

---

# Asian Journal of Law and Policy

Vol 5 No 2 (July 2025)

eISSN: 2785-8979

---

## An Economic Analysis of the Effectiveness of Relevant Market Delineation Methods in Abuse of Dominant Position Cases in India

**Hiteshkumar Thakkar**

GNLU Centre For Law and Economics, Gujarat National Law University, India

*hthakkar@gnlu.ac.in*

ORCID iD: 0000-0003-4028-9403

(Corresponding author)

**Matteo Smacchi**

Luiss Guido Carli University Rome, Italy

*matteo.smacchi@gmail.com*

ORCID iD: 0009-0008-8099-0054

**Mansi Subramaniam**

GNLU Centre for Law and Economics, Gujarat National Law University, India

*mansi20bal050@gnlu.ac.in*

ORCID iD: 0009-0009-6010-6716

### ABSTRACT

In antitrust legislation, determining the relevant market is fundamental and a major determinant of how abuse of dominant position cases are decided. In the Indian context, the Competition Act lists factors to determine the relevant market. However, the relevant market delineation involves a lot of subjectivity, resulting in arbitrary decision-making and several case laws being testaments to the same. Further, the increasing variety in online marketplaces, the emergence of new e-commerce business models, and contemporary determinants of the relevant market (such as network effects) have made the issue even more complex and subjective. The paper argues that the mechanism adopted to delineate the relevant market is highly subjective and aims to highlight the issues associated with delineating abuse of dominant position cases in India. The approaches to determining the relevant market used in the contemporary Competition Commission of India order illustrate the challenges associated with these tests. It aims to propose an alternative to the current



(2025) 5(2) Asian Journal of Law and Policy 115–132

<https://doi.org/10.33093/ajlp.2025.7>

© Universiti Telekom Sdn Bhd. This work is licensed under the Creative Commons BY-NC-ND 4.0 International License.

Published by MMU Press. URL: <https://journals.mmupress.com/ajlp>



approaches, to reduce the arbitrariness and disparity in the adjudication of similar matters. The paper seeks to address whether the current method(s) of identifying the relevant market in abuse of dominant position cases are effective.

**Keywords:** Competition law; Relevant market; Market delineation; Abuse of dominant position; Competition Commission of India; Demand-side substitutability; Supply-side substitutability; SSNIP test

**Received:** 13 March 2024, **Accepted:** 12 February 2025, **Published:** 30 July 2025

## 1. Introduction

Globally, several antitrust regimes have witnessed more stringent control and a number of probes into potential anti-competitive practices, the most common one being the abuse of dominant position. Whether, it has been the European Commission's probe into the alleged abuse of dominant position by Apple Inc. in Europe, or the recent penalty imposed by the Competition Commission of India on Google, antitrust regulatory authorities across countries are exercising more surveillance over firms to prevent the emergence of monopolies (by checking abuse of dominant position by such firms) and ensuring free and fair competition in the market.

A firm is said to be in a dominant position when it possesses market power to such an extent that it enables the firm to operate independently of market forces (generally applying rules of demand and supply, consumer response to change in prices, etc.) and influence the behaviour of its competitors or consumers in its favour.<sup>1</sup> When the firm uses this dominant position to engage in anti-competitive practices, it is called an abuse of dominant position, which is subject to penalty and restrictions by the anti-competitive regulatory authority. The market power of a firm can only be assessed in light of the market in which it operates; thus, even the dominant position of an entity is relative to the relevant market or market definition. This highlights the importance of defining the correct relevant market, as it has a bearing on the final outcome of an antitrust probe.

The relevant market comprises two aspects: the product market and the geographical market. The European Commission has defined the relevant product market as 'all those products or services which are regarded as interchangeable or substitutable by the consumer because of the products' characteristics, prices and intended use'. The relevant geographical market has been defined as 'the area in which the concerned firms are involved in the supply of products or services and in which the conditions of competition are sufficiently similar.'<sup>2</sup> In India, the relevant product market and geographical market are determined by

---

<sup>1</sup> Competition Act 2002, s 4.

<sup>2</sup> 'Definition of Relevant Market' Eur-lex (*European Union, EUR-Lex*, 26 October 2021) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum:l26073>>.

various factors provided under Section 19(7)<sup>3</sup> and Section 19(6)<sup>4</sup> of the Competition Act 2002, respectively.

As far as Indian antitrust jurisprudence is concerned, the determination of the relevant geographical market is usually not subjected to any ambiguity or dispute; when ambiguity does arise, it typically occurs in cases involving online entities and e-commerce platforms. On the other hand, various tests are adopted apart from the factors laid out in Section 19(7) of the Competition Act 2002 to determine the relevant product market. These include the SSNIP Test (also known as the Hypothetical Monopolist Test), as well as demand-side and supply-side substitutability tests. This paper will focus mainly on the determination of the relevant product market.

Section 3 deals with ‘anti-competitive agreements’ and Section 4 deals with ‘abuse of dominant position’. The Competition Commission of India has received a total of 1180 cases under Sections 3 and 4 of the Act. Of these, 1046 cases have been disposed of and 4 cases have been quashed or set aside by the Courts. Thus, 88.64% of the total cases filed so far have been disposed of. However, there are issues in determining the relevant market.

Table 1: Competition Commission of India Disposes of Under Sections 3 and 4<sup>5</sup>

Particulars	2018–19	2019–20	2020–21	2021–22
Cases pending at the beginning of the year	210	188	155	140
Cases received during the year	68	60	55	57
Total	278	248	210	197
Cases decided during the year	90	93	70	67

### 1.1 Statement of Issue

While defining the relevant market is instrumental to determining the market power and subsequently the dominant position of the firm, there is no uniform method or technique used to determine the relevant market. Even the factors listed under Section 19(6) and Section 19(7) of the Competition Act 2002 are non-exhaustive in nature. This subjectivity in determining the relevant market can potentially lead to arbitrariness due to a lack of uniformity in how markets are defined in similar cases.

The case of *Belaire Owners’ Association v DLF Limited, HUDA and Others*,<sup>6</sup> concerned the alleged abuse of dominant position by DLF Limited in its contracts with apartment owners.

<sup>3</sup> Competition Act 2002, s 19(7).

<sup>4</sup> Competition Act 2002, s 19(6).

<sup>5</sup> PIB Delhi, ‘CCI Disposes off 1046 Cases Out of 1180 Cases Received Under Sections 3 and 4 as on 28.02.2022’ (Press Information Bureau, 14 March 2022) <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1805999>>.

<sup>6</sup> *Belaire Owners’ Association v DLF Limited, HUDA and Others*, Case No 19 of 2010 (Competition Commission of India, 3 January 2013).

A similar case in the real estate market was the *Emaar MGF Land Ltd* case, which also concerned the allegations of abuse of dominance by Emaar MGF Land Ltd in its dealings with consumers. Despite presenting similar facts, in the former case, the relevant market was delineated as 'high-end residential apartments in Gurgaon', while in the latter, the relevant market was defined broadly as 'market of services for development and sale of commercial units in Gurgaon'.

The age of constantly changing markets and market conceptions has also seen different interpretations of similar markets by the Competition Commission of India. For example, the question arose before the Competition Commission of India on whether online portals constituted separate markets or were merely different channels of distribution in the same market. In the case of *Mr Ashish Ahuja v Snapdeal.com through Mr Kunal Bahl, CEO and Ors*,<sup>7</sup> the Competition Commission of India clearly favoured the latter position of law. However, in *All India Online Vendors Association v Flipkart India Private Limited and Others*,<sup>8</sup> the Competition Commission of India held that online and offline channels constitute distinct competitive landscapes and the market could thus be restricted only to the Internet. These are a few instances which highlight the arbitrariness associated with determining the relevant market, which occurs mainly due to the application of different tests and the constantly changing market conceptions.

Similarly, subjectivity in determining the relevant market can potentially lead to arbitrariness due to a lack of uniformity in how markets are defined in similar cases. This is evidenced by the instances of *MCX and Ors v NSE of India*. In the instant case, the acts of NSE, such as fee waivers, denial of APIC for ODIN and distribution of NOW for free, are clear acts of protecting its position in the CD segment and are possible due to its position of strength in the non-CD segment. Other side opinions that the Competition Commission of India's determination of NSE's dominant position should have been limited to the CD market alone, and the Competition Commission of India should have considered, on a stand-alone basis and without reference, whether the NSE was truly dominant therein. The Competition Commission of India and the Competition Appellate Tribunal both found NSE guilty of abusing its dominant position. The NSE appeal is pending before the Supreme Court for final adjudication.

## **1.2 Research Questions**

A perusal of the statement of issue reflecting the challenges associated with the existing method of determining the relevant market necessitates delving into the following research questions:

---

<sup>7</sup> *Mr Ashish Ahuja v Snapdeal.com through Mr Kunal Bahl, CEO and Others*, Case No 17 of 2014 (Competition Commission of India, 19 May 2014).

<sup>8</sup> *All India Online Vendors Association v Flipkart India Private Limited and Others*, Case No 20 of 2018 (Competition Commission of India, 6 November 2018).

- (a) Firstly, whether the current method(s) of identifying the relevant market in abuse of dominant position cases are effective;
- (b) Secondly, whether the existing literature is adequate in proposing solutions to address the given issue;
- (c) Thirdly, whether an alternative can be proposed to address the issues pertaining to the delineation of the relevant market.

The paper is divided into four broad parts. Part II discusses the existing legal framework and methods used to determine the relevant market in India, which are also recognised and used in other regimes like the USA and the UK. It further aims to determine if this delineation is effective or not. Part III undertakes a review of the existing literature on the 'relevance of relevant markets' and aims to determine the literature gap. Part IV aims to bridge and address the literature gap by proposing viable solutions to address the challenges occurring in market delineation. It addresses the question of whether relevant market delineation is required at all. Part IV concludes the paper by summarising its findings in each research question.

## **2. The Existing Method of Determining the Relevant Market**

### **2.1 How Is the Relevant Market Determined in India**

As stated earlier, there is a non-exhaustive list of factors in Section 19(7) and Section 19(6) of the Competition Act 2002. The relevant product market is determined by (a) physical characteristics or end-use of goods; (b) price of goods or services; (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products.<sup>9</sup> These factors have been organised into various tests that have been adopted by the Competition Commission of India as well as in the EU and USA antitrust regimes.

#### **2.1.1 Demand-Side Substitutability**

The relevant product market includes all the products of other firms that are similar to the products of the firm in question, as they are direct substitutes. However, the market also includes all those products that are substitutable for the products or services of the firm in question. Demand-side substitutability aims to include those products in the relevant market that consumers see as substitute products to those of the firm in question.<sup>10</sup> The demand-side substitutability is a decisive factor in determining the relevant market.<sup>11</sup> The

---

<sup>9</sup> Competition Act 2002, s 19(7).

<sup>10</sup> European Union, 'Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law' (*EUR-Lex*, 9 December 1997) <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC\\_1997\\_372\\_R\\_0005\\_01](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_1997_372_R_0005_01)> .

relevant market includes substitutes,<sup>12</sup> which are further determined by the effect of an increase in price on the demand substitutability. The factors to be considered are intended end usage,<sup>13</sup> the difference in product or service characteristics,<sup>14</sup> along the impact of price variation.

Under demand-side substitutability, the SSNIP test has recently gained prominence in India. The Small but Significant Non-transitory Increase in Price (SSNIP) test has been used to determine substitutes through the impact of price variation.<sup>15</sup> This test draws from the Hypothetical Monopolist Test (sometimes interchangeable), ie it studies the impact of price variation by a hypothetical monopolist on consumer behaviour towards purchasing other substitute products. In this test, a small, significant and non-transitory (permanent) change in the price of the product or service of the concerned entity is assumed to be around a 5 to 10% increase in the price above the competitive level of pricing.<sup>16</sup> The consumer behaviour after an increase in price is further determined by the difference in product or service characteristics and end usage between the hypothetical monopolist's product. The SSNIP test is included in the 1982 US Merger guidelines, and in India, it has been used by the Competition Commission of India as a tool to determine the relevant market.<sup>17</sup> In *Surinder Singh Barmi v The Board of Control for Cricket in India*, the Competition Commission of India, using the SSNIP Test, concluded that despite such a price increase, cricket was not substitutable with other sports, considering the Indian scenario.<sup>18</sup> The SSNIP Test was also applied in the recent case of *Adani Gas Ltd*.<sup>19</sup>

### 2.1.2 Supply-Side Substitutability

Supply-side substitutability is a less prominently used concept in determining the relevant market and is used only to cover any limitation in the previous approach.<sup>20</sup> It is based on the

---

<sup>11</sup> Sudhanshu Kumar and Sumer M Dugar, *Guide to Competition Act, 2002: An Exhaustive Section-Wise Commentary Incorporating All Legislative and Judicial Developments* (8th edn, LexisNexis Butterworth India 2020).

<sup>12</sup> Sudhanshu Kumar and Sumer M Dugar, *Guide to Competition Act, 2002 vol 1* (7th edn, LexisNexis Butterworth India 2019).

<sup>13</sup> *Om Datt Sharma v Competition Commission of India* [2015] Competition Law Report 529 (Competition Appellate Tribunal).

<sup>14</sup> *M/s Atos Worldline India Pvt Ltd v M/s Verifone India Sales Pvt Ltd and Others* [2015] Competition Law Report 327.

<sup>15</sup> Kaushal Kaushal Sharma, 'SSNIP Test: A Useful Tool, Not A Panacea' [2011] Competition Law Report.

<sup>16</sup> RL Koul and Priya Prasad, 'An Analysis of the Abuse of Dominant Position by the E-Commerce Retailers in India' <<https://www.scribd.com/document/478524160/8ae1Article-IX-Page-55-61>>.

<sup>17</sup> *Belaire* (n 6); *Surinder Singh Barmi v The Board of Control for Cricket in India*, Case No. 61 of 2010 (Competition Commission of India, 8 February 2013).

<sup>18</sup> *Surinder* (n 17).

<sup>19</sup> Press Trust of India, 'NCLAT Upholds CCI Order on Adani Gas for Abuse of Dominant Position' *The Economic Times* (New Delhi, 9 March 2020) <<https://economictimes.indiatimes.com/industry/energy/oil-gas/nclat-upholds-cci-order-on-adani-gas-for-abuse-of-dominant-position/articleshow/74551712.cms?from=mdr>>.

<sup>20</sup> Amelia Fletcher, 'Revisiting the Hypothetical Monopolist Test, and the Role of Common Sense Market Definitions' (Pros and Cons Conference 2017, Centre for Competition Policy, 3 November 2017)

response of suppliers, apart from the firm in question, to a small but permanent increase in the price of the particular firm’s products. The supply-side substitutability examines how quickly competitor firms can switch production and market similar products in the short term, in response to a small, permanent change in the original product prices without incurring significant costs. For this test, the firms or suppliers should have the means to produce and market a variety of products or different grades of the same products.<sup>21</sup> The factors to be assessed are: in how short a time frame can firms switch production, and the additional costs incurred in switching production; these two factors have to be of a value as possible.<sup>22</sup>

Table 2: Methods Adopted in India

Demand-Side Substitutability	Supply-Side Substitutability
Includes those products in the relevant market that consumers see as substitute products to products of the firm.	Response of suppliers, apart from a small but permanent increase in the price of the particular firm’s products.
The factors considered are intended end usage, differences in product or service characteristics, along the impact of price variation.	Examines how quickly competitor firms can switch production and market similar products in the short term, in response to a small, permanent change in the original product prices without actually incurring significant costs.
Small but Significant Non-transitory Increase in Price (SSNIP) test, which studies the impact of price variation by a hypothetical monopolist on consumer towards purchasing other substitute products.	The factors to be assessed are: (i) the time frame in which firms can switch production, and (ii) the additional costs incurred in switching production.

### 2.1.3 CCI’s Approach to Relevant Market Delineation in Abuse of Dominant Position Cases

The methods used by the CCI to determine the relevant market in abuse of dominant position cases stem from the broader approaches of demand-side and supply-side substitutability. However, the methods used are based on common perception and not on economic tests, economic data or analysis.<sup>23</sup>

[https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/knowledge-and-research/the-pros-and-cons/2017\\_4---amelia-fletcher.pdf](https://www.konkurrensverket.se/globalassets/dokument/engelska-dokument/knowledge-and-research/the-pros-and-cons/2017_4---amelia-fletcher.pdf).

<sup>21</sup> Commission Notice (n 10).

<sup>22</sup> Sumer M Duggar, *Guide to Competition Law*, vol 1 (7th edn, LexisNexis 2017).

<sup>23</sup> Cyril Shroff and Avaantika Kakkar, ‘India: Abuse of Dominance’ (*Global Competition Review*, 19 March 2019) <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2019/article/india-abuse-of-dominance>.

The CCI has emphasised the need to look at market realities while assessing the market; in the case of *Lifestyle Equities CV and another v Amazon Seller Services Private Limited and Ors*,<sup>24</sup> the CCI, in respect of cross-sided network effects of online platforms, observed that: 'Delineation of relevant market and competitive assessment is based on market realities as they exist at the time of assessment, keeping in view the facts and allegations. In rapidly changing markets, in particular such as the one in the present case, market assessment cannot have a static approach.'

Another contemporary aspect of relevant market delineation met with the CCI is concerning single-brand relevant markets. In the case of *Sonam Sharma v Apple*,<sup>25</sup> the CCI noted that defining relevant markets based solely on a single brand is seldom justifiable and that relevant markets could not be confined to the products of a single manufacturer. However, in the case of *Shamsher Kataria v Honda Siel Cars India Ltd*,<sup>26</sup> the CCI adopted a brand-specific approach to market delineation. Here, the Commission identified two relevant markets: the primary market (car manufacturing and sales) and the secondary market (spare parts sales and repair services) for each car brand; ie, the CCI concluded that each OEM held 100% dominance in the aftermarket for its genuine spare parts, diagnostic tools and associated repair services.

Thus, it can be observed that while CCI uses methods of demand-side substitutability and supply-side substitutability, the lack of use of data and quantitative tests by the CCI results in arbitrariness and conflicting case decisions.

## 2.2 Analysis: Is the Existing Method Truly Effective

### 2.2.1 Subjectivity Associated With These Tests

While these tests have been defined and implemented by antitrust regimes, it is opined that these tests are highly subjective. For example, to apply the SSNIP test precisely and effectively, it must be applied quantitatively. However, the quantitative application would require exact monetary information that is necessary to decide (a) the competitive level of pricing to be utilised for the test, (b) the overall revenue of the particular Hypothetical Monopolist, and (c) the cross-elasticity of interest and supply between the substitute products.<sup>27</sup> While the Director General conducts a detailed investigation, such information is difficult for competition regulatory authorities to obtain due to a lack of cooperation from

---

<sup>24</sup> *Lifestyle Equities CV and another v Amazon Seller Services Private Limited and Others*, Case No. 09 of 2020) (Competition Commission of India, 11 September 2020).

<sup>25</sup> *Sonam Sharma v Apple* [2018] Competition Law Report 49.

<sup>26</sup> *Shamsher Kataria v Honda Siel Cars India Ltd* [2015] 1 Competition Law Journal 286 (National Consumer Disputes Redressal Commission).

<sup>27</sup> Morris A Adelman, 'Economic Aspects of the Bethlehem Opinion' (1959) 45(5) *Virginia Law Review* 684 <<https://doi.org/10.2307/1070847>>.



the entities involved in the case. Thus, despite appearing to be quantitative and objective, these tests are largely subjective in nature, again leaving a lot of scope for arbitrariness.

### **2.2.2 Practical Shortcomings**

The current tests, especially the SSNIP Test, have practical shortcomings. The tests for demand-side substitutability place a lot of reliance on consumer behaviour based on the assumption of complete knowledge of the consumer. In reality, consumers are not aware of all the substitute products in the market, and the market is characterised by information asymmetry. Hence, the relevant market determined by consumer response to price variation does not depict the true picture. Another shortcoming is that it fails to consider the possibility that price sensitivity could already have been marred by the dominant company's presence in the market.<sup>28</sup> Further, price-based tests fail to work as far as free services are concerned. Multi-sided platforms like Google and e-commerce sites like Amazon do not charge a direct price to their consumers, which makes it difficult to apply the tests involving price variation. Thus, the SSNIP test will not work in those markets where the price is not the decisive parameter for a consumer.<sup>29</sup>

### **2.2.3 Effectiveness of Determining the Relevant Market**

According to Richard Markovits,<sup>30</sup> the value and effectiveness of determining the relevant market can be judged by two standards: firstly, if the exercise of tests to determine the relevant market leads to non-arbitrary results and secondly, from the functional perspective, if the determination of the relevant market is cost-effective.

Sections 2.2.1 and 2.2.2 have already discussed the shortcomings with the existing determination of the relevant market and the arbitrariness associated with it. The existing methods of determining the relevant market are very subjective and suffer from practical shortcomings. Section 1.1 (on the statement of issue) has enumerated cases in the Indian antitrust regime, where similar cases have been treated differently while determining the relevant market. Thus, the delineation of the relevant market is currently very subjective and arbitrary.

The perusal of the second criterion yields more criticism of the determination of the relevant market. To ascertain the effectiveness, the first step is to identify what goals are to be achieved. The proximate goals are easy to determine, such as the prevention of monopolisation, ascertaining the firm's market power, etc. However, the ultimate goals of market delineation are difficult to determine. There is no ultimate goal of efficiency, consumer welfare, economic integration, income re-distribution, etc., associated with market

---

<sup>28</sup> Rupperecht Podszun, 'The Arbitrariness of Market Definition and an Evolutionary Concept of Markets' (2016) 61(1) *The Antitrust Bulletin* 121 <<https://doi.org/10.1177/0003603X15625109>>.

<sup>29</sup> Podszun (n 28).

<sup>30</sup> Richard S Markovits, *Economics and the Interpretation and Application of US and EU Antitrust Law: Volume I Basic Concepts and Economics-Based Legal Analyses of Oligopolistic and Predatory Conduct* (Springer 2014).

delineation, ie, there is no criterion against which one can weigh the effectiveness of relevant market delineation.<sup>31</sup> Markovits further raises questions as to even if these goals are assumed to exist, the goals cannot be weighed and hence cannot be evaluated. Hence, the cost-effectiveness of market delineation cannot be determined and an attempt at an instrumental or functional analysis of market delineation fails. According to Markovits, market-oriented approaches to antitrust issues could never be justified functionally as the process of generating aggregate market figures and defining markets created high costs and negative benefits; it reduced the value of non-aggregate data.<sup>32</sup>

Thus, there are questions raised on the effectiveness of the relevant market delineation as an approach to dealing with abuse of dominant position cases. Drawing from this section as well as the statement of issue, it raises the question of whether relevant markets need to be determined at all, or is there any other efficient manner of determining abuse of dominant position to avoid these arising challenges.

### **3. Literature Review**

The objective of this paper necessitates a perusal of existing literature. This section aims to summarise the existing literature that offers alternatives to the existing methods of delineating the relevant market. It is observed that arguments have been made in favour of doing away with relevant market delineation.

#### **3.1 Existing Literature in the Area**

##### **3.1.1 Louis Kaplow<sup>33</sup>**

This proves to be one of the most significant works amongst existing literature, which makes the bold argument that market definitions should be done away with, as it does not achieve the purpose of giving an inference into the market power of the firm. While Professor Kaplow proposes several arguments in support of doing away with the relevant market, two arguments should be elaborated upon. First is the central argument placed by Professor Kaplow that the market delineation should be discarded due to its futility, ie, the purpose of market delineation is to assess the market power of the firm; however, any coherent way of market delineation necessarily requires an assessment of the firm's market power.<sup>34</sup> This defeats the purpose of market delineation as it uses the ends of its objective to achieve the means. The relevant market is determined by how accurately one can determine the market power of the firm. However, even the end objective of determining the relevant market is the

---

<sup>31</sup> Markovits (n 30).

<sup>32</sup> Markovits (n 30).

<sup>33</sup> Louis Kaplow, 'Why (Ever) Define Markets?' (2010) 124(2) Harvard Law Review 437.

<sup>34</sup> Kaplow (n 33).

assessment of market power, thus rendering the whole exercise unnecessary (the SSNIP test is an example of this).

Secondly, the paper makes some interesting observations about the use of cross-elasticities in the relevant market in determining the market power of the firm. The inclusion of a firm's substitutes and the application of the SSNIP test attract the concept of cross elasticity as a means of determining the relevant market. This causes the relevant market to be based on cross elasticity, rather than the elasticity of demand of the product on the basis of which market power inferences need to be made.

### **3.1.2 Rafik Rabia 'Defining Markets in a New Age: Save the Relevant Market Now!', *Competition Forum*<sup>35</sup>**

The given paper underscores the challenges associated with defining the relevant market and proposes an alternative to the same. While it concurs that the purpose of defining the relevant market is to assess the market power and to identify competitive constraints on the firm, it argues that the current relevant market delineations present a picture that is 'either black or white', when in reality, there are greys involved, ie, products might neither be in or out of the market. The paper also argues that market power cannot be assessed on the basis of price increases in the wake of 'free markets' anymore (e-commerce platforms, search engines, etc.).

Although the paper briefly discusses various alternative methods, such as the hypothetical market power test, the real market power test and the comparative market test, the paper concludes that these methods cannot replace the definition of the relevant market and that relevant markets cannot be done away with. It proposes that the relevant market 'can be saved' by using an economic approach based on effects, ie, based on the 'operator's harmful capacity', that is usually used in cases of merger approvals.

### **3.1.3 Rupprecht Podszun, 'The Arbitrariness of Market Definition and an Evolutionary Concept of Markets', *the Antitrust Bulletin*<sup>36</sup>**

The given paper underscores the problems associated with relevant markets and further discusses the criticisms posed by Richard Markovits regarding the effectiveness of relevant market delineation. It argues that there is no means of determining the efficiency of defining the market as there is no immediate tangible goal against which its results can be measured. It also criticises the determination of relevant markets based on price variation.

The paper proposes an evolutionary definition of relevant markets that seeks to assuage the drawbacks of the present system. He proposes the definition: 'Market in the sense of

---

<sup>35</sup> Rafik Rabia, 'Defining Markets in a New Age: Save the Relevant Market Now!' (*Competition Forum*, 5 November 2020) <<https://competition-forum.com/defining-markets-in-a-new-age-save-the-relevant-market-now/>>.

<sup>36</sup> Rupprecht Podszun (n 28).

competition law is the environment in which the behaviour under investigation takes place, encompassing all factors that are relevant for shaping the decisions of the actors.’ This is an open definition that does not instrumentalise the notion of a ‘market’, ie, as mere forces of demand and supply. Thus, this method advocates a more subjective approach than what is currently in force. It proposes a more qualitative approach; the paper states the possibility of having an SSNDQ test (small but significant, non-transitory decrease in quality), which is effective in assessing ‘free markets’. Thus, this literature reworks the market definition to be broader in scope and involves a more qualitative analysis than a quantitative one.

### **3.1.4 Michael G Baumann, ‘Is a Relevant Market Irrelevant’, *Secretariat Economics*<sup>37</sup>**

While this paper deals with rethinking the relevant market in light of merger approvals, it is worth examining how the existing conception of the relevant market (which is similar to that in abuse of dominant position cases) can be rethought.

The given paper’s relevance lies in its discussion of Joseph Farrell and Carl Shapiro’s claim that a new screening mechanism is required for mergers in the antitrust regime as it recognises the difficulties in determining the relevant market according to the Horizontal Merger Guidelines in the USA (that relies on the current mechanisms to determine the relevant market). Farrell and Shapiro suggest a screening method for mergers, called the upward pricing pressure (UPP). The UPP approach measures the incentive of the firm to raise the price after the merger. Thus, it does not measure actual price increases but the incentives to increase the price after the merger. UPP is determined based on various factors such as merging firms’ prices, marginal costs and diversion ratios.

### **3.1.5 Gregory J Werden, ‘Why (Ever) Define Markets? An Answer to Professor Kaplow’ (*Contradictory Views*)<sup>38</sup>**

It is also important to peruse the contradictory views; Gregory J Werden’s work presents a counter to Professor Kaplow’s arguments on the irrelevance of the market delineation that doing away with the relevant market would lead to chaos in litigation. Werden argues that the relevant market delineation serves other analytical purposes beyond the determination of market share. It sets the market limits that help determine other factors, such as barriers to entry into the market etc. Werden refutes Kaplow’s argument that markets comprise homogeneous products and presents several scenarios on how the relevant markets include substitutes as well. According to this literature, the relevant market is narrowly defined by the operation of the upper limit set by the Hypothetical Monopolist Test and the lower limit

---

<sup>37</sup> Michael G Baumann, ‘Is a Relevant Market Irrelevant?’ (*Secretariat Economists*, 2009) <<https://ei.com/economists-ink/summer-2009/is-a-relevant-market-irrelevant-by-michael-g-baumann/>>.

<sup>38</sup> Gregory J Werden, ‘Why (Ever) Define Markets? An Answer to Professor Kaplow’ (2012) 78(3) *Antitrust Law Journal* 729 <<http://dx.doi.org/10.2139/ssrn.2004655>>.

set by the smallest market principle (which presumes a standard or homogeneous set of products).

### **3.2 Perusing the Literature Gap**

All the papers cited above underscore the challenges associated with the existing method of market delineation. However, most refrain from giving a concrete alternative to setting the competitive constraints or boundaries, especially in the abuse of dominant position.

Professor Kaplow's Louis Kaplow, 'Why (ever) define markets?', Harvard Law Review advocates doing away with the entire relevant market delineation itself; however, as countered by Gregory J Werden, the relevant market serves other analytical purposes as well. While Rupperecht Podszun (in Rupperecht Podszun, 'The Arbitrariness of Market Definition and an Evolutionary Concept of Markets', *The Antitrust Bulletin*) attempts to provide an alternative, it proposes a wider definition of the market, broadening its scope. This is a meritorious proposition, but it increases the subjectivity associated with defining the markets and could potentially lead to arbitrary results. Michael G. Baumann, 'Is a Relevant Market Irrelevant', *Secretariat Economists*, also proposes UPP as a solution, however, which is only in the context of merger approvals (not within the scope of the paper).

Another gap is that there is a lack of literature specific to Indian antitrust jurisprudence. These papers have been written considering the EU and/or US antitrust regimes, and there is a serious need for more literature on the relevance of relevant markets centred around the Indian antitrust jurisprudence as well.

## **4. Alternatives to Relevant Market Delineation**

### **4.1 Can Relevant Market Delineation Be Done Away With**

What guides the section on analysis is the question of whether the relevant market delineation can be done away with, in the context of abuse of dominant position in India. Since the goal of market delineation is to ascertain the market power and then the dominant position, we must look into the factors determining the dominant position of the firm and whether they can be determined through some other means.

With respect to Section 3 of the Indian Competition Act,<sup>39</sup> ie, cases dealing with anti-competitive agreements, it has been clarified by the Supreme Court of India that delineation of the relevant market is not a prerequisite, especially when the conduct of the parties falls within the presumptions laid out in Section 3 of the Act.<sup>40</sup> The question arises as to whether the same principle can be extended to abuse of dominant position cases as well.

---

<sup>39</sup> Competition Act 2002, s 3.

<sup>40</sup> *Competition Commission of India v Coordination Committee of Artist and Technicians of West Bengal Film and Television Industry* [2017] Competition Law Report 447.

Section 19(4) of the Indian Competition Act outlines the factors that determine the dominant position of a firm.<sup>41</sup> Though it is again a non-exhaustive list, the Competition Commission of India must rely on these factors while ascertaining dominant position. These factors include market share, entry barriers to the market, structure and size of the market. Market share, though not the only criterion, has been recognised in past cases as a decisive factor in ascertaining the dominant position of an entity.<sup>42</sup> Market power also depends on the ability of the firm to control the price, which further depends on barriers to entry and exit to the market as well. The current framework relies heavily on market definitions to determine abuse of dominant position. If the relevant market is to be done away with, the alternative in place must ensure that abuse of dominant position can be determined effectively, even without a defined market.

To determine whether relevant market delineation can be done away with in India, reliance can be placed on methods used in US and EU antitrust law; such is evidenced by prior, as well as recent international collaborations between the CCI and the EU Commission.<sup>43</sup>

## **4.2 Using the Direct Evidence Method**

Since relevant market delineation is a means to an end and not the end itself, economic theories propose the direct evidence method. The direct evidence method does not follow a structured approach of market delineation, followed by ascertaining dominance and further determination of abuse of dominant position. This method directly looks at whether consumers are paying higher prices for the firm's goods or services due to less competition in the market, and hence surpasses the need to use the Hypothetical Monopolist Test or SNIP tests.<sup>44</sup> The direct evidence method is not a common method; in Indian cases, the Competition Commission of India necessarily undertakes all the stages of delineation before gauging the abuse of dominant position. Since this method directly examines the evidence of abuse of dominant position, it is a more objective, proof-based system that can minimise arbitrariness and subjectivity.

The direct evidence method can be undertaken through 'before-and-after benchmarks'.<sup>45</sup> In this, the firm's behaviour and pricing can be examined before and after the event of alleged abuse of dominant position (say a new policy restricting market access, a new product or service launched that causes it to acquire a dominant position, etc.). If the prices

---

<sup>41</sup> Competition Act 2002, s 19(4).

<sup>42</sup> *Competition Commission of India v Fast Way Transmission Pvt Ltd and Others* (2018) 4 Supreme Court Cases 316.

<sup>43</sup> Press Trust of India, 'CCI Chief Calls for Devising New Tools to Check Anti-Competitive Practices' *Business Standard* (New Delhi, 5 December 2022) <[https://www.business-standard.com/article/economy-policy/cchi-chief-calls-for-devising-new-tools-to-check-anti-competitive-practices-122120501173\\_1.html](https://www.business-standard.com/article/economy-policy/cchi-chief-calls-for-devising-new-tools-to-check-anti-competitive-practices-122120501173_1.html)>.

<sup>44</sup> Stephan M Levy, 'Are Relevant Markets Ever Irrelevant?' (HMG Review Project-Comment, Project No P092900 2009) <[https://www.ftc.gov/sites/default/files/documents/public\\_comments/horizontal-merger-guidelines-review-project-545095-00020/545095-00020.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-545095-00020/545095-00020.pdf)>.

<sup>45</sup> Stephan M Levy (n 44).

post the alleged initiation of abuse of dominant position are higher than those before the event, the firm can be said to have abused its dominant position.

This can be better explained with the help of an example. In 2021, Together We Fight Society filed information against Apple India before the Competition Commission of India for abusing its dominant position through its discriminatory app store guidelines.<sup>46</sup> Apple's app store guidelines mandate that developers have to use only Apple's in-app purchasing system and further impose a 30% commission on every developer. Here, the event reflecting the dominant position is the imposition of the app-store guidelines. Clearly, after the imposition of these guidelines, Apple stands to gain through greater revenues accruing through the 30 per cent commission, which can be further increased as Apple's in-app purchases are the only way through which developers can offer their products over iOS devices. Thus, a prima facie examination reveals that Apple is an alleged abuser of a dominant position. This probe formed the basis for the probe by CCI into Apple's alleged anti-competitive behaviour. The case is presently being deliberated upon by the CCI.<sup>47</sup>

This approach has also been referred to as a 'common-sense approach'<sup>48</sup> as it makes use of plain logic and does not involve any procedure as such. Alternatively, the contemporaneous (comparative) benchmark approach can be used as an indicator of unfair pricing. In this method, the prices of a product of the firm in one geographical market are compared with prices of the same firm in another geographical market, which is competitive in nature. Unfair pricing is inferred if the firm charges higher prices than those charged in the competitive market. However, in this method, differences in consumer preferences, income levels and competitors need to be considered. The contemporaneous approach depends on the geographical market selected as a benchmark. The contemporaneous approach has been used in the US antitrust merger analysis. The FTC's (Federal Trade Commission) economists applied a contemporaneous benchmark model to predict that the proposed merger between Staples and Office Depot (Staples-Office Depot merger) would lead to price increases. For their analysis, the FTC relied on electronic pricing data for a market basket of office supplies across various U.S. cities.<sup>49</sup>

The before-and-after benchmark approach is more feasible than the contemporaneous benchmark approach, as the latter requires a geographical market with similar characteristics to the particular market taken into consideration, while the former can be more universally applied. Thus, it is submitted that in the absence of relevant market delineation, the before-and-after benchmark approach is more feasible as an alternative.

---

<sup>46</sup> MM Sharma, 'Apple Faces Antitrust Investigation in India for Alleged Abuse of Dominance' (*Lexology*, January 28, 2022) <<https://www.lexology.com/library/detail.aspx?g=ef062d33-8e5a-4317-aa2b-5a568690c8dd>>.

<sup>47</sup> Aditya Kalra, 'Exclusive: India Antitrust Probe Finds Apple Abused Position in Apps Market' *Reuters* (New Delhi, 12 July 2024) <<https://www.reuters.com/technology/india-antitrust-probe-finds-apple-abused-position-apps-market-2024-07-12/>>.

<sup>48</sup> Stephan M Levy (n 44).

<sup>49</sup> Stephan M Levy (n 44).

### 4.3 Application of SSNIP and SSDQ Tests to Make Inferences on Market Power

While this might seem in contradiction to what was argued earlier, the given section talks about the application of these tests to determine the market power of the firm rather than for the delineation of the relevant market. SSNIP and SSDQ tests help determine substitutes to the firm's products; if such determination reveals an absence of substitutes or several substitutes, it either indicates greater or lesser market power (of the firm), respectively. The case of consumer response in free markets is taken care of by the SSDQ test (small but significant decrease in quality). It is opined that these tests could be used directly to determine the market power of the firm and whether the firm is in a dominant position or not. This method can be used when there is a lack of direct evidence of abuse of a dominant position.

Let's take an example to understand its application. Again, taking the instance of the Competition Commission of India's probe into Apple India's abuse of dominant position, the market power of Apple India is to be determined with respect to its dealings with app developers, according to the facts of alleged dominance. Even if there is a small, significant, permanent increase in price (in this case, an increase in commission) were to be made, app developers would be compelled to continue to deal with Apple India, as it is the sole controller of the App store which is the only means through which apps could be made available to users. This lack of substitutes indicates that Apple possesses high market power. Having decided that Apple possesses high market power, its act of charging a 30 per cent commission can be assessed for abuse of dominant position.<sup>50</sup>

The direct evidence method can be used to determine abuse of dominant position in a relatively more direct and objective manner, without the need to delineate the relevant market. Delineating the relevant market brings in subjectivity at every stage of market delineation, which can be minimised through the direct evidence method. This is the main proposition of the given paper, as it is a less time-consuming process that helps minimise subjectivity and arbitrariness. Alternatively, while SSNIP suffers from certain limitations, as addressed earlier, it can be used directly to determine the market power of the firm indicated by substitutes. The same goes for the SSDQ test, which is effective in determining market power in the case of free markets, as it does not use price variations. These methods can help the Competition Commission of India circumvent the relevant market delineation and its limitations and even ensure faster redressal of the dispute.

## 5. Conclusion

With the increase in abuse of dominant position cases, it becomes important to ensure that these cases are dealt with uniformly and in a non-arbitrary manner. Market delineation is one of the fundamental stages on which abuse of dominant position rests. There have been

---

<sup>50</sup> Daniel Mándrescu, 'The Apple App Store—A New Kind of Hallmark Case' (*Kluwer Competition Law Blog*, 18 March 2024) <<https://competitionlawblog.kluwercompetitionlaw.com/2024/03/18/the-apple-app-store-a-new-kind-of-hallmark-case/>>.



criticisms of the existing methods of market delineation, which raises the question of whether relevant market delineation is necessary in the first place or can be done away with. Revisiting the research questions that were aimed to be answered through this paper:

**(a) Whether the current method(s) of identifying the relevant market in abuse of dominant position cases are effective;**

The current methods of demand-side substitutability, the SSNIP test and the Hypothetical Monopolist Test, suffer from practical shortcomings; they place too much reliance on consumer behaviour and are not effective in free markets like online aggregate platforms, search engines, etc. Moreover, as analysed by Richard Markovits, the relevant market delineation's effectiveness cannot be measured due to the absence of an end goal. Thus, this calls for researching alternative methods to address the issue.

**(b) Whether the existing literature is adequate in proposing solutions to address the given issue;**

There is literature that highlights the demerits of the existing methods of market delineation. The most significant in this regard is Professor Kaplow's essay 'Why (ever) Define Markets?', where he makes the bold argument of not needing to define markets in the first place due to their lack of adding any value. The literature gap identified is that while existing literature highlights the need to do away with relevant market delineation, it fails to provide a concrete alternative, as the current jurisprudence relies heavily on market definitions. Further, there is an absence of literature that analyses the issue with respect to the Indian antitrust regime.

**(c) Whether an alternative can be proposed to address the issues pertaining to the delineation of the relevant market.**

Yes, an alternative to relevant market delineation is an approach based on 'common sense', that is, the direct evidence method. In this, the direct evidence associated with the abuse of dominant position is reviewed, such as the act of restricting market access or unfair pricing etc. A way of perusing the direct evidence is analysing price differences before and after the allegedly abusive conduct. This method deals with the issue more objectively and can minimise arbitrary results. In the absence of direct evidence, another approach (albeit not flawless) could be to apply the SSNIP or SSNDQ tests to directly determine the market power rather than delineate relevant markets.

These alternatives are not foolproof and may not allay all the concerns associated with relevant market delineation. However, it helps achieve the determination of abuse of dominant position directly, rather than undergoing a long-drawn process of relevant market delineation. Further, being based on evidence, it enables a more uniform and objective approach to dealing with abuse of dominant position cases.

### **Acknowledgement**

This paper is a revised and expanded version of a paper entitled 'Economic Analysis of the Abuse of Dominance in the Context of Relevant Markets' presented at the 19th Annual Asian Law and Economics Association (AsLEA) Conference on August 8–9, 2023, at the Academia Sinica Institutum Iurisprudentiae, Taipei, Taiwan.

### **Funding Information**

The authors received no funding from any party for the research and publication of this paper. ◆