ABUSE OF DOMINANCE IN THE REAL ESTATE SECTOR

(RESEARCH REPORT PREPARED UNDER THE INTERNSHIP PROGRAMME OF COMPETITION COMMISSION OF INDIA)

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Shagun Badhwar
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Shagun Badhwar
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1. INTRODUCTION

Dominant Position has been appropriately defined in the Competition Act, 2002 (hereinafter known as the “Act”) in terms of the ‘position of strength enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market, in its favor’.

The term ‘abuse of dominant position’ refers to anti-competitive business practices in which a dominant firm may engage, in order to maintain or increase its position in the market.

When there is perfect competition in the market, the consumer is sovereign as he has the freedom of choice through which his welfare is maximized. However, this freedom of choice can be easily compromised by monopolists in the market. They have a negative result not only on the consumer but the economy as well. These so-called ‘monopolists’ control the prices and have the power to increase prices or reduce volumes; the reason for this is the lack of competition in the market.

The Act lists several factors which the Commission must consider in determining the relevant product and geographical market along with list of other factors which the Commission should consider in determining dominance - such as market share, entry barriers, size, resources, economic power, commercial advantage of the firm and so on. If proved that the firm is in fact holding a dominant position then what has to be shown is: has there been an abuse of that dominance? If the answer is in the affirmative then that would come under the purview of the Act. Practices such as unfair or discriminatory pricing, limiting or restricting production or technical or scientific development, denying market access amongst others all constitute abuse.

“Relevant market” has been defined exhaustively in Section 2(r) of the Act which is determined with reference to relevant product market or the relevant geographic market. Market means where the buyers and sellers have access to each other, it is an established medium for the supplier-consumer communication.

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1 Explanation to Section 4(2) of The Competition Act, 2002
2 See M.A.P. Oil Co. v. Texaco, Inc. 691 F.2d 1303 (9th Cir. 1982)
distinct prices are factors in identifying a distinct market. The purpose of the Act is to promote and sustain competition in markets. Market for that purpose is not the entire market, but only a portion of the relevant Indian market which can be viewed as an independent business area of effective competition, where supply and demand interact. Therefore, it is defined in terms of interchangeability and substitutability.

EC Competition Law by Alison Jones and Brenda Sufrin (Oxford University Press) explains:

“The purpose of defining the relevant market is to identify which products and services are close substitutes for another that they operate as a competitive constraint on the behavior of the suppliers of those respective products and services. Suppose, for example, you are suspicious that Y, the only producer of the yellow widgets, is exercising market power and engaging in monopoly pricing. A preliminary question which must be asked is whether or not the product has substitutes to which the consumers could easily turn. If it does, then if Y raises the prices it will lose customers. If customers can instead buy blue widgets and pink widgets, which are perfect substitutes, from other firms a rise in price of yellow widgets is meaningless in economic terms. Similarly, suppose Y is the sole manufacturer of all colors of widgets. Y will still not be able to raise prices without losing customers if blodgets, which are made by other firms, are perfect substitutes for widgets. The problem of market definition is that it is often difficult to decide which products or services are in the same market. It is obvious, for example, that steel beams and chewing gums are not in the same market, but what about coffee and tea, vodka and whisky, bananas and apples, Eurostar and cross-channel ferries? A relevant market has a product, geographic, and (sometimes) temporal aspect”. (p.38 and 39)

The Act differs from the Monopolies and Restrictive Trade Practices Act (herein after known as “MRTP”) with regard to the meaning of dominance. This can be seen with an analysis of the definition. Under the MRTP, a dominant undertaking was defined as an undertaking which “supplied, produced or controlled not less than one-fourth of the total supply of that good or service in India.” However under the Act there is no such

3 See Competition Law & Practice – D.P. Mittal
criterion, there are several other factors besides say the one-fourth market share that are taken into consideration to determine whether the enterprise is indeed dominant. This has made determination of dominance less restrictive and hence much more flexible. Therefore, in the light of the above definition we can safely conclude that the Act does not prohibit or restrict enterprises from coming into dominance. All that the Act prohibits is the abuse of that dominant position. The Act therefore targets the abuse of dominance and not dominance per se. Some practices by dominant firms are prohibited, but are lawful if done by small competitors who do not distort competition.

1.1 Factors for determining Dominance

Dominance is the position of economic strength of an enterprise, determined on the basis of its power to operate independently of influence of competitors or consumers or the market. As it has already been stated, mere dominance in the market is not abusive. The law makes a distinction between those practices which restrict or exclude competition and those in which the success of the business is due to a superior product or an enterprise that is run more effectively and efficiently than another. Therefore, it is important that competition policy does not try to replace the role of competition in the market. It should not be used as a tool to protect competitors from competition in the market. Various elements are taken into account in assessing dominance.

Raghavan Committee Report on Competition Law observes as follows in paragraph 4.4-8:

“Therefore, to assess dominance it is important to consider the constraints that an enterprise faces on its ability of act independently. The current market share is a necessary but insufficient prerequisite for dominance. In spite of having a large market share a firm may be constrained by the threat of competition from potential entrants and by the purchasing power of its own customers. Entry barriers could result from absolute advantages such as patents (legal) and access to certain inputs. These could also result from strategic first-mover advantages. High sunk cost could make markets incontestable. Exclusionary practices could increase strategic advantages of the first mover. Lastly, factors other than existing or potential competition need to be considered. For example, strong purchasing power-if customers are powerful relative to the enterprise-can also constrain the behavior of the firm.”
From the aforesaid paragraph light is thrown on the various factors constraining the behavior of an enterprise. However, no factor alone can be decisive; in all or most cases there is a combination of these factors which is required to ascertain dominance. A dominant position derived from a combination of several factors which, when taken separately are not necessarily determinative.4

1.2 Dispute between Consumer Forum and Competition Commission of India (CCI).

There is a tendency to confuse competition law with other related disciplines and concepts, in particular when it comes to consumer protection law and competition law. These are different concepts, though quite related since they seek to ensure that markets can function for the maximum benefit of consumers.5 As such, they have been described as “the two sides of the same coin”.6 However, there are some distinctions which enable us understand the significant disparity between the two. First, while the role of competition law is to ensure that the marketplace remains competitive, so that a meaningful range of options is made available to consumers, the role of consumer protection law is to protect consumers’ ability to choose freely and effectively among options.7 Second, while competition law requires that consumers find a reasonable range of options in the market place, undiminished by artificial constraints like price-fixing or anti-competitive mergers, consumer protection law requires that consumers are able to make a reasonably free and rational selection from among those options, unimpeded by artificial constraints like deception or the withholding of material information.8 In some cases, the industry representatives in India adopt the view that the CCI conflicts with the Consumer Redressal Forums as the Consumer Protection Act, 1986, already exists to deal with any or all such grievances. According to them, before the consumer signs the buyer-seller agreement he should understand the terms and

4 United Brands Co. v. Commission (1978) ECR 207
5 Introduction to Competition law: a sine qua non to Liberalized Economy by Nnmadi Dimgba, BCL, PhD, www.globalcompetitionforum.org/regions/africa/Nigeria/INTRODUCTION TO COMPETITION LAW.pdf
8 Introduction to Competition law: a sine qua non to Liberalized Economy by Nnmadi Dimgba, BCL, PhD, www.globalcompetitionforum.org/regions/africa/Nigeria/INTRODUCTION TO COMPETITION LAW.pdf
conditions behind it and if he is of the view that it is discriminatory and illegal then he should not sign it. It is stated that once the buyer signs on the dotted line, he for all future purposes is to be informed of all the clauses in the contract and cannot at a later stage plead that he was unaware of the provisions.

Let us look at a situation which seems to fall within the ambit of the Consumer Protection Act, 1986. In this instance, the builder has taken undue advantage of the buyer. It also highlights the arbitrary and unequal rights, obligations and liabilities of the two contracting parties under an agreement. This can be seen in the development of the first apartment projects by DLF, which is situated on the Gurgoan – Faridabad road called ‘Oakwood Estates’. The residents of this condominium have fought a protracted battle with the builder, seeking control of common areas and transfer of maintenance role the Residence Welfare Association ("RWA"). This RWA has complied a fairly comprehensible list of what a builder has to do, but has not been done in this case. Given below are some of the important points;

1. Filing of declaration under Apartment Act ensures implementation of this Act. Sole owners or all owners are to execute this Deed of Declaration: **Not done by builder**
2. Conferring Heritable and Transferable Ownership Rights under the Act, with its undivided share in the common areas and facilities: **Not done**
3. Categorization of common areas: **Not done**
4. Declaration of shops, parking's, community centre, primary nursery school as common area: **Not done**
5. Own exclusive club and health centre, exclusive cable and master antennae connection, cable connection: **Not provided**
6. Formation of Apartment Owners Association: **Not done**
7. Board of managers to be elected in first meeting: **Not done**

In such a case the grievance of the sellers can be settled in the consumer forum as there is a blatant violation of the buyer-seller agreement. A number of cases that have

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come before the CCI against realtors under Section 4 have been dismissed for two main reasons, (a) that they relate to a consumer dispute and thereby do not fall under the provisions of the Act and (b) that the companies did not enjoy the position of dominance in the market. While dismissing one of the cases the CCI, in its order said, “It is quite possible that injustice has been done to the informant at the hands of the opposite party. However, for any injustice done by a builder to the consumer, the remedy does not lie under Section 3 or Section 4 of the Competition Act, neither Section 4 should be attracted for each and every building project, however big or small, started by an enterprise.” It added that the intent of Section 4 was to curb anti-competitive practices arising in the market because a dominant player was adopting such practices and tactics, which killed competition. The objective was also to prevent abuse of dominance and therefore not to take up every case in which there is a violation of the buyer-builder agreement as there already exists a separate platform for that, which would be rendered ineffective if this were to happen. In cases where the Commission is of the opinion that the nature of the grievance is such that it does not fall under the purview of the Competition Act, the Commission dismisses the case and leaves it open for the parties to seek redressal elsewhere. Most of the complaints that have been dismissed by the CCI were directed towards seeking compensation from the developer for personal interests, for which CCI is not the platform.
2. PROCEDURE FOR INQUIRY INTO ABUSE OF DOMINANCE

Chapter IV deals with the Duties, Powers and Functions of Commission. There are three distinct ways in which the Commission may inquire into any alleged contravention of the provisions of the Act, either it can take up a matter suo-moto (on its own motion) or on receipt of any information by any persons or enterprise accompanied by the required fee or on a reference made by the Central Government or State Government of a statutory authority.

Section 18 states that it is the duty of the Commission to eliminate practices having adverse effect on competition, to promote and sustain competition, to protect the interests of the consumers and ensure that freedom or trade is carried on by other participants, in the Indian markets. For the purpose of discharging its duties and performing its functions, the Commission may enter into any memorandum or arrangement with any agency of any foreign country after the approval of the Central Government.

2.1 Factors for determining Dominance

Under Section 19(4) of the Act, the Commission shall, while inquiring whether the enterprise enjoys dominant position or not under Section 4, have due regard to any or all 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 enterprise or sale or service network of such enterprise;
(f) Dependence of consumers on the enterprise;
(g) Monopoly or dominant position whether acquired as a result of any statute or 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 services for consumers;

(i) Countervailing buying power;

(j) Market structure and size of market;

(k) Social obligations and social cost;

(l) Relative advantage, by way of 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.

The above mentioned factors enumerate a comprehensive list of issues that should be looked into before passing an order but are in no way exhaustive. Clause (m) enables the Commission to look into any other matter that might be necessary to prove dominance of an enterprise. If any factor is proved by the complainant, that can lead to an inquiry against the opposite party by the Director General (DG). It is not necessary that all the factors need to be proved simultaneously to attract the provisions of the Act.

For determining whether a market constitutes a “relevant market” for the purposes of the Act, the Commission shall have due regard to the “relevant geographic market” and “relevant product market”.\(^{10}\) The factors to determine “relevant geographic market” and “relevant product market” are enumerated in Section 19(6) and Section 19(7) of the Act respectively.

\(^{10}\) Section 19(5) of the Competition Act, 2002
3. ASSESSMENT OF THE REAL ESTATE SECTOR UNDER THE REGIME OF COMPETITION COMMISSION OF INDIA

3.1 Competition Issues in the Real Estate Sector

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.\(^1\) Previously, the governments support to housing had been centralized and directed through the State Housing Boards and development authorities. In 1970, the Government of India set up the Housing and Urban Development Corporation (HUDCO) to finance housing and urban infrastructure activities and in 2002 the government permitted 100 per cent Foreign Direct Investment (FDI) in housing through integrated township development. The residential real estate industry now is driven largely by private sector players.\(^2\) This increase in activity has led to several issues in the sector, which mostly include problems being faced by the buyers. This is why the watchdog of competition in India has to keep its eyes and ears open.

Over the last year, there has been a sudden influx of complaints against several property majors mainly for imposing highly arbitrary, unfair and unreasonable conditions on the buyers. This is believed to be a result of the Rs. 630 crore penalty, in a 237-page order that was imposed on what is seen to be the biggest real estate company, DLF in the case of Belaire Owners Association (“Informant”) vs. DLF Limited & Ors. (“Opposite Parties”)\(^3\) last August. The fine amounts to a 7% of the company’s average annual turnover in the past three years. This judgment is a powerful tool in the hands of an average property buyer against the developers which has put hundreds of builders in the country on edge as they too have been committing the same offences for many years now. Most complaints that reached CCI cited delay in delivery and biased buyer-builder agreements, which in some cases brings to the front the abuse of power by the said developer.

\(^1\) Case No.19 of 2010, MANU/CO/0044/2011
\(^2\) Ibid.
\(^3\) Ibid
According to the CCI officials, over 200 letters have been received against some of the biggest names in real estate in the recent past. The Commission however has been closely scrutinizing enterprises and inquiring into whether they enjoy a dominant position or not under Section 4. A larger number of cases have been disposed of under Section 26(2) for not having a prima facie case. The CCI made it clear that there could be a case where the consumers suffer at the hands of the developers but that solely does not attract Section 3 and 4. There could be cases where the grievance could not be resolved by the Commission and the redressal lay either in the Consumer Disputes Redressal Forum or the Civil Courts. The intent of Section 4 is to curb anti-competitive practices arising in the market because a dominant player was adopting such practices and tactics, which killed competition. The objective is also to prevent abuse of dominance.

In view of so many real estate cases coming up at the CCI, National Real Estate Development Council (NAREDCO) is planning to come out with a draft national agreement, which will be a model buyer-builder agreement for the industry to follow. It is in dialogue with customers, consumer forums, besides following the CCI recommendations in the DLF case, to draft the agreement. One of the discrepancies that the draft agreement may look at correcting is the clause where a buyer is expected to pay up to 18 per cent interest on defaulting on the installment. However, in case of a delay in delivery by the developer, it pays only one to two per cent as penalty charge. Most of the Industry representatives are opposed to any such proposed changes since they are of the opinion that the mandatory standard agreement prescribed by the act leaves very little scope of exploiting buyers.

If we look at the Gurgaon region itself we can see a number of projects in which the allotees, who have been waiting a minimum of three years still have not got possession. Mentioned below is a comprehensive list of a large number of such projects by some of the biggest real estate enterprises, which were supposed to be handed over by the year 2011-2012 but are still pending. This will help us visualize the undue advantage that is being taken by such enterprises. They are oblivious to the needs of the

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investors and go along constructing at their own pace. This is the sort of behaviour that is highly condemnable. It is time someone gave them a wakeup call.

3.2 Comprehensive list of delayed project in Gurgaon, Haryana

The following table highlights 9 different projects which were launched in 2004-2005 and the investors still do not have possession.

<table>
<thead>
<tr>
<th>Row Labels</th>
<th>Estimated Number of Units in Project</th>
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<tr>
<td>2004-Q3</td>
<td></td>
</tr>
<tr>
<td>Sweta Estates Central Park II</td>
<td>1445</td>
</tr>
<tr>
<td>Ardee Palm Grove Heights</td>
<td>429</td>
</tr>
<tr>
<td>2004-Q4</td>
<td></td>
</tr>
<tr>
<td>Parvnath Exotica</td>
<td>722</td>
</tr>
<tr>
<td>MGF The Vilas</td>
<td>369</td>
</tr>
<tr>
<td>JMD Gardens (DFG Towers)</td>
<td>500</td>
</tr>
<tr>
<td>Clarion The Legend</td>
<td>499</td>
</tr>
<tr>
<td>2005-Q2</td>
<td></td>
</tr>
<tr>
<td>Silverglades IVY</td>
<td>156</td>
</tr>
<tr>
<td>Bestech Park View Spa</td>
<td>322</td>
</tr>
<tr>
<td>AEZ Alpha</td>
<td>189</td>
</tr>
</tbody>
</table>


These are all examples of how builders make false promises they never live up to. Napoleon once said that if you want to be successful in life then make promises, but deliver nothing. This seems to be exactly the state of affairs in Gurgaon amongst many other states. All the builders do is make promises to make your dreams come true but deliver nothing. This long drawn tussle between the apartment owners and the developers is already a threat to the real estate boom and will continue to intensify as the buyers start become aware and begin fighting for their rights.
In the above mentioned cases, deposits in crores have already been made by the buyers but even 5 years later they still don't have possession. The buyers seem to be completely dependent on the builders and locked in with no suitable exit option. This has caused a great deal of difficulty in the lives of many. For example investors who are living in rented accommodation have to continue to do so and pay exorbitant rates due to the delay that has been caused in handing over possession. An order of the Commission in relation to DLF magnolias has been passed by the CCI stating that there has been a gross violation of justice and a breach of Section 4 of the Act.
The following statistics highlight the estimated number of units which should have been completed by the builders in the year 2009 but are still incomplete.


Yet another project which is being developed by DLF was delayed. The Competition Commission in DLF Park Place Residents v. DLF Limited & Others passed an order on the 29th of August, 2011 against DLF for abusing its dominant position in Gurgaon, Haryana. No penalty was imposed as the facts and circumstances were similar to a prior order passed against DLF but the CCI issued a cease and desist order from formulating and imposing such unfair conditions in its agreement with buyers in Gurgaon.
After analysing the facts and statistics above, it is clear that once the buyer-seller agreement is signed by the investor and is underway, he is at the mercy of the builder. In most cases there is no reasonable exit clause which implies that the investor is stuck with the unfair conditions imposed on him by such an agreement. Usually buyers have no option but to accept in toto and give the assent to ‘Apartment Buyer’s Agreement’, though the clauses are onerous, arbitrary and one-sided. A person who is desirous of booking apartments in such cases has no escape but to accept all clauses.

However in light of the recent CCI judgements in favour of the buyers, there has been a tremendous impact on an industry that is known to practice one-sided agreements and not meet the expectations and promises made to investors in brochures. These modern day Napoleons need to start delivering before things get out of hand. Hence, great caution and due care must be exercised while drafting brochures,
prospectuses, disclosures made by directors to investors and company websites; and to further ensure that the agreements are not lopsided.

3.3 The saga between DLF and CCI continues...

Competition Commission of India has accused DLF (India’s largest real estate firm) on three separate occasions for abusing its dominant position. On May 5, 2010, the Belaire Owner’s Association, an association of buyers in DLF’s Belaire residential project in Gurgaon, complained to the CCI that DLF was violating the provisions of the Act. An order was passed on 12th August 2011 in favour of the buyers, highlighting that DLF was in fact in contravention of Section 4 (2)(a)(i). This was a culmination of a 15-month battle between the buyers on one hand and DLF along with two Haryana urban planning authorities on the other. DLF has appealed against the CCI order at the Competition Appellate Tribunal. The order is much awaited, though the chances of success for DLF seem slim. Let us look at the brief facts of each of these cases and the factors which lead to DLF being held guilty on three separate occasions.

3.3.1 Where Abuse of Dominance has been proved

3.3.1.1 Case 1: Belaire Owner’s Association vs. DLF Limited and HUDA

It was a landmark judgement, as for the first time action was taken against a real estate firm for ‘grossly abusing its dominant position’. Not only did the CCI impose a penalty of INR 6,300 million at the rate of 7% of the average turnover of DLF for the last three financial years but also issued a ‘cease and desist’ order from imposing unfair and unreasonable conditions in its agreements with buyers for the residential buildings to be constructed.

The facts of the case are as follows: DLF announced the launch of ‘The Belaire’ which was supposed to be a multi-storied residential housing complex to be constructed in DLF City, Phase-V, Gurgaon, Haryana. Initially there were supposed to be 5 buildings consisting of 19 floors each with a total of 368 apartments in the whole complex. The buyers were promised possession in 36 months. However, the terms of this contract were unilaterally violated when instead of 19 floors DLF constructed 29 which led to a substantial delay in the construction as a result of which the buyers were

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16 Case No. 19 of 2010
left in the dark not knowing when they would get possession. This led to huge financial losses for the allottees. The total price paid by the apartment allottees included the ownership right of his apartment, as also prorate ownership right of land beneath the building as well as pro-rata right of common areas and facilities (which may be located anywhere in the complex) which due to the increase in the number of floors stood largely compressed.

A complaint was filed by the Informant against DLF, Haryana Urban Development Authority (HUDA) and Department of Town and Country Planning (DTCP), State of Haryana alleging that DLF, by abusing its dominant position, had imposed highly arbitrary, unfair and unreasonable conditions on the allottees which had serious adverse effects and ramifications on their rights. It was also alleged that HUDA and DTCP had approved and permitted DLF to act in an illegal, unfair and irrational manner as they had allotted land and given licenses, permissions and clearances which are in violation of various statutes.

The CCI held that a prima facie case existed and directed the DG to investigate into the matter under Section 26(1). It is pertinent to note that the order of the Commission was challenged before the Competition Appellate Tribunal, on the grounds of lack of jurisdiction. However this appeal was dismissed. The DG held that the Act was applicable in the instant case and delineated the relevant market on the basis of services provided by the developers for construction of ‘high-end buildings’ in Gurgaon, Haryana.

The CCI on the basis on the DG report framed four major issues for consideration which are as follows:

**Issue 1:** Whether the provisions of the Competition Act, 2002 were applicable to the facts and circumstances of the instant case?

- DLF contended that ‘Sale of apartment’ is neither a sale of good nor service, and thus it is not covered under Section 4(2)(a)(ii) of the Act.
- It was further contended that the Act did not have retrospective effect and since the terms and conditions of the agreements were executed in December 2006 and 2007 prior to May 20, 2009 when the provisions relating to abuse of dominant position came into effect, it was not applicable.
Lastly it was stated that all the clauses in the ‘Buyers-Seller Agreement’ were in accordance with the ‘industry practice’ which was incorporated by all the real estate enterprises and did not amount to abuse.

With respect to the first issue whether the ‘Sale of apartment’ amounts to sale of goods or services the CCI relied on the definition of service under Section 2(o)\(^\text{17}\) of the Consumer Protection Act, 1986 along with Section 2(u)\(^\text{18}\) of the Act and held that the definitions are of a wide magnitude and include service of any description and it includes the provision of services in connection with business of any industrial or commercial matters such as real estate. Thereby the intent of the legislature is to include service of any description including for real estate as clearly provided in the Section. This implies the activities undertaken by DLF are within its ambit.

The second contention of DLF was related to the provisions of the Act not having a retrospective effect. To counter this argument the CCI relied on a judgement by the Bombay High Court in the matter of Kingfisher Airlines Ltd. vs. CCI\(^\text{19}\) and held that the Act applies not only to all existing agreements but also covers those subsisting agreements which were entered into prior to the coming into force of the Act.

With regard to the last contention relating to the arbitrary and unfair clauses in the ‘Buyers-Seller Agreement’, the CCI held that the industry practices which were supposedly followed by all the real estate enterprises emanated from the market leaders and DLF being the market leader in the real estate sector in the relevant market was held to be enjoying a dominant position. The same practise if adopted by a non-dominant player may not fall within the ambit of Section 4, however being a dominant player there is a sense of responsibility which has to be carried on.

\(^\text{17}\) Section 2(o) "price", in relation to the sale of any goods or to the performance of any services, includes every valuable consideration, whether direct or indirect, or deferred, and includes any consideration which in effect relates to the sale of any goods or to the performance of any services although ostensibly relating to any other matter or thing;

\(^\text{18}\) "service" means service of any description which is made available to potential users and includes the provisions of service in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising.

\(^\text{19}\) [2011]100CLA190(Bom)
**Issue 2:** Meaning and definition of the term ’relevant market’, in the context of Section 4 read with Section 2(r), and Section 19 of the Act.

As regards the relevant product market for the purpose of Section 4, it was highlighted by the DG in his report that the houses in the instant case are not smaller low priced dwelling units, the cost of each unit is between Rs. 2-3 crore which constitutes a distinct class in itself. Relying on the case of Wanadoo, COMP/38.223 [2005] 5CMLR 120, the DG stated that the relevant product market would be services provided by the developers for providing 'high-end' apartments to the customers.

As far as relevant geographic market is concerned, DLF contended that dominance needs to be looked into in the entire NCR and not only the Gurgaon region. However, The DG submitted that the relevant geographic market is the territory of Gurgaon, Haryana itself as a person who wants to reside in Gurgaon for various reasons will like to settle in that area itself. A decision to purchase a ’high-end’ apartment in Gurgaon is not easily substitutable by a decision to purchase a similar apartment in any other geographical location.

**Issue 3:** Whether DLF has a position of dominance in the above mentioned relevant market?

Once the relevant product and geographic market is determined, the next question that needs to be investigated is whether the party in question has a position of strength in the relevant market in India. In the present case DLF submitted several reports and contended that they are not dominant in the relevant market as there are many other large real estate companies and builders in India, because of which the customers have a wide choice when it comes to selecting residential apartments. There is ample choice and it is immaterial as to who is the largest.

The market share of DLF in the relevant market was ascertained on the basis of the report from Centre for Monitoring Indian Economy (herein after known as “CMIE”) for the month of April 2010. The report stated that DLF along with its subsidiaries has the highest market share in India among all the listed companies engaged in housing construction during the year 2007-08 and 2008-09 with 40.46% and 32.65% respectively. DG also stated that after an analysis of total sales figure of 82 companies
taken from CMIE, who are engaged in residential real estate and are not only operating in Gurgaon, but all over India, DLF has 44% of the market share. For the year 2009-10 also, the market share of DLF in the relevant market is about 50%. Lastly the DG brought out that as far as companies operating in Gurgaon are concerned, the market share of DLF based on their all India sales during the Quarter ending June 2010 was 45% as compared to the second largest company i.e. Unitech, which was 19%. All these factors coupled with the fact that DLF had an early mover's advantage in a sector with natural entry barriers due to high cost of land and brand value of incumbent market leaders, DLF barely faced any or no competition from its rivals.

**Issue 4:** Whether there has been an abuse of dominance?

Once dominance of an enterprise is established the next step is to determine whether there has been an abuse of that position of strength. Mere dominance of an enterprise is not enough for action to be taken against them. In the present case, the DG after examining the allegations of the Informant concluded that with respect to the commencement of the project without sanction/approval from DTCP, delay in completion of the project coupled with the unilateral violation of the agreement when decision was taken to increase the number of floors mid-way (from 19 to 29) which led to the issue of floor area ratio and density per acre, all amounted to abuse of dominant position. DLF denied charges of abuse and stated that there was no violation of any law if projects are launched before building plans are submitted to the concerned authorities. DLF also claimed that when agreements are entered into between parties consensually they are binding on both parties and so the issue of abuse of dominance does not arise.

The following are the sixteen clauses in the Buyers Agreement which were considered to unfair by the Commission:

1. Unilateral changes in the agreement and the power to supersede and substitute the terms of the agreement with respect to subsequently approved lay out plans without the consent of the apartment allottees;
2. DLF’s right to change to layout plan, again without the consent of the apartment allottees;
3. Discretion of DLF to use areas owned by the allottees in the compound for other purposes like residential, commercial;
4. It was mandatory to pay preferential location charged paid up-front, but when the location was unavailable, the refund would of the amount of his last instalment (without any interest);
5. Unilateral right of DLF to increase and decrease super area with consent of allottees who had to bear the price of this right, by being corced to make additional payments as and when necessary;
6. DLF has the right to substitute the method of calculating the proportionate share in ownership of the land beneath the building and/ common area and facilities even though the allottees has already been promised he owns a certain amount of land;
7. The allottees have no rights in regard to the community recreational facilities;
8. The current project underway ('Belaire') can be linked to another one at the sole discretion of DLF which would alter the ambience and quality of living, which is the main reason that allottees have decided to invest in the project in the first place;
9. DLF made it mandatory for the allottee to pay any extra external charges that would arise during the construction;
10. Arrangement of the supply of power to the apartments and their rates are in the hands of DLF can be levied as and when desired;
11. Arbitrary forfeiture of amounts paid by the allottee as earnest money, brokerage charges etc;
12. No exit option for the allottees, in case possession is not handed over and even in that event the money is refunded without interest after the apartment has been sold to someone else. DLF had minimized any loss possible for itself but had maximized losses for the allottee in every situation;
13. DLF at any point can abandon the project without any penalty. In case possession is not handed over within three years of the agreement, DLF is liable only to refund the amount paid by the apartment allottee with a simple interest at 9% per annum for the period such amount was lying with DLF. If the project is delayed beyond three years, compensation will be paid at a mere 5%.
14. Allottees have no rights relating to alterations of the building;
15. Third party rights created to raise finance/loan, which is to the detriment of the allottees without their consent;

16. Penalty in case of default of payment for the allottees is at a rate of 15% for the first ninety days after which it would at 18% per annum.

With all these contentions in mind, CCI held that DLF was abusing its dominant position owing to several unfair and one sided conditions inter-alia unilateral changes in the agreement and absolute discretion to change clauses without consent of allottees. The allottees on one hand had no reasonable exit option and on the other had no authority with regard to the building plans. All powers, authority and control vested with DLF.

Mr. R. Prasad, Member of the CCI, in his supplementary order enumerated the concept of ‘aftermarket abuse’ a concept which was first brought to light by the U.S Supreme Court in the Eastman Kodak case\textsuperscript{20}. 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 characterized 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.

As of now the case is pending in the Competition Appellate Tribunal (COMPAT) and there is a stay order on the penalty of Rs. 630 crore. However, the CCI has made it clear that if DLF is found guilty of abusing it dominant market position, it will have to pay an extra penalty to Rs. 900 crore.

\textsuperscript{20} See Eastman Kodak Co. vs. Image Tech. SVCS504 U.S. 451(1992)
3.3.1.2 Case 2: DLF Park Place Residents vs. DLF Limited

On 29\textsuperscript{th} August, 2011 another similar ‘cease and desist’ order was passed by the CCI in the case of DLF Park Place Residents \textit{vs.} DLF Limited. In this case the Informants were a resident welfare association who filed a case against DLF Home Developers Ltd. HUDA and DTCP, State of Haryana were also named as respondents. The Commission opined that the order passed by it in Case No. 19 covered several aspects of the issues that have been highlighted in the present case. Therefore, the instant case was disposed off through a common order.

The brief facts of the case are as follows: 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 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. 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 the matter under Section 26(1).
The CCI on the basis of the DG report framed two major issues for consideration which are as follows:

**Issue 1:** Is there a case of abuse of dominance?

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 Hoffman-La Roche, the Court of justice while defining a position of economic strength, stated:

“such a position does not preclude some competition.... but enables the undertaking...if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.”

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) need to 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.

**Issue 2:** Has DLF engaged itself in practices which may be said to be abusive under the Act?

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) of the Act.
The Commission was of the opinion that the conduct of HUDA and DTCP of Government of Haryana did not come within the ambit of Section 4 of the Act. It went on to state that various clauses of the Buyer's Agreement are unfair and in contravention to Section 4. The Commission passed an order under Section 27(a) directing DLF to –

- Cease and desist from formulating and imposing unfair conditions in its agreements with buyers in Gurgaon, Haryana.
- To modify the unfair conditions imposed on buyers within 3 months of the said order.

Note: No penalty was imposed, as the nature of contravention was identical to that in Case No. 19 of 2010. In that case the Commission had imposed a penalty of Rs. 630 crores.

3.3.1.3 Case 3: M/s Magnolia Flat Owners Association & Others. vs. M/s. DLF Universal Limited & Others

The phrase ‘Third time is a charm’ clearly didn’t apply to DLF when CCI on 31st January, 2012 passed yet another order against DLF for contravention of the provisions of Section 4. In the case of M/s Magnolia Flat Owners Association & Others. vs. M/s. DLF Universal Limited & Others, the informants filed a case under Section 19 (1) (a) of the act against DLF Limited (“hereinafter referred to as DLF”), HUDA and DTCP. It was contended that DLF had abused its dominant position by imposing discriminatory conditions against the apartment allottees in the residential project “Magnolia” and the other two parties had favoured DLF because of its dominant position in approving sanctions which were to the detriment of the allottees.

In the present case DLF invited applications for the booking of apartments in the Group Housing Complex “Magnolia” consisting of 19 multi-storied residential buildings of 17 floors each in Phase V, DLF, Gurgaon, Haryana. It was represented by DLF that possession would be handed over in 36 months. The payment plan was spread over a period of 2.5 years from the time of the booking, therefore a large number of funds (five instalments = Rs. 1 crore) was already paid by the allottee even before the sanctions and approvals were given. After 90% of the sales consideration was given by the buyers and two months after the possession of delivery date, DLF submitted revised building plans
where they wanted to increase the number of floors from 17 to 22 and 26 in some towers which not only was a unilateral decision on the part of DLF but also posed as a great threat to the structural safety of the building. There were several other clauses in the agreements which were seemingly one-sided.

Considering all the above, the Commission found that a prima facie case exists which should be investigated further. After obtaining information from both sides, the DG outlined the relevant market and whether there was dominance. Since each apartment unit was ranging between Rs. 2.7 crore to Rs. 14 crore, DG determined the relevant market (as ‘services provided by developers and builders for constructions of high-end residential units in Gurgaon’) on the same lines as it was done in the above to cases (Case No. 18 and 19 of 2010). DG further stated that DLF did in fact enjoy a position of dominance in terms of Section 19(4) of the Act considering the fact that it has a large market share and is in a position to behave independent of the competitive forces.

The Commission found DLF to be in contravention of Section 4(2)(a)(i) of the Act and has directed DLF to cease and desist from formulating and imposing unfair conditions with its buyers in Gurgaon and to suitably modify within three months all such unfair conditions in the agreement.

Keeping the above findings in mind, it is important to note that the DLF judgement has opened a can of worms as far as complaints against realtors are concerned. However, this is still the only case in the real estate sector in which the CCI has passed an order for the contravention of Section 4.

3.3.2 Critical analysis of the interpretation of Abuse of Dominance by the CCI

Over 90% of the cases filed under Section 19 of the Act have been closed under Section 26(2), on the ground that informants have failed to define the relevant market or there was no data to show that the opposite party was holding a position of dominance or even if it was there was no abuse of that position.
3.3.2.1 Determination of dominant firm

While determining whether a firm is dominant or not, several factors mentioned under Section 19(4) have to be looked into to come to such a conclusion. However, when there is a situation in which an enterprise is dominant all across India, then in the future if action is brought against that enterprise for abuse of dominance, will it be necessary for the informant to prove the firm’s dominance in the relevant product and geographic market again? This question has left a number of people perplexed as to the procedure behind determination of a dominant firm.

This can be highlighted in the fact that in the DLF Belaire Case, the DG after careful analysis, highlighted the findings of CMIE showing that DLF not only had a presence in the Gurgaon, Haryana region but all across India. After an examination of total sales figured of 82 companies taken from CMIE, who were engaged in real estate (residential) business all over India, the market share of DLF is at about 44% and the share of the second largest real estate company is almost 1/3rd of that of DLF. DLF as per its own projections stated that they were developing projects throughout India, which involved the development of plot, residential, commercial and retail developed area of approximately 46 million square feet, 377 million square feet, 88 million square feet and 56 million square feet, respectively, totalling over 574 million square feet. This market share analysis throws light on the fact that DLF has the highest market share among all housing construction companies in India. The Commission is receiving cases against DLF in almost all corners of the country, which means the presence of DLF is in all corners.

There have been several cases filed against DLF, which have been dismissed by the Commission owing to lack of evidence to show that the firm is dominant or that there has been an abuse of the dominance. Is this justified?

Some of the recent orders passed under Section 26(2) are as under:

**Owners and Occupants Welfare Association vs. M/s DLF Commercial Developers Ltd. & Others**\(^2\) - The informants were the allottees of commercial flats and

\(^2\) *Competition Commission of India – Case No. 15/2012*
shops located in the two buildings known as DLF Tower A and B at Jasola District Centre, Jasola, New Delhi. The informants has alleged that the opposing party has abused its dominant position by imposing unreasonable conditions in the buyer agreement which has enabled them to unjustly enrich themselves of Rs. 249 crore. The informant in this case has identified the relevant market as 'high end commercial space in south west Delhi, more particularly in Jasola District Centre, Jasola'.

For considering dominance the primary deciding factor is related to the identification of relevant product market and geographic market. The Commission has to determine whether the customer has readily available options to switch to other suppliers located elsewhere in case unreasonable conditions are imposed on them. The Commission was of the opinion that two situations exist in the buying of commercial space which is under development. The first being booked by consumers for establishing a new business venture or shifting their present one from one place to another and the second being those who are merely investing in property to safeguard their future. In the latter case, there is a vast substitutability available as they are not 'area-specific' customers unlike the former. In the present case the informant did not state the purpose for which the investment was made nor has it been alleged that Jasola has some special features in comparison to other spaces available anywhere in Delhi. Therefore, those who wished to invest in Jasola could do so anywhere else in Delhi. In the present case, the relevant geographic market cannot be confined to the Jasola District Centre or south west Delhi as there were a number of other commercial spaces available in an around the area. Entire Delhi will have to be considered relevant geographic market. In the Jasola area itself, there were about 11 other developers, such as TDI, Omaxe, Realtex who were offering a more reasonable price which goes to show that substitutability is not an issue. Thus, it is clear that the dominance of DLF in Delhi in the market or providing commercial space is not there even prima facie.

Member R. Prasad in his dissenting order stated that, the informant had rightly delineated the relevant product and geographic market as providing 'high end apartment for customers in the territory of south west Delhi, Jasola District Centre'. The informant has also attempted to establish the dominance of DLF by establishing the fact that our of a total of 27 acres of land, DLF was allotted 3.18 acres which was the single largest land holding and thereafter, abuse of dominance was shown with reference to
several arbitrary clauses in the buyer's agreement. Mr. Prasad cited a US Supreme Court judgment which was given in the Kodak case, in which the terminology “captive consumer” was coined. In the light of the recent scenario, once the buyer has made a large amount of investments and signed the agreement he has no choice but to stick to his decision. Substitutability and inter-changeability of the product goes out of the window. This is a clear denial or market access by the builders which is in contravention of the provisions of Section 4(2)(c) of the Competition Act. According to Mr. R. Prasad there are several factors given in Section 19(6) to determine geographical market and even one factor is sufficient to define a relevant geographic market. In the present case, at least four out of twelve factors apply. A person who has chosen ‘Jasola’ has a place to invest would have done so for various reasons such as affordability, proximity, the environment etc and therefore, he would not want to substitute that with Noida or Gurgaon or any other place. The fact that the informants picked the opposing party out of all the competitors is purely because of the reputation of DLF in the market which give it certain credibility.

In the present case the opposing party has acquired a position of dominance after the consumer booked the commercial space with it and once that situation arises, the consumers are totally dependent on the builder. There is dominance also in terms of the market share of DLF being the highest in the Jasola area. Size coupled with resources is what gives DLF the position of dominance which has been abused by extremely harsh and onerous terms and conditions of the buyer's agreement.

M/s Rajarhat Welfare Association & Ors. vs. DLF Commercial Complexes Ltd. & Ors.22 – The informants are a welfare association who are intending to purchase commercial units in different multi-storied projects in Rajarhat, Kolkotta. It has been alleged that the opposite party (‘DLF’) are the largest developers of property operating in India. In or about January, 2008, DLF issued an advertisement containing details of commercial/retail outlets to be constructed in Rajarhat, under the name ‘DLF Tower’. Several representations were made to the informants regarding the state of the art infrastructure which was going to be used in the construction of the said complex. It

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was also represented to the informants amongst other things, that all necessary sanctions and approvals had been obtained.

It has been alleged by the informants that the application form for booking a unit is a standard form contract devised by DLF in which the terms and conditions are onerous and unilateral. A person who is desirous of booking an apartment is left with no discretion to negotiate and is forced to agree to the terms of the form due to the dominant position of DLF. The informants alleged that DLF abused its dominant position as even after the issuance of allotment letter by DLF, the allottees were not guaranteed a unit and further payments in excess of 35% had been made by 90% of the allottees within a period of four months; also no construction activity had even started. Further, the Commercial Space Buyers’ Agreement was also a standard printed form of agreement leaving no space for negotiation. However, all the members desirous of booking a unit had no option but to sign, having paid 35% of their project unit cost.

On these facts and allegations, the informants stated that there was abuse of dominance by DLF. The Competition Commission of India held that the informant failed to show that DLF enjoys a dominant position in developing commercial space in the metropolis of Kolkata (which was identified as the relevant product and geographic market). The Commission reasoned that, in recent times there has been an influx of IT companies in Kolkata which generated a demand for commercial office and retail space. There were several prominent developers in the city of Kolkata itself. As per the information on the public domain, DLF was a new entrant in developing commercial space in Kolkata and cannot be seen to be able to operate independently of competitive forces prevailing in the relevant market or affect the competitors or the relevant market in its favour. Therefore, the Commission held that there is no violation of Section 4.

The above mentioned cases are mere examples of an enterprise whose dominance has been established all over India and yet cases filed against them have been dismissed without an inquiry. This has opened a can of worms, when it comes to questions being raised by other parties who have been aggrieved by DLF in other instances but have failed to get justice under the Act.
There is a dichotomy that exists when it comes to the determination of the relevant geographic market in the above cases. In the first instance, a narrower approach was adopted, whereby the area of Jasola (which is almost 1/10th of Delhi) was defined as the relevant market. In the second instance, the whole of Calcutta was taken as the relevant market which implies that a broader approach was adopted by the Commission. The lack of consistency in the defining the relevant market sometimes leaves the common man bewildered. To avoid this problem, clear and cogent reasons which have led to the determination of the relevant market should be highlighted to the public after the order has been passed.

The explanation to Section 4, states that there are two factors that need to be proved to show that an enterprise has a position of strength in the relevant market. First, is that the enterprise can operate independently of competitive forces prevailing in the relevant market. Second, the enterprise is considered to have a position of strength, if it can affect its competitors or consumers or the relevant market in its favour. The second part of the explanation to Section 4 emphasises the fact that dominance can be determined if the enterprise is affecting the consumers in any way. Section 18 states that it is the duty of the Commission to protect the interest of the consumer. Therefore, if the informant is able to show that the interests of the consumers are being affected by the enterprise in a negative manner then in that case the Commission should conduct a further investigation.

3.3.2.2 Dependence of consumer on enterprise

The Commission, while inquiring whether an enterprise is enjoying a dominant position or not under Section 4, has to give due regard to any or all of the factors mentioned under Section 19(4). A careful analysis of most of the cases against developers/builders filed for the contravention of Section 4, throws light on the fact that the buyers, after signing on the dotted lines are in more than one way dependent on the enterprise with little or no option to substitute their choice. If there is adverse affect by the enterprise on the consumer and if this factor is proved, it is enough to attract Section 4. However, it can be seen that cases filed under Section 4 are more often than not dismissed by the Commission due to the failure of the informants to show that the enterprise is dominant, irrespective of the fact that the consumers are wholly
dependent on the enterprise with no option but to succumb to their dictates. Such situations clearly attract Section 19(4)(f).

An example of such an instance can be seen in the following case:

**In Iqbal Singh Gumber & Mrs. Hardeep Kaur vs. Purearth Infrastructure & Others**\(^{23}\) an application was filed under Section 19(1) by the two informants stating that the opposite parties had misused their dominant position. The informants had booked a show room in a mall/commercial complex at Central Square, Bara Hindu Rao, Delhi which was being constructed by the opposite party. The booking was done in 2006 and payment was complete on 20\(^{th}\) July, 2008. It is alleged by the informants that false information was given to them about the project. Not only were the informants told that it would be a world class business centre surrounded by beautiful landscape but also that the it would have an average footfall of 10,000 persons per day. Despite all the representations and receiving full payments, the possession of the commercial space had not been handed over till date, and to make things worse the whole face of the project had been changed without their knowledge. Now the opposite parties were constructing flatted factories and not shopping malls.

It is clear that the allegations of the informant pertain to abuse of dominant position by the opposite party. The informants did not define the ‘relevant market’ in this case but it appears to be market of ‘services for development of commercial sauce for shopping malls in Delhi’. As per the information available on the public domain it cannot be said that the opposite party is holding a position of dominance in the relevant market. The developers who are prominent in Delhi NCR seem to be Ansal API Ansal Housing, DLF Ltd., DLF Home Developers, Omaxe Ltd, Parsvnath Ramprasth, Supertech Unitech, Vatika and TDI. The presence of the opposite party does not seem to be substantial in comparison to the said developers. Further, studies showed that the opposite party is developing approximately 3.71% of available space in 2010, 2.43% in 2011 and 1.58% of total projected space available by the end of 2012.

However, Mr. R. Prasad did not agree with the majority opinion and in his dissenting order stated that, it is not necessary that only the market share of the

\(^{23}\) *Competition Commission of India – Case No. 10/2012*
opposite party should be looked into, and that the determination of the relevant market in this case needs to be reconsidered. He stated that the relevant geographic market should be the land area where the construction is going to take place (66 acres of land in this case) as the provisions of the service was distinctly homogenous and can be distinguished from neighbouring areas. The relevant product market on the other hand means all those services which are either interchangeable or can be substituted. In the present case, after the informants had booked the space and made the “full payment” there could not be any substitution as the switching costs were too high. The informants were locked-in with no escape. Therefore, in this case the relevant market would be ‘service for the development of commercial space for a shopping mall in Central Square, Bada Hindu Rao, Delhi’. He opined that the consumers in this case were totally dependent on the opposite party, this Section 19(4)(f) is clearly attracted. The agreement increased the position of strength of the OP which attracted Section 19(4)(g). He further stated that this case was a denial of market access and should be investigated under Section 26(1) of the Competition Act.

3.3.2.3 Is the law of the land being applied equally to all consumers?

After a careful evaluation of the present state of affairs in the real estate sector, it can be seen that the common man has two perspectives when it comes to competition issues in the sector. On one hand, it is felt that after the DLF order justice was not only done but seen to be done, as for the first time a real estate giant was actually punished for abusing its dominant position and harming consumer welfare. This painted a clear picture in the mind of the public that no one was above the law and at the end no matter what the scenario or circumstances the wrong doers would be punished. However, on the other hand, questions were raised regarding the disparity that existed with other prominent builders, who under similar facts and circumstances were let off the hook. There were also certain cases which have been mentioned above, in which DLF was accused of abusing its dominant position but instead of facing the music again were acquitted. This has led to confusion in the mind of the people, from professionals to the common man, each one is seeking clarification regarding the implementation of the concept of abuse of dominance by the CCI.
Below-mentioned are two cases in which, the builders were found to be prominent in the relevant geographic and product market along with having a brand value for the consumers to go by, but were dismissed without an inquiry by the Commission stating that the informant failed to provide any credible/cogent evidence to show infringement of Section 4.

**Shri Girish Batra vs M/s BPTP Ltd. & Ors**

24 – The brief facts of the case are as under: the opposite party (BPTP) is engaged in the business of developing Business Parks and Residential Townships. In the present case, BPTP was inviting the public to purchase the residential apartments and Villas being constructed by it under the name “Park Land” in Faridabad. The informants after making advance payments came to know that BPTP was not the owner of the land for the said Villas and had abandoned the project without informing the informants.

The informants alleged that BPTP was abusing its dominant position and imposing unfair and discriminatory conditions on the informant for the return of the money deposited towards purchase of the Villa. The informant highlighted the facts that BPTP in its Draft Red Herring Prospectus has claimed itself to be the largest Real Estate Company in Faridabad and therefore is in dominant position in Faridabad. The Commission, after a perusal of the information available on the public domain stated that it is evident that BPTP is a well known name in the Real Estate Market and is one of the prominent players in the geographic area of Faridabad along with having a considerable brand value in the market. However, the Commission stated that there was no material to indicate that BPTP can be considered to be in a dominant position as there were many players of the size of BPTP in the geographic area of Faridabad. Hence, the case was dismissed as there was no prima facie case to show the contravention of Section 4.

**Sudama Nagrath vs M/s. SRS Real Estate Ltd.**

25 - The brief facts of the case are as under: the opposite party (SRS) is engaged in the business of developing Residential Apartments. In the present case, SRS had launched a project in Greater Faridabad, under the name “SRS Pearl”. The informants, along with 28 other persons had applied for allotment of flats which has been confirmed by SRS. An arrangement was made

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24 Case No. 42/2010
25 Case No. 65/2010
whereby an advance of one lac was paid by the informants, which was to be followed by
remaining installments once the necessary documents such as allotment letter etc were
given. However, contrary to the said arrangement, after one year three months, SRS
returned the advance money stating that they will not be able to provide the residential
unit. The informants submitted that, SRS had not only pre-launched a project without
getting necessary approvals from the State Government but had acted arbitrarily by
unilaterally cancelling the bookings of the said apartments and was thereby, abusing its
dominant position in the relevant geographic market which was a violation of Section 4
of the Act.

The Commission after considering the information available on the public
domain held that there are many known players, in the same line of business, who are of
the size of SRS in the geographical area of Faridabad. Hence, it cannot be held that SRS
enjoys a dominant position in the relevant market which implies that there is no
infringement of Section 4. The Commission, therefore, is of the view that no prima facie
case is made out for making a reference to the Director General for conducting
investigation into this matter under Section 26(1) of the Act.

With due regard to the above decisions, can it be said that in a case where an
enterprise is shown to have a prominent position in the relevant market along with a
substantial brand value for consumers to go by, then in those cases a further
investigation under Section 26(1) should be conducted? In cases where the builders are
taking advantage of their investors, by either pre launching projects without necessary
approvals, cancellation of projects unilaterally without informing the investors, or by
leaving no reasonable exit option, or by stringing investors along purely because of their
reputation in the market, should they be let off the hook? While some consumers are
benefitting from the Act, such as in the DLF case, is it justified that the other consumers
in similar circumstances are not? Does the law of the land apply to only a select few?
The answer to the above questions is the need of the hour right now. As there is an
underlining feeling in the mind of some of the consumers, that this Act is only for the
protection of a few privileged persons in society. Due to this reason, great caution has to
be exercised by all those involved in the real estate sector along with the CCI. A clear
image has to be painted regarding the reasons for an order that is passed so that the
common man does not feel any bitterness towards the very legislation that has been
brought about to foster his welfare. One of the recommendations can be that, the CCI should prepare an active advocacy and media campaign before an important order is being passed, which highlights the reasons for the same. This campaign should be in full swing within the first six months of the order as that is the time when people’s interests are at its peak and the aggrieved are seeking some sort of direction. Consumer welfare should be fostered by clarifying the list of reasons and conditions which led to the judgment.
4. ASSESSMENT OF THE REAL ESTATE SECTOR UNDER THE REGIME OF COMPETITION BUREAU OF CANADA

Canada’s Competition Act (“the Act”) is one of the oldest competition statutes in the western world. In Canada, the three major areas of competition law are: (i) conspiracy (i.e., cartels), (ii) mergers (i.e., merger control) and (iii) abuse of dominance (i.e., monopolization). Under Section 79 of the Federal Competition Act, abuse of dominance occurs when a dominant firm (firms) engages in a practice of anti-competitive acts that results in prevention or substantial lessening of competition. In Canada, like India, it is not dominance per se that is prohibited, but rather the abuse of a dominant position. Since the modern Act was introduced in 1986, there have been less than 15 abuse of dominance cases brought in Canada (a number of which have been settled under consent orders or agreements)\textsuperscript{26}.

To establish abuse of dominance under the Act, which is one of the Act’s civil “reviewable matters”, the Commissioner of Competition (the “Commissioner”) must establish the following elements on application to the federal Competition Tribunal (the “Tribunal”):

1. A firm’s market position in a relevant market (product and geographic market), there is no bright line market share threshold for dominance. However, after an analysis of the abuse of dominance cases in Canada, the Tribunal has held that a market share of less than 50% would not constitute dominance. Most cases involve companies with a market share of over 80%.

2. The firm has engaged in a practice of anti-competitive acts; and

3. The firm’s conduct has resulted in (or is or is likely to result in) prevention or substantial lessening of competition.

4.1 Cases of Abuse of Dominance in Canada

Some examples of Canadian abuse of dominance cases in the real estate sector include:

\textsuperscript{26} Abuse of dominance, http://www.ipvancouverblog.com/canadiancompetitionlaw-abuseofdominance/, last visited on 25\textsuperscript{th} August, 2012.
4.1.1 Case 1: Commissioner of Competition v The Canadian Real Estate Association (CT-2010-002) case

In Commissioner of Competition v The Canadian Real Estate Association (CT-2010-002) case, the Commissioner after three years of discussions and several months of negotiations commenced abuse of dominance proceedings against Canadian Real Estate Association ("hereinafter known as CREA"), claiming that CREA was abusing its dominance in the market for residential real estate brokerage services.

Facts: CREA owns, and its members operate, an online database featuring homes for sale across Canada. The Bureau raised concerns with certain CREA membership rules that allegedly required brokers to meet certain “minimum service requirements” to access Multiple Listing Service (“MLS”) systems administered by CREA’s member real estate board. The bureau alleged that certain membership rules governing access to the database imposed by CREA substantially prevented or lessened competition in the supply of real estate services by brokers and others wishing to offer a reduced set of services to customers in Canada. It is a well known fact that access to the brokers of the MLS system is necessary for the supply of residential real estate services. The particular “minimum service requirement” prohibited the “mere posting” of property information and made it mandatory for listing brokers to perform other services, such as presenting and advising on all offers. This restricted the expansion of existing brokers and entry of new ones, thus posing a threat to competition.

Although CREA offered to modify its rules following the filing of the application, the Commissioner was not convinced and continued with the application. However, in October 2010, the case was settled under a consent agreement, which provides that CREA for a period of 10 years, cannot adopt, maintain or enforce anti-competitive rules against real estate agents who have been hired to perform limited functions, such as the ability to provide “mere postings” for vendors on MLS or to discriminate against them because they offer (or wish to offer) mere postings to vendors.

This case was a landmark judgement as it opened up the ‘Multi Listing System’ to a certain extent, but realtors still felt they were on a tight leash in terms of the information they could make available to the public. The Commissioner in May 2011, in light of the situation at hand, filed an application for an order from the Competition
Tribunal under Section 79 of the Act (abuse of dominance) against the Toronto Real Estate Board (TREB).

4.1.2 Case 2: Commissioner of Competition vs. The Toronto Real Estate Board (CT-2011-003)

In Commissioner of Competition vs. The Toronto Real Estate Board (CT-2011-003), the Bureau brought an application challenging certain membership rules enacted by The Toronto Real Estate Board (“hereinafter known as TREB”), which prevent or discriminate against TREB members that wish to use the TREB’s MLS system to offer services over the internet. The Commissioner alleges that the TREB and its members are dominant in the market for the ‘supply of residential real estate services in the Greater Toronto Area’, and have abused their dominant position. The Toronto MLS system contains data about previous listings and sale prices, historical prices for comparable properties in the area, and the amount of time a property has been on the market.27

The Commissioner has alleged that TREB controls the supply of residential real estate brokerage services in the Greater Toronto Area and that its acts are anti-competitive due to the following reasons:

- TREB has control of, and access to, the use of the TREB’s MLS system;
- The rules that TREB has made which restrict the ability of member agents to provide customer access to certain MLS data online through, for example, password protected websites, also called Virtual Office Websites (VOWs), which would allow buyers and sellers to directly search the MLS database without relying on a middleman (broker in this case). This enables the customers to search a full inventory of listings containing up-to-date data online, before making a decision to tour a home or attend an open house;
- Due to TREB’s restrictive practices, agents do not have the flexibility to share important brokerage business models/services in innovative ways.

The above mentioned acts limit and prevent competition substantially. This has a huge impact on the consumer as listing services are often associated with increased

levels of exclusive sales which leads to benefits for the brokers who have invested in advertising and other services and also for the consumers who have a large variety to choose from. Therefore, MLS is a primary source of information about housing and in most communities, is an essential marketing tool.

TREB has responded to the allegations of the Commissioner, stating that, among other things, it is exercising its copyright in the MLS system, hence, there can be no interference in its conduct. The case is currently scheduled to be heard by the Tribunal in September–October of 2012 and a decision is expected in late 2012 or maybe even the following year. The TREB case raises a number of novel issues with respect to the degree to which an owner’s restrictions on the use of its intellectual property (here the MLS system) can constitute an abuse of dominance. It will be interesting to see what the Bureau decides as this will not only have a huge impact on not only the consumers everywhere but all those who are selfishly using their intellectual property rights to the detriment of the society at large.
5. UNITED STATES ANTITRUST DIVISION AND THE REAL ESTATE SECTOR

There are two basic antitrust laws in the United States – the Sherman Act and the Clayton Act, both of which can be enforced either by the Antitrust Division of the Department of Justice (“hereinafter referred to as DOJ”), the Federal Trade Commission (“hereinafter known as FTC”) or any injured third party. Section 2 of the Sherman Act condemns monopolization or attempted monopolization. Monopolization requires showing the market power and such anti-competitive or exclusionary conduct of a firm with market power that impairs competitor’s opportunities and restricts healthy competition from the relevant market.

In the United States “attempt to monopolize” is considered to be anti-competition. In US vs. Aluminum Co (Alcoa) (2d Cir 1945) Judge Learned Hand said, “... conduct falling short of monopoly, is not illegal unless it is part of a plan to monopolize, or to gain such other control of a market as is equally forbidden. To make it so, the plaintiff must prove what in criminal law is known, as a ‘specific intent and intent which goes beyond the mere intent to do the act.”

For many years the real estate business was perceived to be outside the scope of antitrust laws because real estate is not movable in nature. The first ruling related to the real estate sector was in 1950, where the court held that the National Association of Real Estate Board was in violation of the Sherman Act. But it was in the early 1970’s that great attention was paid to the real estate industry. The Department of Justice investigated Board of Realtors all across America and their Multiple Listing Services (MLS) which are used by property agents to showcase homes and provide information and advice relating to housing schemes, prices etc. These MLS are essential for obtaining the best prices for a home and therefore, very valuable for the consumers who are cautious when it comes to selecting a house, as it is an enormous investment of an individual's lifetime savings. When a shared listing service is the predominant means of providing information about houses for sale, the practices of shared listing services can be the subject of competition law concerns. A number of cases were filed and were held to be in violation of Section 1 of the Sherman Act. However, majority of the cases that were investigated were related to bid rigging conspiracies for selected properties.
offered at public auctions in a number of localities around the United States. This resulted in dozens of guilty pleas and still remains to be a primary concern as this type of illegal activity limits competition in the housing markets and harms already financially distressed homeowners.

5.1 Case filed alleging Monopolization under Section 2 of the Sherman Act

5.1.1 Case 1: Hackman vs. Dickerson Realtors, Inc. (2007)

In 2007 a case related to the Realtors in Rockford, Illinois came up for consideration – Hackman vs. Dickerson Realtors, Inc. (2007). It was alleged that Section 1 and 2 of the Sherman Act had been violated. In this case the realtor brought an action against the defendants, who were competitors, a state realtors’ association, and a local realtor association. The realtor stated that the defendants unlawfully conspired to exclude him from the Rockford, Illinois realtors market which was the alleged to be the relevant market in the present case, because he charged a lower commission rate than that of the defendants (which was 6-7%). Plaintiff alleged that the defendants shared and received an equal number of clients under the local multiple listing rules which was to the detriment of not only the realtor who had effectively been boycotted but also the consumers who were entitled to lower commission rates but were deprived because of the actions of the realtors.

The defendants alleged the following:

- The Sherman Act did not apply to non-profits and thereby the suit should be dismissed;
- The plaintiff failed to show that the realtor associations engaged in competitive conduct;
- Or that it possessed monopoly power.

The Courts granted the defendants motion and dismissed the case and held:

1. The Sherman Act does in fact apply to non-profits, but the plaintiff failed to show that the defendants were conspiring to boycott against him;
2. To show mere parallel conduct on part of the defendants is not enough and it could not be inferred that inter-state commerce was affected;
3. Plaintiff failed to show that the realtor association had reached an actual agreement with other defendants;

4. There were no facts to show that the defendants held a monopoly in the market or the fact that the associations agreed to conspire with the defendants to monopolize the market;

Keeping the above considerations in mind the defendant’s motion was granted.

In 2009, the plaintiffs filed another suit28 against the defendants, alleging that there had been a ‘conspiracy to boycott’ pursuant to Section 1 of the Sherman Act. The facts of the case were the same as above. The defendants moved to dismiss the case for failure to state claim upon which relief could be granted. However, in this case the motion was granted in part and denied in part. The Court held that, the plaintiff’s second amended complaint had now sufficiently pleaded the defendant’s knowledge and intent to engage in a group boycott, thereby excluding the plaintiff from the local real estate market in Illinois.

Sherman Act violations are strictly construed. A corporation can be fined under the Sherman Act for up to $10,000,000. An individual may be fined up to $350,000 and individuals may be sentenced to prison for up to three years. Therefore, it would be wise for the real estate players to err on the side of caution rather than being reckless and being fined enormous amounts.

The real estate brokerage industry is a model of competition with 2.5 million licensees nationwide and 1.25 million of those being members of the National Association of Realtors. Real estate tends to be highly competitive with no one company dominating the industry. In fact the very largest company in the industry, NRT (a subsidiary of Cedant Corporation), controls less than 5% of the entire marketplace.29 This is one of the reasons why the real estate industry and been closely monitored over the years for possible violations of anti-trust laws. Therefore, brokers and agents should understand the activities that can lead to possible violations and take affirmative steps to avoid being compromised.

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29 Antitrust Laws – Their Intent and Meaning by Edward I. Sumber, WCBR Counsel
6. CONCLUSION

After a comprehensive analysis of the data, statistics given above, it can be safely concluded that the growth of the real estate sector in India and across the globe is inevitable. This is going to give exemplified powers to those who own properties and the authorities that regulate any or all such transactions related to the land. The saying, “With great power, comes great responsibility” should become a mantra for these land owners and regulatory authorities, otherwise there is going to be utter chaos all round. If power leads to corruption, this will not only cripple the fast emerging real estate sector but have a severe effect on our economy as well. It has been said by some experts that for every 1 per cent increase in corruption, there is an 11 per cent per capita reduction in Foreign Direct Investment flows.

The abuse of this power is already beginning to show some color. The real estate agents all across the country have been disregarding the rights of the consumers for decades now. In recent times, according to a survey conducted by a global consultancy firm, KPMG, the real estate and construction sector has been voted as the most corrupt sector in India (32 per cent), followed by telecommunications in second place with 17%. Large capital investments, multi-level approvals, complex processes and huge projects give immense opportunity for corruption, the survey said. The survey was based on responses from 100 Indian and multi-national corporations operating in the country in diverse areas such as transportation and logistics, oil and gas, consumer goods and so on. The reason for corruption allegedly was a substantial amount of government and political intervention in these sectors.

Corruption in the real estate sector coupled with the emergence of real estate as a top investment avenue for majority of the society is a great cause for concern for the competition authorities. Nearly two thirds of urban, employed Indians feel that real estate offers the best investment opportunities. In the survey covering 10 major cities, including metros and mini-metros, the majority of respondents picked investing in realty as the first and most preferred option. In another survey conducted by

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Associated Chambers of Commerce and Industry of India (ASSOCHAM) in seven Indian non-metro cities, even there real estate topped the preference charts and emerged as the most preferred investment avenue for working professionals. Almost 60 per cent of the survey respondents preferred realty vis-à-vis bullion and stock market which stood at an astonishing 20 per cent and 15 per cent respectively.\textsuperscript{32}

The need of the hour is strict enforcement of existing provisions under the law. Law without active implementation as and when required is no law at all. Provisions to protect consumer welfare exist for a purpose, and that purpose would be lost if due importance is not given. The Competition Act, 2002 is one of the main provisions enacted to promote and sustain competition in the market, to protect the interests of consumers and to ensure freedom of trade is carried on by other participants in the market.

It is clear from the assessment of the real estate sector under the regime of the Act, that the Commissions first impact in the promotion of consumer welfare coupled with prevention of abuse of dominance in the real estate sector was seen in the DLF order. Ever since then the anti-monopoly regulator has been flooded with a host of real estate related complaints. There have been some concerns raised recently in light of this order which questions the procedures used by the CCI to delineate the relevant market. It has been opined, that there are have been several cases with similar facts and circumstances, but in each case the determination of the relevant market has been inconsistent. However, the work of the Commission in the promotion of healthy competition in the market along with protection of consumer interest cannot be taken away.

In light of the present state of affairs in the real estate sector, great caution has to be exercised by all those involved. Following are certain guidelines which should be followed by the investors, builders and the Commission, so the real estate sector can function smoothly without any conflict.

\textsuperscript{32} Real estate top investment avenue in non-metros, http://www.track2realty.com/real-estate-top-investment-avenue-in-non-metros/
Guidelines for the Real Estate Developer/Builder:

- Arbitrary, one-sided, unfair clauses should be excluded from agreements;
- Collusive behavior between different developers should be avoided by the industry in the formation of such agreements, as that amount to a violation of the Competition Act as well;
- Since majority of the complaints relate to delay in handing over possession, extra efforts should be made by the developer to hand over possession on time;
- Great caution and due care must be exercised while drafting brochures, prospectuses, disclosures made by directors to investors and company websites;
- The buyers must be informed of all the aspects of the project at all times;
- In case of inordinate delays on part of the builder, there should be a fair exit option for the buyer;
- If any changes need to be made to the agreement, the same should be done with the consent of the investor.

Guidelines for the Investor/Buyer:

- The buyers should be aware of the right vis-a-vis the builder and should act on them;
- Before purchasing land or making any payment, the buyer should first and foremost see if the land in question has been purchased and is registered with all necessary approvals from the competent authority;
- The buyer-seller agreement should clearly be understood by the investor and if there are any clarifications, they should be made before it is signed;
- If certain clauses in the agreement are arbitrary then negotiations if necessary, should be made directly with the builder;

Guidelines for the Government:

- All regulatory authorities should carefully scrutinize any agreement before giving permission;
- No sanctions of land should be approved unless the builder fits all the necessary mandatory requirements required by the authorities;
- There is an urgent need for a model buyer-seller agreement which should be the foremost priority of the Government at the moment;
• The regulatory authorities should not have a bias towards the dominant enterprises, as this would have a negative impact on the entire society as a whole.

**Guidelines for the Commission:**

• The Commission should implement an active advocacy and media campaign to spread awareness within the first six months of an order, highlighting the reasons for the order, this will bring clarity and a certain amount of satisfaction in the minds of the consumers that justice has been done to the fullest;

• A model draft ‘Buyer-Seller Agreement’ should be designed by the Commission to assist and guide the builders in the right direction when it come to formulating their own agreement;

• The Act, being predominantly an economic law should give due importance to the economic perspective while determining cases and passing orders;

• An economics-based approach will help in not only identifying company strategies in various markets which either result in consumer harm or improve consumer welfare. This will enable the Commission to take up only those cases in which there is gross violation of the Act, thereby increasing productivity;

• The Commission should adopt an effects based approach in all cases and figure out how the conduct of the enterprise is effecting the consumers, if there is consistent harm then that in itself will prove to be an anti-competitive practice which will be a violation of the Act;

• Rule of reason should take precedence over a dirigiste approach as long as it is within reasonable limits. This helps keeping the competitive process open and avoids excluding healthy competition from the market.
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