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**DELEGATION OF
EUROPEAN UNION
TO INDIA**

Defining Market Under Competition Law

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Significance of Defining Market

- The term Market is used in several connotations –
 - Market orientation
 - Market as relating to only private sector
- Wherever a transaction or trade occurs between a buyer(s) and seller(s) there is a market
 - Ownership – public or private sector addresses problems of management
 - Resource allocation defined by the State or market
- Competition Act ,2002 is an instrument of Economic Liberalization where the intent is on moving towards market orientation
- The focus of Competition Act is on competition. The Commission is the instrument of the Act
 - to promote and sustain competition in markets not competitors
 - in doing so protects the interests of consumers
- The Commission defines the 'relevant' market considered critical in assessing anti-competitive effects

Relevant Market Defined as per Act

- The Act defines the relevant market in Se. 2(r), (s) & (t)
- 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”*
- Relevant product market
“..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”
- 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 neighboring areas”

Need for Defining the Relevant Market

- Need for defining the relevant market:
 - Drawing the parameters of malfeasance in the relevant market
 - Assessment of Dominance and the possibility of unilateral conduct
 - Limiting the boundaries of Commission jurisdiction in assessing anti-competitive outcomes
- Young competition agencies tend to be more market active in the early years perhaps to make an impact;
- Unease with shifting market contours and comfort of regulators with set rules and regulations;
- Reference to the relevant market is only in Sec.4(2) *Explanation*; Sec. 6; i.e. Abuse of Dominant Position and Mergers

Need for Defining the Relevant Market

- Sec 19(5) on duties of the Commission with regard to **Inquiry into certain agreements and dominant position of enterprise** refers to:

For determining whether a market constitutes a “relevant market” for the purposes of this Act, the Commission shall have due regard to the “relevant geographic market” **and** “relevant product market”
- Sec 19(5) on duties of the Commission with regard to **Inquiry into Combination** refers to Sec 20(4):

For the purpose of determining whether a combination would have effect of or is likely to have an appreciable adverse effect on completion in the relevant market

Current Debate

- Is it necessary to define in the market as the relevant market is defined in Sec.4 and Section 5 & 6 ? Is Sec. 3 out of the ambit of definition?
- Sec 3 pertaining to horizontal and vertical agreements the emphasis is on 'Anti-Competitive Agreements'
 - Sec.3(3) is on cartels – there is flexibility in terms of '*engaged in identical or similar trade of goods or provision of services*'
 - Sec 3(4) deals with two or more markets – any agreement or agreement with a dominant enterprise? Is it reference to Sec 3.
- Sec 4 and Sec 6 deal with dominance and its abuse – Sec 4 for existing dominance and its abuse and Sec. 6 on future dominance and its abuse
- Is it abuse of a dominant firm that is more important or is it market definition as defining the market has constraints

Play at the Ground Level

- Commission Orders define the market in all cases filed before it – Sec 3(3) & 3(4); Sec. (4); Sec. 5 & 6
- Commission defines both product market and geographic market
- The methodology for defining the market varies among the cases. Most rigorous approach to market definition in terms of use of economic tools (SNNIP) has been mainly in mergers
- Definition of market can often consist of three if not four definitions
 - Informants definition of market
 - DG's definition of market usually in keeping with Prima Facie Order which at the first stage is in line with informant
 - Respondent's definition of market
 - Majority Order definition of market
 - Minority Order definition of market
- Assessment of anti-competitive effects rests on the definition of the market – too narrow or too broad

Methodology for Market Measurement

- Defining the relevant market is the first and in many respects the most important question in antitrust analysis.
- In most antitrust cases, the outcome falls neatly from the resolution of the market definition issue.
- To establish consistently reliable empirical criteria for determining what degree of substitutability among goods, distance, and time delineates a market for legal purposes.
- Price is the ideal datum for measuring the extent of the market because it is the variable by which competition is most directly expressed
- Complex information about changing demand and supply conditions is transmitted through price.
- Profit opportunities are revealed by widening price-cost margins, and rivals, moving to take advantage of transitional quasi-rents, will drive price and profit back to normal levels.
- On this consideration the tool used is the SNNIP Test (Small but non transitory increase in prices)
- Relevant markets are determined in a mostly *ad hoc* fashion in antitrust investigations.

Case: Cartel among Association of Wholesale and Retail Dealers in Pharmaceutical Sector

Market Definition in Cartel Cases

	Informant/Prima Facie	DG/Prima Facie	Respondent	Majority Order
<p>Allegation of wholesale dealers insisting on payment of membership to be considered for retail ship.</p> <p>Fixing of price and margins</p> <p>No discounts permitted</p>	<p>Several cases allegation cartel on account of association</p> <p>Association regulates the entire all-India pharmaceutical trade</p>	<p>Cartel among wholesalers through the Association which controls the entire pharmaceutical sector</p>	<p>Association formed to ensure systematic functioning at the retail in terms of selection of appropriate and competent retailers; control scope for dealing in drugs as opposed to pharma</p>	<p>Cartel of Association</p>

Comments and points for Discussion

1. Does a cartel require a definition – in this case it is a hierarchy of associations starting from producer to retail level?
2. Where and what is the consumer harm?
3. Is it a case of Sec. 3(3) or 3(4) – Vertical restraints and how t be viewed?

**Case: Case No 3/2011
Shamsher Kataria v Honda
Siel**

Market Definition in AOD

Market Redefined Case of Aftermarket	Informant/ Prima Facie	DG/Prima Facie	Responde nt	Majority Order
<p>The allegation related to the availability of spare parts easily and at cheaper costs. Deliberate abuse of dominance by car manufacturers to keep prices , restrict supply of spare parts and restrict number of service canters.</p>	<p>Case of Aftermarket</p>	<p>Relevant Market divided into three markets- primary market and aftermarket; a third market for servicing</p>	<p>Systems Market A single car market</p>	<p>Two markets – a primary market and an aftermarket for car spares. For each car all spare parts are aggregated and recourse was to the ‘cluster aftermarket’ distinct and separate from the primary car market.</p>

Comments and Points for Discussion

1. Is there an aftermarket ? How is it to be defined consistent with the definition of ‘substitutes’ used in the definition of the relevant [market](#).
2. Is it a case under Sec. 4 or under [Sec.3\(4\)](#) – Is market definition required for Sec. 3(4) ? Does it require the use of SNNIP?
3. What is the competitive constraint. Is it possible to lower costs through

Case: No 13/2009 MCX-SX v NSE	Market Definition in AOD -2			
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Stock Exchange, Networks and Platforms	Informant/Prima Facie	DG/Prima Facie	Respondent	Majority Order/Minority Order
Dominance of NSE in the NSE in the stock exchange which includes currency derivative exchange. Allegation of predatory pricing and leveraging	Entire stock exchange	Entire stock exchange	Currency Derivative (CD) segments and the Over The Counter (OTC) forward	Majority Order – ‘the stock exchange services in respect of the CD segment in India. Minority Order – ‘the stock exchange service platform in respect of CD segment in India.

Comments and Points for Discussion

1. For stock exchanges how does one define the market? How is competition defined? CA provide for an adversarial role.
2. Is zero pricing predatory pricing? How does predatory pricing bring consumer harm?
3. Leveraging – and the two markets. How t define the two markets? As per the Act Sec. 4(2)(e) *“.....uses his dominant position in one relevant market enter into, or protect another relevant market”*
4. Is cross-subsidization a competition concern?
5. Can abuse be assessed without definition of market? Assessment of dominance needs market definition?

**Case: No.16/2010
Prints India v
Springer**

Market Definition in AOD-3

Virtual Markets	Informant/Pri ma Facie	DG/Prima Facie	Respondent	Majority Order/Minority Order
Dominance of Springer in publishing of STM journals of unfair pricing and using position to oust existing publishers.	Publication of STM Journals. Geographic market India	Publication of STM Journals. Geographic market India	Online Publishing as product market.	Majority Order: Online Publishing is the product market. Geographic market undefined. Minority Order: Publication of STM Journals.
Cases No: 7/2012,30/2012 Consim v Google;	Product Market –online advertising on general search engine. Geographic Market - India			

Comments and Points for Disucssion

1. How to define the product market when there is no price -? Can SNNIP test be applied?
2. How to define geographic markets when the market is virtual? – Whose jurisdiction?
3. How to measure dominance ? Market share – does market share suggest market power?
4. How to assess abuse when there is no market boundaries? What is the metric to be used for assessing abuse?

Notice: 2013/05/1220	Market Definition of Mergers
Jet-Ethihad:	<p>Airlines – Majority order went on the basis of ‘origin and destination’ pairs. Every combination of a point of origin and destination is a market; 2 or more adjacent airport in the same relevant market; multiple airports within a reasonable distance or time; time sensitive or time insensitive passenger groups.</p> <p>Minority Order – all international flights from the country; macro frame.</p>
Notice. No.C2014/05/170	
Sun-Ranbaxy	Market was of molecules -49 and two formulations
Comments and points for discussion	
<ol style="list-style-type: none"> 1. Defining the market in the case of pharma products is appropriately drilled down to the molecule level as this where the minimum substitutability occurs. The chemical equivalents of a molecule fall within a group. In generics competition primarily takes place between different brands based on the same molecule. 2. Alternative definition suggested is of drugs falling with a therapeutic group – here the clarity of substitutability is limited. 	

Defining the Market – Reality

- Defining the market is not always easy. A narrow market increases the scope for dominance
- Abuse and its assessment in traditional industries is based on market share
- Under the Competition Act dominance under ‘per se’ approach lead to abuse;
- For cartels market is not significant but agreements are; for vertical agreements dominance is necessary although the Act does not mention it.
- Market as a means to assess dominance and abuse feasible for traditional industries.
- In high tech and knowledge based industries market definition is difficult and abuse has to be seen in terms of competitive constraints.
- How to modify the black letter of law – or rather how to interpret it?

Select References

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- Lim Yong and Shen Yunyu, (2015), 'A Tale of Two Courts: Handling Market Definition in Abuse of Dominance Cases under Market Share-Based Statutory Power Presumptions in China and Korea', **CPI Antitrust Chronicle**, pp 2-17.
- (Case COMP/M.6281), Microsoft/Skype, European Commission decision of 7 October 2011, paragraph 99.
- (Case T-79/12), Cisco Systems v. Commission, judgment of the General Court delivered 11 December 2013).
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This is over and above the select references given in the presentation on Competition Law. Cases of CCI maybe got from the Commission website.

Thank You

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