that on different counts, the market is restricted and therefore, they have a complete hold on the supply of spares to the aftermarket. The Commission notes that unlike section 3(5) of the Act, there is no exception to section 4(2) of the Act. Therefore, if an enterprise is found to be dominant pursuant to explanation (a) to section 4(2) and indulges in practices that amount to denial of market access to customers in the relevant market; it is no defense to suggest that such exclusionary conduct is within the scope of IP rights of the OEMs. CCI opinioned that the OEMs have denied market access to independent repairers and other multi-brand service providers in the aftermarket without any commercial justification. "*A perfect notion of competition is a non-dominant enterprise may enter into a vertical agreement which forecloses the market but enhance certain distribution efficiencies may not be concluded causing an AAEC in the market. However, where such agreements are entered into by a dominant entity they are presumed to cause AAEC."*

The producer of durable goods prevents other aftermarket firms from offering complementary goods or services from abusing its dominant position in the aftermarket. The durable goods producer behaves in a fashion that stops alternative producers from offering the complementary good by restrictions imposed on the OESs resulting in the original durable goods producer monopolizes the aftermarket. The users of the car wanting to purchase the spare parts have to necessarily avail the services of the authorized dealer of the OEM. The independent service providers require the spare parts and diagnostic tools compatible to the various models of automobiles manufactured by the various OEMs to carry out their economic activity of providing repair and maintenance services in the Indian automobile aftermarket.

Abuse of Dominance

It comprised of following elements: -

Agreements

CCI noted that there exist various relationship terms between OEMs and OESs, and OEMs and authorized dealers, that are working either through express agreements or by practice, and restrict the selling of spare parts directly in the aftermarket and to independent repairers. The CCI noted that OEMs and their authorized dealers are in a principal to principal relationship as they are both independent entities but the fact remains that they are in a vertical relationship with exclusivity built into the relationship when the authorized dealers are restricted from doing business for others they are entirely dependent upon the OEMs whereby policy and practice, independent sale to aftermarket is restricted at all levels. It was further noted that OEMs were highly marked up and imposing unfair conditions in the sale of spare parts was accepted as a violation of Section 4(2)(a)(ii) of the Competition Act, 2002. The OEMs imposing restrictions through agreements and practices on original equipment suppliers by restricting them from selling spare parts including technical manuals diagnostic tools etc., in the aftermarket including to the independent repairers, and to the authorized dealers, restricting them from sourcing spare parts from OES and from selling spare parts to independent repairers thereby refusing to deal acted in violation of Section 3(4) (b), (c) and (d). The restrictions imposed by the OEMs create entry barriers for the OES who could establish their R&D and produce matching quality spare parts directly supplying genuine spare parts of an OEM in the open market as well as to OEMs. The OEMs acting through their authorized dealer network deny 94.99% of the total service providers active in the Indian automobile aftermarket [689]consisting of multi-brand retailers, semi-organized service stations, and un-organized garage workshops in effectively accessing the Indian aftermarket on competitive terms forcing their customers to buy repair services together with spare parts.

scrutinize whether an enterprise is having dominance are the identical in both circumstances.

Market strength

Initial step in examining dominant position is to ascertain the market share of any enterprise that is alleged against. As such the share of market held by the enterprise standalone doesn't draw inference of dominant position, however, it's an indicator of power in marketplace. It's capacity to sustain the power over a period of time that forms dominant position. The statistics of share in marketplace provides glimpses of the comparative potencies of enterprises at a specific point of time. If share in marketplace fluctuate significantly in a time frame then that may indicates possibility of an effectual competition in the marketplace.

Generally, it is viewed that an extremely high market share indicates a deduction of domination provided absence of extraordinary situations. The orientation to extraordinary situations refers to probable competition independent of that present in the current market. Outsized market shares over a longer time frame also gives rise to a more firm belief of dominance as for instance a share of 55% in market is generally considered to be large in *Belaire Owner's Association vs. DLF Limited & Ors.*

Barriers to entry and exit

The extent of entry and exit barriers also plays an important role in determining a dominant position of any given entity. It is generally acknowledged that a barrier to entry refers to such a cost that is greater to any new player in the marketplace as compared to any preexisting market competitor. Such charges are significant as lower the number of such barriers more difficult it will become for a pre-existing inefficient player to keep new competitors out of market and to safeguard its market dominance. Thus through this way the probable new players to any given marketplace will apply competitive burdens on pre-existing market participants and it presents a situation where no intervention of competition law is required to check dominance. However, in presence of such entry barriers the big players with market strength have more prospective acquire dominance in market and thus more securely placed to have an anti-competitive effect on the marketplace.

It is owing to the critical role played by entry and exit barriers in specifying the presence of dominant position, it is included in most of competition legal regimes relating to controlling abuse of dominance for example Indian Competition Act takes it as one of factor to consider in determining dominant position in a relevant market.[5]

The evaluation relating to the fact that what is to be covered under term entry and exit barriers in any jurisdiction will largely contingent upon policy/political opinions of the necessity for interference in markets. For this cause, differences are among the actual implementation of competition law in the India, EU and USA. In the European Community jurisdiction, the Courts and the competition authorities have adopted a procedure more akin to a wider meaning of barriers to entry.

Intellectual Property Rights of the OEMs

The commission also denied protection of section 3(5) i.e. protection of intellectual property rights to an agreement between OEMs and OESs as the Act only recognizes protection to those IPRs which have been conferred under that Indian legislation which is listed in 3(5). The CCI considered no defence to suggest that such exclusionary conduct is within the scope of intellectual property rights

[5] The Competition Act of India, 2002 (12 of 2003) of India

of the car manufacturers. In addition, the IP rights are vested with the parent companies' handling operations from the foreign jurisdictions. Henceforth, no commercial justification could be considered in the matter.

OEMs were not able to demonstrate that they owned IPRs and technology transfer agreements ("TTAs") were not covered by the exception under Section 3 (5) of the Act. Restrictive conditions to protect intellectual property rights are protected only subject to a party demonstrating that the agency that administers[6] intellectual property rights in India has validly recognized (or is about to recognize) such rights. Technology transfer agreements do afford such protection. CCI rejected TTAs as a ground to refuse to deal in spares and diagnostic tools as TTAs did not prevent the OEMs from selling spares and diagnostic tools in the open market. CCI reasoned that sale of products with IPRs would not affect the IPRs if the products were sold on the open market by OESs. TTAs granted a right to exploit and did not confer the IPRs itself.

It was noted that "*Only Ford has some patents over 11 body parts which have been granted in India and applications for grant of patents over 30 body parts in India is made rest OEMs in the case do not have the rights secured in India which is required in 3(5) and even if they have unlike section 3(5) of the Act there is no exception to section 4(2) of the Act. If an enterprise is found to be dominant pursuant to explanation*

(a) to section 4(2) and indulges in practices that amount to a denial of market access to customers in the relevant market it makes no defence to suggest such exclusionary conduct is within the scope of intellectual property rights of the OEMs. Neither entering into a TTA could solve the purpose unless such rights have been granted upon the OEMs pursuant to the provisions of the statutes specified under section 3(5)(i) of the Act. Thus, the OEMs pursuant to a TTA were holding a right to exploit a particular IPR held by its parent corporation and not the IPR right itself. The factors listed in section 19(3)(a)-(c) should be prioritized over the factors listed in section 19(3)(d)-(f) when an agreement irrespective of being of enhancing provisions allows an enterprise to completely eliminate competition in the market and become a dominant enterprise."

The claim of copyright protection over its engineering drawings as 'literary works' which need not be registered to get protection, under section 2(o) of the Copyright Act but the right has been limited by the Copyright Act itself mandating the copyright over the designs registered or capable of being

6 ACMA Report 2011.

registered under the [Indian] Design Act, 1911. The right again cease to exist once the concerned design has been applied more than 50 times by industrial process by the owner of the copyright or his licensee. All such products are finished products and selling them in the open market does not necessarily compromise the IPR for such products.

IV. CONCLUSION

Widely regarded as the father of modern economics, Adam Smith , while explaining the functioning of markets described contrasting, yet complementary forces of *self-interest* and *competition*, as the invisible hand that drives markets. Though free market model of economic set up has been prevalent for a century or so, it is as late as last quarter of 20th century that it has been globally recognized as the most efficient economic model. Thus, with the increasing adoption of free market model of national economy around the world led to growing dependence on markets to address the aims of economic development of a country. However, free markets also do have issues like abuse of dominance and anti-competitive conduct by enterprises at the marketplace. To address these negative connotations of free market model and stimulate competition for safeguarding consumer prosperity and efficient apportionment of resources in an economy, there arises requirement of robust framework of competition law and its effective implementation. In this context, the advanced economies like US and European Union had a head start with a robust system of competition law and policy in their market. Nevertheless, emerging markets and developing economies like India have taken effective steps in this direction set up an effectual competition system to tackle effectually the machinations and falsifications in the marketplace and to adopt "competition culture" in every field of the nation's economic[7] sphere. The one such area of interest for scholars of competition law is that of tackling abuse of dominance/monopolization by big market players in their respective spheres

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