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DELEGATION OF  
EUROPEAN UNION  
TO INDIA

# Abuse of dominant power- exploitative & exclusionary practices

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# Why Competition?

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- ❑ Competition is BENIGN:
- ❑ Reduces prices
- ❑ Improves quality
- ❑ Boosts choice
- ❑ Promotes efficiency
- ❑ Encourages innovation
- ❑ Punishes THE LAGGARDS
- ❑ Ensures AVAILABILITY OF GOODS in abundance of acceptable quality at affordable price (AAA)

# Why Competition Law?

- ▶ Helps maintain free and fair competition in markets which is a critical challenge.
- ▶ The need for a law and an umpire is critical.
- ▶ Need to infuse competition imperative.
- ▶ MRTP Act focused on curbing monopolies. It was limited in sweep and rigidly structured.



# Goals of the Act

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- ❑ *To prevent practices having an adverse effect on competition.*
  - ❑ *To promote and sustain competition in markets.*
  - ❑ *To protect the interests of the consumers.*
  - ❑ *To ensure freedom of trade carried on by other participants.*
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- A 3D illustration in a reddish-pink hue. A stylized human figure stands on a small pedestal, placing a puzzle piece onto a path of puzzle pieces that leads towards a larger, raised platform. On top of this platform, the word 'GOAL' is written in large, bold, 3D letters.

# Five Dimensions of the Act

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- ◆ **Anti-competitive Agreements** [Sec. 3]
- ◆ **Abuse of Dominance** [Sec. 4]
- ◆ **Combinations**, include *acquisition of shares, voting rights, assets/control, mergers, amalgamations and takeovers*
- ◆ **Advocacy** - maximum impact with least intervention
- ◆ **Advisory**- to tame anti competitive public action .

All these dimensions of law are in force

# Risks of Abuse of dominance

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- On conclusion of an enquiry, the CCI may:
  - Issue directions to discontinue abuse of dominance
  - Impose penalty such penalty which may be upto 10% of the average turnover for the last three preceding financial years upon such person or enterprise which are parties to such abuse
  - Pass such other orders as it may deem fit to a member of a group
  - Direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position
  - A person responsible for the conduct of business of an enterprise shall be deemed guilty and liable for punishment unless he proves
    - (a) that abuse took place without his knowledge or
    - (b) that he had exercised all due diligence

# 3 tier process

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- ❑ Determination of Relevant Market
- ❑ Determination of dominance of enterprise or group
- ❑ Determination of abuse of dominant position in terms of Section 4(2) of the Act

# Relevant Market - Foundation

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- The purpose of determining relevant market is identify the economic space in which a firm may be able to exercise its market power.
- '**Relevant Market**' includes *relevant product market* and *relevant geographic market*.

**Relevant Product Market** – comprises all those products or services which are regarded as interchangeable or substitutable by the consumer.



## In the Case of:

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**United Brands v. Commission** – It was argued that bananas were in the same market as other fruit. The ECJ held that the banana constitutes a **separate market** since it has special features distinguishing it from other fruits, like it is the only fruit which can be consumed by infants and the elderly.

# Relevant Market – Foundation (Contd.)

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- ❑ **Relevant Geographic Market** – refers to market comprising the area in which the conditions of competition are distinctly homogenous.
- ❑ This could be a 'small town', 'state', across the nation or even global.

# Determination of Dominant Position - Factors

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- ▶ Market share of the enterprise
- ▶ Size and resources of the enterprise
- ▶ Size and importance of the competitors
- ▶ Economic power of the enterprise
- ▶ Vertical integration of the enterprises
- ▶ Dependence of consumers on the enterprise

# Determination of Dominant Position – Factors (Contd.)

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- ▶ Dominant position as a result of statute
- ▶ Barrier to entry
- ▶ Countervailing buyer power
- ▶ Market structure and size of market
- ▶ Social obligations and social costs
- ▶ Contribution to the economic development
- ▶ Any other factor (residuary factor)

# Abuse of Dominant Position

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- The Act does not prohibit dominant position – it only frowns upon the ‘abuse’ thereof.
  
- ***Dominant Position*** refers to a position of strength enjoyed by an enterprise or group in the relevant market, in India, which enables it to -
  - *Operate independently of competitive forces prevailing in the relevant market; or*
  - *Affect its competitors or consumers or the relevant market in its favor.*
  - *‘Group’ is open ended.*

# Types of Abuses

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- **Exploitative Abuses**– i.e., conduct which results in exploitation of others in the value chain, for e.g.,
  - imposition of unfair or discriminatory conditions
  - imposition of unfair or discriminatory prices e.g., *predatory pricing*.
  
- **Exclusionary Abuses** – **conduct which interferes with the competitive process, for e.g.,**
  - Making conclusion of contract subject to acceptance of supplementary obligations
  - Denial of market access
  - Limiting production of goods, provision of services; scientific development;
  - Using dominance in one relevant market to enter into or protect other relevant market

# How an Inquiry can be initiated

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- ❑ Suo motu; or
- ❑ Upon receipt of an information from any person, consumer or their association or trade association, or
- ❑ Upon receipt of a reference from Central/State Government or statutory authority



# Powers of the DG

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- ❑ Requisition of information from the parties
- ❑ Requisition of information from ex-employees, distributors etc.
- ❑ The DG can summon and record evidence during investigation.
- ❑ DG can exercise the powers of '**Search and Seizure**' ("Dawn Raids").
- ❑ DG are vested with the powers of a Civil Court to aid Inquiry/Investigations



# A word of caution in communication

- ❑ Email, SMS, FAX, Communication in any e-mode are admissible evidence- irretrievable once clicked/sent.
- ❑ Skillful communication is imperative.
- ❑ Do not sound guilty .
- ❑ Do not use expression like **“destroy after reading”**.
- ❑ Avoid the exaggerated use of “power” words(e.g. **“we’ll destroy them”, “we will nail them to the wall”**)
- ❑ Avoid giving the false impression that a customer is being given favored treatment( e.g. **“None of our other customers is getting this special discount”**).

# A word of caution in communication (Contd.)

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- ❑ Do not give false impression that some action is being taken as a result of an agreement between competitors ( e.g. **“Everyone in the industry agrees that prices are too low”**).
- ❑ Be careful with the use of the word “market” (e.g. **“we are dominant”**).
- ❑ Marking a document **“personal and confidential”** or keeping it in your **“personal”** files or home office or computer does not mean that it won’t be discovered.
- ❑ Do not use the term **“market”** when referring to distribution channels.

# A word of caution in communication (Contd.)

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- ❑ Do not use terms such as “**control**”, “**power**” or “**dominance**” when referring to the company’s present or future position;
- ❑ Do not use vivid words or images suggesting combat (“**crush**”, “**destroy**”, “**block access**”, “**conquer**”, “**dominate**”) to describe the company’s marketing practices.
- ❑ Do not use the term “**market**” to refer to parts of a nation. For cities, regions, and other limited geographic areas, use terms such as “**area**”, “**region**” or the like.

# Conditions precedent

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- ❑ Prima facie opinion
- ❑ Reference to DG to submit an Investigation report
- ❑ Post receipt of report, the CCI mandated to invite objections and suggestions
- ❑ Mandated to give an opportunity of being heard before Inquiry by CCI a pre condition

# Thanks for being Attentive

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