Abuse of Dominant position in US and EU
The concept of abuse of dominant position in US and EU has some basic differences and it is interesting to note that the competition law in India has seen a shift from more reliance on EU than US in dealing with abuse of dominance cases. This is quite evident from the fact that the concept of ‘monopolistic trade practices’ under the MRTP Act was more near to US law of ‘monopolisation’ while the concept of ‘abuse of dominance’ under the Competition Act is more nearer to the EU text in Article 102 which prohibits abuse of a dominant position.

While there is a basic distinction in enforcement approach in EU and US, i.e. in US, there is a criminal enforcement of anti-trust laws while in EU it is administrative. India has followed the administrative model in EU.

**Learning Outcome**

- **Explain** the concept of abuse of dominant position in United States (US)
- **Explain** the concept of abuse of dominant position in European Union (EU)
- **Distinguish** between the regimes in US and EU
- **Compare** the provisions relating to abuse of dominant position in US and EU with the Indian Competition Act, 2002

This module would enable the learners to:

<table>
<thead>
<tr>
<th>Subject Name</th>
<th>Competition Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paper Name</td>
<td>Dominant Position and its Abuse</td>
</tr>
<tr>
<td>Module Name/Title</td>
<td>Abuse of Dominant Position in US and EU</td>
</tr>
<tr>
<td>Module Id</td>
<td>Module 18</td>
</tr>
<tr>
<td>Pre-requisites</td>
<td>Basics of Competition Law</td>
</tr>
<tr>
<td>Objectives</td>
<td>To understand the concept of dominant position in United States and European Union, the key jurisprudential differences and applicability in India</td>
</tr>
<tr>
<td>Keywords</td>
<td>Abuse of dominant position, monopolisation, unilateral conduct, market power</td>
</tr>
</tbody>
</table>
18.1 Abuse of Dominant Position in US

Under Section 2 of the Shearman Act in US it is unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." Thus, there are three offences established by this section which are commonly termed as, i.e. "monopolization, attempted monopolization, and conspiracy to monopolize." It is pertinent to note that section 2 of the Sherman Act targets single-firm conduct or unilateral conduct of firms with monopoly power or with a dangerous probability of attaining such power which can be distinguished from the violation of section 1 of the Sherman Act or Section 7 of the Clayton Act which deals with conduct of two or more firms coming together in restraint of trade. Firms with monopoly power can reduce output, charge higher prices and thus, can be detrimental to the consumers.

Here it is important to note that the jurisprudential development of US antitrust law has seen a significant shift over time from Harvard School to Chicago School, i.e. from more interventionist approach (protection of small and medium enterprises) to less interventionist and more economic approach (opening up of markets and economic efficiency). This shift is a universal phenomenon across antitrust jurisdictions and roots into the fact that sometimes single firm conduct may create efficiencies and benefit consumers.

18.1.1 'Monopoly Power' under US Law

Monopoly power in US is generally referred to as the power to control prices and exclude competition. The aforesaid two factors are intertwined and have been treated as one by the US Supreme Court. Unlike the EU Law on abuse of dominance, which has elaborate guidelines on the assessment of relevant market and the enforcement priorities in applying Article 102 of the Treaty on the Functioning of European Union (TFEU) to abusive exclusionary conduct by dominant undertakings, the US Law does not have such elaborate guidelines as such. The US Law on monopolisation has to be interpreted from the catena of decisions of the US Supreme Court and the circuit courts. However, an analysis of these decisions would reveal that more or less the approach in dealing with monopolisation cases in US is quite similar to the EU Law on prohibiting abuse of dominant position, except some philosophical differences which has been discussed below.

In US, monopoly power of an enterprise can be proved by way of direct evidence of actual exercise of control over prices and/or the actual exclusion of competition from the relevant market. It may be noted that it is difficult to find direct evidence and thus monopoly power is inferred by way of indirect/circumstantial evidence of the defendant's ability to control prices or exclude competition which can be gauged from the defendant's share in the relevant market and the existence of barriers to entry.

18.1.2 Market Definition

In Walker Process, US Supreme Court found it essential to define relevant market because without a definition of that market there is no way to measure the defendant's ability to lessen or destroy competition. In evaluating a claim for monopolization or attempted monopolisation, it is necessary to find out whether the defendant possesses monopoly power or is in a position to obtain monopoly power. American Bar Association recognises that defining the relevant market for purposes of Sherman Act Section 2 presents the same issues as defining the relevant market for other antitrust purposes, including Sherman Act Section 1 and Clayton Act Section 7.
Relevant market assessment thus becomes a key to Section 2 analysis in US and changes the scene of the case altogether, for example in *Alcoa’s Case* the District Court had computed Alcoa’s market share to be about 33%; however after re-defining the relevant market, the Circuit Court computed the share to be over 90%. In *Dentsply Case*, the Third Circuit held that the relevant market for artificial teeth included dental dealers as well as dental labs (district court only included dental labs in the definition).

Though there are no specific guidelines on assessment of abuse of dominant cases or the relevant market as such, Department of Justice (DOJ) and Federal Trade Commission (FTC) recognize that “the market-definition requirement brings discipline and structure to the monopoly power inquiry, thereby reducing the risks and costs of error.” The Horizontal Merger Guidelines provide for a specific section on market definition and the same is based upon the Hypothetical Monopolist test and SSNIP test, however, in cases of monopolisation due care needs to be taken and the tests laid down in the merger guidelines may not be applied as it is, as the analysis in merger cases is *ex ante* opposed to *ex post* analysis in monopolisation cases. Still, the Merger Guidelines serves an important document to find out the approach in US. Let us take an example from the Guidelines to understand the relevant market concept.

The market definition has both the product and geographic dimensions. The focus in determining the relevant product market is to find out the reasonable interchangeable products which consumers would shift to on the basis of price, use and quality, commonly referred to as demand substitution. The supply-side substitutability occurs when the producers are easily able to shift their production from one market to the other. In geographic market definition, the consideration is all the physical territories to which the consumers would easily move to for their source of supply in case of price rise or any other constraint in the market, like short supply, etc. Thus, it can be noted that the approach of determination of relevant market in US is very similar to the EU.

18.1.3 Market Share as a Relevant Factor
In US many lower courts continue to regard market share as the starting point in assessing monopoly power, while others consider market share and entry barrier simultaneously. While market share is an important factor in determination of monopoly power of a firm, market share only is not sufficient in absence of any barriers to entry or other evidence of the defendant’s ability to control prices or competitors. An analysis of cases in US would show that generally a market share in excess of 70% has been prima facie considered to be sufficient evidence to establish monopoly power, and in cases where the market share is less than about 50% there would not be a case of monopoly. The cases of market share between 50% to 70% has seen a lot of intellectual quagmire in US and leads to necessity of other evidences. While market share has been required to be coupled with other circumstances to establish monopoly power of a firm, market share itself needs to be of a durable nature. The durability of the market share shows the market power of the firm to maintain this share in the market vis-à-vis its competitors.

18.1.4 Other factors
Sometimes rather than going on for relevant market determination, etc. the market power is established by way of direct evidence like proof of high profits, however, this approach poses several difficulties in determination of monopoly power especially the price-cost margin analysis. Some important factors in determining the monopoly power in US are:

(a) Barriers to Entry which means a cost or condition which would deter a new entrant in the market even on an increase in price by the monopolist. Such barriers may be
the legal license requirements, intellectual property rights, control by way of natural monopoly, etc. 

(b) Market Structure and Performance  ĭ Courts also consider other market structure characteristics in determining whether or not a firm has monopoly power, including the relative size and strength of competitors, economies of scale and scope, probable development of the industry, the elasticity of consumer demand, the homogeneity of products, dwindling market demand and potential competition ĭi.

18.2 Monopolization
The legal test for satisfying the requirements of Ċmonopolisationĉ claim are (i) monopoly power and (ii) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

While the first element has been discussed above, the second element has been recently explained by US Supreme Court in Verizon’s Case ĭii as follows:

The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts Ċbusiness acumen ĉ in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive ċconductĉ.

The conduct referred to above is the exclusionary conduct and has been interpreted by US courts as the conduct harming the competitive process and thereby the consumers rather than only competitors. The US approach has been very cautious on this aspect as not to condemn the aggressive business conduct of enterprises which has a very thin line difference from the anticompetitive conduct. The requirement of intent of the enterprise has been relevant in determining such conduct like in cases of predatory pricing.

18.3 Attempted Monopolization
The offence under section 2 of the Shearman Act is a stage before the monopolisation case and has to satisfy the following requirements ĭiii (i) anticompetitive conduct, (ii) a specific intent to monopolize, and (iii) a dangerous probability of achieving monopoly power.

The requirement of ċintentĉ is more specific in cases of attempted monopolisation and a mere desire to increase market share or win customers from a competitor is not sufficient, there has to be a specific intent established to destroy competition or build monopoly. The evidence may be direct or an inference drawn from circumstantial evidence. Coupled with the requirement of ċspecific intentĉ is the requirement of dangerous probability of success keeping in view the circumstances of the case. A relative high market share and significant entry barriers raises this probability and in such cases, the US courts have upheld the attempted monopolisation claim.

18.4 Conspiracy to Monopolize
Elements of this offence are (i) existence of a combination or conspiracy (ii) an overt act in furtherance of the conspiracy and (iii) specific intent to monopolize. Analysis of the conspiracy or combination in this offence is done on the same principles that govern conspiracies in restraint of trade cases under Section 1 of the Sherman Act. However, this has to be distinguished from the concept of ċshared Monopolyĉ or ċjoint monopolisationĉunder
which a group of firms that collectively possess monopoly power can be found liable for joint monopolisation, has been rejected by the US Courts\textsuperscript{xvi}.

18.5 Anticompetitive Conduct

Exclusionary or anticompetitive conduct is an essential requirement in establishing both monopolisation and attempted monopolisation cases. The cases of anticompetitive conduct may involve refusal to deal, vertical agreements, sham litigation, bundled and royalty rebates, predatory pricing, tying arrangements, market allocation, and other cases like unfair and malicious business tactics. Unlike EU, US does not have a readymade list of anticompetitive conduct and has to be read from the decisions of the Courts. Some of these cases can be discussed as follows:

Vertical Restraints: While vertical restraints conduct are generally examined under Section 1 of the Sherman Act (anti-competitive agreements or agreements in restraint of trade), vertical restrictions have also been examined under Section 2 violation in cases of refusal to deal with “disloyal” customers or suppliers, exclusive dealing, tying, bundled pricing, and most favored customer clause.

In \textit{United Shoe Machinery Case}, the court held that the defendant violated Section 2 by offering certain shoe manufacturing equipment only pursuant to a 10-year leases that discouraged customers from switching to the defendant’s competitors. It was found in this case that the long-term leases impeded competitor access to customers more than outright sales because a customer who purchased the machinery could sell it in the secondary market and then turn to another supplier, whereas a customer subject to a long-term lease had no practical way of switching to a competitor during the term of the lease. In fact, the term of the lease provided for penalties for customers terminating the lease early.

While the monopolisation cases in US are dealt with under section 2 of the Sherman Act, Section 5 of the FTC Act, which is administrative in nature, has also been enforced in cases of abuse of dominance cases on the grounds of “unfair methods of competition” which has been compared by authors to the concept of “unfairness” present in Article 102 of TFEU\textsuperscript{xvii}. As regards the categories of abuses in US and EU, the various kinds of exclusionary and exploitative abuses are discussed below separately comparing each of them from US and EU perspective for a better understanding.

18.6 Abuse of Dominant Position in EU

Article 102 (previously Article 82 EC and prior to that Article 86 EC) of the Treaty on Functioning of European Union (TFEU) deals with the provision of abuse of dominant position and specifically enlists the types of abuses as opposed to US which relies on judicial interpretation of the concept as noted above. Article 102 of TFEU runs as follows:

\textit{Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:}
It is pertinent to note here that the present Competition Act of India follows EU provisions closely as may be noted from the provisions itself and also the interpretations given to the law by CCI and COMPAT/Supreme Court/High Courts in the last five years of enforcement. Analysis of Article 102 would reveal five basic elements for establishing an abuse of dominant position in EU, i.e. (i) there must be an ‘undertaking’—single or collective (ii) a dominant position (iii) held in internal or common market (iv) abuse and (v) effect on inter-state trade. Further, in EU there are elaborate guidelines for implementation of the provisions of AOD\textsuperscript{xviii} as well as to determine Relevant Market\textsuperscript{xix}. While these guidelines provides an explanation as to which cases would be hit by the Commission’s scrutiny on the ground of likelihood of a conduct causing seriously anti-competitive foreclosure effects on markets, these guidelines does not rewrite the law of Article 102 and cannot bind the EU courts as such.

There are significant developments in the European Union law of antitrust that is a move towards an ‘effects-based’ approach from ‘form-based approach’. Another change being the introduction of exclusionary abuses expanding the scope of exploitative abuses which has been actually the purpose of having Article 102. These points are discussed in the following headings\textsuperscript{xx}.

18.7 **There must be an ‘Undertaking’: Single or Collective**

Unlike India, in EU the ‘undertaking’ has not been defined; the definition of the term comes from the ECJ\textsuperscript{xvi} case law which states ‘the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed\textsuperscript{xvi}.’ Here it is important to note that EU adopts a functional approach in deciding whether an entity is an undertaking or not depending on its engagement in economic activity\textsuperscript{xxi}. The same legal entity may be acting as an undertaking when it carries on one activity but not when it is carrying on another. For example, in MOTOE case\textsuperscript{xxii}, the sporting body was not allowed to claim exemption when it mixed its economic activity with that of regulatory activities. A similar approach has been taken by CCI in sports cases\textsuperscript{xxiii}.  

\begin{itemize}
\item directly or indirectly unfair purchase or selling prices or other unfair trading conditions;
\item production, markets or technical development to the prejudice of consumers;
\item dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
\item the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
\end{itemize}
The term ‘undertaking’ has similar meaning for both Article 101 and 102. This element is crucial as if an entity is not an undertaking, the Article 102 does not apply to them. For example, Eurocontrol, a body created by Member States of EU for the purpose of establishing navigational safety in the airspace of Europe, was not held to be an undertaking while examining its standard-setting power. While in India, there is a very narrow exception to the term ‘enterprise’ by way of ‘sovereign function’ in EU the exceptions have been quite broad excluding the activities connected with the exercise of the powers of a public authority and social activities.

18.8 A Dominant Position

As per the EU Guidelines, the assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 102. While the dominant position has not been defined in EU law, the definition emerges from the United Brand’s Case and subsequently affirmed in Hoffman La Roche Case:

“The dominant position referred to in this Article relates to a position of economic strength enjoyed by undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to and appreciable extent independently of its competitors, customers and ultimately of its consumers.”

It may be noted here that India follows this definition in Competition Act as noted in Module 17. Another important peculiarity of EU approach in dealing with AOD cases is that in EU, holding a dominant position confers a special responsibility on the undertaking concerned, the scope of which must be considered in the light of the specific circumstances of each case. This is not the case in US where the undertaking has no special responsibility by virtue of its dominance as such.

18.8.1 Relevant Market

For determining the dominant position of an undertaking, it is necessary to determine ‘relevant market’. There is a specific guideline on the determination of relevant market which provides for factors to be considered while determining the same. The Guidelines emphasizes the need for determination of relevant market in following words:

Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible inter alia to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance.

The determination of relevant market has always a decisive influence on the competition case before the Commission in EU as it may indict or exonerate an undertaking from the application of competition laws depending on the definition of relevant market. Commission Notice on Relevant Market in EU further states that the relevant market is established by a combination of the market two dimensions:
Relevant Product Market: A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

Relevant Geographic Market: The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

Here it may be noted again that the definition is quite similar to the Indian Competition Act, 2002.

18.8.2 Market Share
Market share is an important and preliminary factor in determining dominance of an undertaking in the relevant market. While there is no pre-determined threshold of market share for determination of dominance in EU, analysis of cases decided by Courts and enumerated in the Commission's Guidance provide the following principles, reiterated in Intel Case:

- Market shares of 50% or more give rise to a rebuttable presumption of dominance;
- Market shares of 70% to 80% and above have been treated as clearly indicating dominance, subject to verification against the other factors;
- Dominance is not likely if the undertaking's market share is below 40% in the relevant market. However, there may be specific cases below that threshold where competitors are not in a position to constrain effectively the conduct of a dominant undertaking, for example where they face serious capacity limitations;

Market structure has been considered as an important factor even in cases when the market share has been below 40%. For example, in Coca-Cola[Case COMP/39.116] where the
settlement applied only where and when Coca-Cola entities had at least a 40% market share, which was at least twice the size of its nearest competitor and in British Airways v Commission[Case C-95/04], where British Airways was held dominant with only 39.7% (which had been falling steadily), given the next largest player had 5.5%.

18.9 Factors for determining Dominance:

While market share analysis provides for a useful first indication in determination of dominance in EU, the Commission interprets the market shares in the light of the relevant market conditions, and in particular of the dynamics of the market and of the extent to which products are differentiated. The EU Guidelines enumerates the following three factors to be considered, i.e.:

18.9.1 Market Position
Generally, this has the reference to the market share of the undertakings concerned, discussed above, coupled with other factors like market structure, etc. It has been noted in EU that the higher the market share and the longer the period of time over which it is held constitutes an important preliminary indication of the existence of a dominant position.

18.9.2 Expansion and Entry
Likelihood of entry and expansion in the relevant market puts a competitive constraint on the dominant undertaking to abuse its dominant position, which may not be the case if there are entry barrier in the market. Barriers to expansion or entry can take various forms. They may be legal barriers, such as tariffs or quotas, or they may take the form of advantages specifically enjoyed by the dominant undertaking, such as economies of scale and scope, privileged access to essential inputs or natural resources, important technologies, or an established distribution and sales network. They may also include costs and other impediments, for instance resulting from network effects, faced by customers in switching to a new supplier^xxx.

18.9.3 Countervailing Buyer Power
Demand substitution and supply substitution are considered as an important competitive constraint. Demand substitution is normally the most important factor which means the products/services or supplies considered as substitutes by the customer. This is tested by way of SSNIP (Small but Significant Non-transitory Increase in Price) test, i.e., the question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range of 5-10%) but permanent relative price increase in the products and areas considered. If substitution were enough to make price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market.

Supply substitution, is normally less immediate and is given less weight than demand substitution. In Supply substitution, suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to a small and permanent increase in price.

Other than the aforesaid two important competitive constraints, the buyer's power to influence the market, called countervailing buyer power, is also an important consideration for the Commission at EU in determining dominance of an undertaking. If countervailing power is of a sufficient magnitude, it may deter or defeat an attempt by the undertaking to profitably increase prices.

18.10 Dominant position must be held within the internal market or a substantial part of it
In EU, Article 102 of TFEU relates to the European Community as a whole and is independent from the national markets of its member countries. It is important to establish that the dominant position in question is held by an undertaking within the internal market or substantial part of it. What would amount to an internal market or a substantial part of it needs to be understood from the facts of the case. For example, in ENI's Case, the question related to abuse of dominant position in gas transportation market. While concluding that the affected markets for gas transport in and to Italy and supply markets in Italy are thus of particular economic importance in relation to the whole internal market and may be considered a substantial part of the internal market, Commission in EU noted that gas consumption in Italy is one of the highest in the European Union, with national demand in 2007 [of about 85 billion cubic metres (bcm)] exceeding 15% of total consumption in the EU. Of this, around 87% (or around 74 bcm) constituted imports, thereby demonstrating the particular importance of the import infrastructures, access to which is essential. In this respect, the TAG and TENP/Transitgas pipelines account for more than 50% of gas imports into Italy respectively about 30% and 20% and are indispensable for the import of gas from Northern Europe and Russia.

18.11 An abuse
Being dominant is unlawful, only the abuse of the same is under the EU law. An abuse may be exclusionary or exploitative. Exclusionary abuses can further be divided into price-based and non-price-based abuses. These are discussed in para 19.13 with a comparison with US position on the same.

18.12 An effect on inter-state trade
This particular factor differentiates between an anti-competitive conduct which has purely national dimension from that of conduct which has community dimension. There must be an effect on trade between Member States implies that there must be an impact on cross-border economic activity involving at least two Member States. This requirement is independent of the relevant geographic market definition.
18.13 Abuse of Dominance: Comparative US and EU Perspective

There is a move towards converging competition law principles around the world, EU and US being no exception. However, there seems to be inherent issues in achieving convergence, some of which go to historical context and others are concerned with different approach of enforcement (civil or criminal).

18.13.1 Test for Dominance: As regards the threshold for "dominance" in Europe is lower than the threshold for "monopoly power" in the United States. In Europe, market shares in the area of 40 per cent maybe troublesome, while in the United States, actual monopolisation is not often found until market share reaches at least 60 per cent, if not more. Other than this, the approach in US has been more on 'effects-based' than 'form-based' which has now been introduced in EU also as noted above. In US there is no concept of special responsibility of a dominant enterprise as is there in EU and further the concept like 'Super Dominance' which has been propounded in EU does not find a mention in US.

18.13.2 Collective Dominance: The Competition Act does not refer to the concept of "collective dominance" however it is proposed to amend the Competition Act to include the said provision by inserting the text "singly or jointly after enterprise or group" in Section 4(1) of the Act. It is pertinent to note that this concept has been extensively applied in EU starting from the decision of Italian Flat Glass case (1992) to Airtours case. However, in US the approach towards collective dominance has been not so conducive, as US follows the concept of unilateral conduct and the collective action of enterprises are dealt with under Section 1 of the Sherman Act which deals with agreements in restraint of trade. There are three basic elements for enforcement of the concept of collective dominance, i.e. entities must be independent economic entities, the undertakings must be united through economic links and by virtue of this links the undertakings must together hold dominant position.

The abuse of dominance is generally classified into Exploitative and Exclusionary abuses; which may also be categorised as 'pricing practices' like exclusive dealing agreements, tying, refusal to supply etc.
18.14 Exploitative Abuses

Exploitative Abuse refers to an exploitation of the consumer/customer by the dominant enterprise for earning monopoly profits and is a direct loss to the consumer welfare. Excessive pricing may be one of the examples of this.

18.14.1 Excessive Pricing

Excessive Pricing has been treated as an abuse in EU. Excessive pricing was defined by ECJ in United Brand’s case as “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse.” Excessive pricing has not been treated as a violation in US antitrust law which has been reiterated in the latest case of Verizon v. Trinko. However, the EU law on excessive pricing is moving towards convergence with US law. Establishing an excessive pricing offence under the competition law is difficult task as the agency has to (a) determine whether the amount of the profit margin is excessive by comparing the disputed price with production costs and, if so, (b) determine whether the price is either (i) unfair in itself or (ii) when compared to competing products. The competition agency is not expected to become a price regulator and an aggressive enforcement in excessive pricing cases may have chilling effects on competition, i.e. it may deter innovation.

18.15 Exclusionary Abuses

Exclusionary Abuses are to exclude or prevent the competitors from the market so as to earn monopoly profits. This type of abuse covers behaviour impairing the market structure which indirectly harms consumers. These abuses may range from a simple tying and bundling to a complex royalty scheme. Exclusionary abuses may be both price based and non-price based.

NON-PRICE BASED ABUSES

18.15.1 Refusal to Deal with a Rival

US Supreme Court in Colgate has long back said “in the absence of any purpose to create or maintain a monopoly the Sherman Act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise its own independent discretion as to parties with whom he will deal.” However, determining when a firm with monopoly power may lawfully refuse to deal with a rival has been one of the contentious issues both in US as well as in EU. Generally, in a refusal to deal case, the violation involves a market foreclosure for one or more firms that compete in a downstream market with that supplier, thus eliminating effective competition. This may also the form of Margin Squeeze i.e. involves a vertically integrated firm dominant in an upstream market supplying a necessary input to a downstream competitor, at a price which does not allow the downstream business to cover its costs (including a reasonable profit).

Essential Facilities: The “essential facilities” doctrine requires the owner of a facility, not easily replicated, generally tangible, without access to which that party's competitors cannot provide services to their customers, to make that facility available to others. While the concept originated from US then developed by EU, at present it seems EU relies more on this concept than US.
Refusal to License Intellectual Property: Generally no violation of antitrust laws have been found in cases involving refusal to license intellectual property by a dominant firm, however, in case of the IP becoming an essential facility, the approach has been different. Further, there have been issues relating to "sham litigation" for delaying an entry of already expired patent in the market and violation of FRAND commitments on Standard Essential Patents.

18.15.2 Exclusive Dealing and Rebates

Exclusive dealing arrangements require a buyer to purchase products or services for a period of time exclusively or predominantly from one supplier. Competition issue comes from the fact that the market is restricted to the extent of exclusive deal for other competitors, the agreements may be for long term. While in EU there are elaborate guidelines to deal with the cases of exclusive dealing, in US the approach has not been precisely clear. In fact, a general view in US has been that exclusive dealing arrangements are pro-competitive.

Another angle of exclusive dealing abuses is offering of rebates or loyalty discounts. These rebates may be conditional rebates i.e. when a buyer gets a rebate when it exceeds a purchase threshold which applies to all the sales (retroactive) or only to the sales in excess of the threshold (incremental). In EU Intel Case\textsuperscript{xlvii}, the issue related to Intel’s abuse of dominant position by giving rebates to OEMs (Dell, Lenovo, HP and NEC) that were conditional on the OEMs obtaining all or nearly all of their CPU requirements from Intel, and in the case of the retailer Media-Saturn Holding (MSH), making payments conditional on only stocking computers using Intel’s CPUs. This was considered a violation of antitrust laws by the Commission.

PRICE BASED ABUSES

18.15.3 Predatory Pricing

The predatory pricing approach in US and EU is somewhat different, as in US "decoupling test" is important whereas in case of EU this is not so\textsuperscript{xlviii}. ECJ summarises the general approach to predatory pricing in two leading cases AKZO\textsuperscript{lix} and Tetra Pak II\textsuperscript{l} as follows: 

- In AKZO this Court did indeed sanction the existence of two different methods of analysis for determining whether an undertaking has practiced predatory pricing. First, prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown\textsuperscript{li}. Further, the difference relates to cost benchmarks\textsuperscript{lo}. In EU, according to the ECJ, prices must exceed Average Total Costs to avoid claims of predation; while in US in absence of any settled benchmark as such, US-DoJ takes a more accommodative approach in predation cases.

18.15.4 Tying and Bundling

Tying arrangements is an agreement by a firm to sell one product (tying product) but only on the condition that the buyer also purchases another product (tied product). In US, these arrangements are generally dealt with under Section 1 of the Shearman Act. In EU tying is a non-price abuse, and has been enforced aggressively in Microsoft Case\textsuperscript{lii}.

Bundling involves bundled pricing and is a particular form of loyalty discount where discounts are awarded when customers makes a sufficient number of purchases across multiple product lines, in contrast to traditional volume discount which is calculated on the basis of single product. Bundled pricing has competition concern as it may lead to
strengthening of market power and foreclosure of markets. Again, consistent with the non-interventionist approach of US, the cases of bundling are not that aggressively taken as is done in EU.

SUMMARY

William Kovacic has elaborated the reasons for the focus on competition systems of the EU and US and further its convergence for the reason that the interaction of the competition policy systems of the EU and US deeply influences the convergence process within all of the multinational and regional networks. India being no exception to this convergence process is being also influenced by the jurisprudential developments in this context. The convergence on interpretation of the competition law principles is required for having predictability and avoiding inconsistency in approaches of the competition agencies in handling similar kind of matters. This not only raises compliance costs for the enterprises but also
**Quadrant III: (Learn More / Source for Further reading / Web Resources):**

**DID YOU KNOW?**

<table>
<thead>
<tr>
<th>Description</th>
<th>Image</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Although most cases concern monopoly power of sellers, a buyer may also possess power over price and entry. This power is referred to as &quot;monopsony&quot; power to distinguish it from a seller's monopoly power.</td>
<td></td>
<td>United States v. Griffith, 334 US 100 (1948); Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., 549 US 312 (2007).</td>
</tr>
<tr>
<td>The European Commission and the national competition authorities in all EU Member States cooperate with each other through the European Competition Network (ECN)</td>
<td><img src="http://ec.europa.eu/competition/ecn/more_details.html" alt="ECN" /></td>
<td><a href="http://ec.europa.eu/competition/ecn/more_details.html">http://ec.europa.eu/competition/ecn/more_details.html</a></td>
</tr>
<tr>
<td>Treaty on the Functioning of European Union (TFEU) also referred to as Treaty of Lisbon. The Treaty of Lisbon changed name from the &quot;Reform Treaty&quot; when it was amended and signed in Lisbon, Portugal, by the prime ministers and foreign ministers of the 27 EU Member States on 13 December 2007. Rules on Competition including State Aid is just a small section (Title VII: Chapter 1: Articles 101 to 109) in the Treaty which covers all other subjects governing the European Union.</td>
<td></td>
<td><a href="http://www.eudemocrats.org/fileadmin/user_upload/Documents/D-Reader_friendy_latest%20version.pdf">http://www.eudemocrats.org/fileadmin/user_upload/Documents/D-Reader_friendy_latest%20version.pdf</a></td>
</tr>
<tr>
<td>In EU there is a separate office of &quot;Hearing Officers.&quot; The Hearing Officers’ main roles are to organize and conduct the oral hearing and act as an independent arbiter where a dispute on the effective exercise of procedural rights between parties and DG Competition arises in antitrust and merger proceedings and are independent of the Directorate General for Competition and report directly to the Competition Commissioner.</td>
<td></td>
<td><a href="http://ec.europa.eu/competition/hearing_officers/index_en.html">http://ec.europa.eu/competition/hearing_officers/index_en.html</a></td>
</tr>
<tr>
<td>In United States Department of Justice (DOJ) has a specific Division on Antitrust and is headed by an Assistant Attorney General having responsibility of criminal enforcement under the Sherman Act.</td>
<td></td>
<td><a href="http://www.justice.gov/atr/index.html">http://www.justice.gov/atr/index.html</a></td>
</tr>
</tbody>
</table>

**Notes:**
- **United States v. Griffith, 334 US 100 (1948):** This case established the concept of "monopsony" power in the context of a buyer’s power to influence prices and entry. It distinguished this from a seller’s monopoly power.
- **Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co., 549 US 312 (2007):** This case further clarified the differences between monopoly power of sellers and monopsony power of buyers.
- **European Competition Network (ECN):** The ECN is a network of competition authorities in EU Member States that cooperate to ensure effective enforcement of EU competition laws.
- **Treaty on the Functioning of European Union (TFEU):** This treaty, also known as the Lisbon Treaty, is the framework for the functioning of the European Union, including rules on competition.
- **United States Antitrust Division:** The DOJ’s Antitrust Division enforces federal antitrust laws and is headed by the Assistant Attorney General for the Antitrust Division.
United States—Federal Trade Commission (FTC) has Bureau of Competition among other Bureaus like consumer etc., which deals with the Antitrust Enforcement from an administrative angle.

Like Section 5 of the FTC Act, Article 102 TFEU is a broad and open-ended provision, which prohibits abusive conduct by dominant undertakings without defining what is meant by either “dominant position” or “abuse.”

Majority of the Countries follow the EU model of administrative enforcement, as US applications such as the use of private rights of action and the imposition of criminal sanctions to punish cartels are scrutinized in many civil law countries.

American Bar Association section of Antitrust Law publishes the latest developments on Antitrust Laws in US and is a kind of restatement. The latest version (7th ed) is published in 2012.


INTERESTING FACTS

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Interesting Facts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Decision in EU Competition Cases is finally taken by the College of Commissioners—27 political appointees who take such a decision collectively by majority vote. DG Competition makes the investigation and final recommendations to this college.</td>
</tr>
<tr>
<td>2.</td>
<td>U.S. antitrust laws are enforced by both the FTC’s Bureau of Competition and the Antitrust Division of the Department of Justice. The agencies consult before opening any investigation. The Antitrust Division handles all criminal antitrust enforcement.</td>
</tr>
<tr>
<td>3.</td>
<td>In US approximately 75% of all antitrust cases are brought by way of private enforcement (action brought by citizens for violation of the Sherman Act directly to the courts), whereas in EU the private enforcement is practically non-existent, taking shape just in last few years.</td>
</tr>
</tbody>
</table>

Section 2 (i) of the MRTP Act, 1969: “monopolistic trade practice” means a trade practice which has, or is likely to have, the effect of—(i) [maintaining the prices of goods or charges for the services] at an unreasonable level by limiting, reducing or otherwise controlling the production, supply or distribution of goods or the supply of any services or in any other manner; (ii) unreasonably preventing or lessening competition in the production, supply or distribution of any goods or in the supply of any services; (iii) limiting technical development or capital investment to the common detriment or allowing the quality of any goods produced, supplied or distributed, or any service rendered, in India to deteriorate; (iv) increasing unreasonably- (a) the cost of production of any goods; or (b) charges for the provision, or
maintenance, of any services; (v) increasing unreasonably- (a) the prices at which goods are, or may be, sold or re-sold, or the charges at which the services are, or may be, provided; or (b) the profits which are, or may be, derived by the production, supply or distribution (including the sale or purchase) of any goods or by the provision of any services; (vi) preventing or lessening competition in the production, supply or distribution of any goods or in the provision or maintenance of any services by the adoption of unfair methods or unfair or deceptive practices;]

9Walker Process Equipment Inc. v. Food Machinery & Chemical Corp. 382 US 172 (1965)
10Jonathan IGleklen (ed.), ABA Section of Antitrust Law, Antitrust Law Developments, American Bar Association (7th ed. 2012) at p.229
11United States v. Aluminum Co. of America (Alcoa) 148 F. 2d. 416 (2d Cir. 1945)
14United States v. E. I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 404 (1956); see also Microsoft, 253 F.3d at 511 52 (because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the relevant market must include all products reasonably interchangeable by consumers for the same purposes.)
15ABA, supra note 5 at p.230
16For example, in Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007) (the existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output.)
17ABA, supra note 5 at p.236
20Spectrum Sports, Inc. v. McQuillan 113 S.Ct. 884, 890-91 (1993). In order to determine whether there is a dangerous probability of monopolisation, courts have found it necessary to consider the relevant market and the defendant’s ability to lessen or destroy competition in that market.
22William Kovacic, Article 102 TFEU: The case for a remedial enforcement model along the lines of Section 5 of the Federal Trade Commission Act, Concurrences: Competition Law Journal, 1-2013 pp. 54-61
28See Case 61 of 2010 in the matter of Surinder Singh Barmi against Board for Control of Cricket in India (BCCI) decided on 08.02.2013:2013CompLR297 (CCI), and Case No. 73 of 2011 Σh. Dhanraj Pillay and Others against M/s Hockey India decided on 31.05.2013: 2013 CompLR543 (CCI)


Case 322/81 Nederlandsche Banden Industrie Michelin (Michelin I) v Commission [1983] ECR 3461, paragraph 57


Commission Notice on the definition of Relevant Market, Para 7

Commission Notice on the definition of Relevant Market, Para 8

Commission Notice on Article 82, Para 14. Case COMP/39.386 Long-term electricity contracts in France, where the commitments offered to alleviate the Commission’s concerns terminate early if EDF’s market share falls below 40%

Commission Notice on Article 82, Para 17. The dominant undertaking’s own conduct may also create barriers to entry, for example where it has made significant investments which entrants or competitors would have to match, or where it has concluded long-term contracts with its customers that have appreciable foreclosing effects


Microsoft v. Commission, Case 322/81 [1983] ECR 3461, ECJ said that a firm in a dominant position has a special responsibility not to allow its conduct to impair undistorted competition on the internal market

For e.g. see Microsoft decision dated 24 March 2004 where the Commission said that Microsoft, with a market share above 90 percent, had an overwhelmingly dominant position


Patrick Hubert and Marie-Laure Combet, “Exploitative Abuse: The End of the Paradox” Doctrines l Concurrences N 1 2011 I pp. 44-51

United States v. Colgate & Co., 250 US 300 (1919)

Case T-271/03 Deutsche Telekom v Commission

MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132 (7th Cir.), cert. denied, 464 U.S. 891 (1983).


The U.S. Supreme Court stated in the Brooke Group case that in order to establish predatory pricing, there must be evidence of the likelihood of an increase of the company’s prices following a predatory price cut. *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993)


T-201/04 Microsoft v. Commission Ŷ case dealing with the tying of Windows Media Player to Windows. COMP/39.530 Ŷ Microsoft (Tying) Ŷ Microsoft tying its Internet Explorer web browser to its Windows operating system
