



CONSUMER BEHAVIOUR: ROLE IN DETERMINATION OF RELEVANT PRODUCT MARKET UNDER COMPETITION LAW

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Abstract

Relevant Product Market is used to describe a market in respect to a particular product

In this study, the researcher is going to assess how consumer behaviour plays a role while understanding RPM (Relevant Product Market), in context with competition law. The researcher will see two cases, United Brands v. Commission¹ and CCI v. Coordination Committee of Artist and Technicians of WB Films and Television². During the case of United Brands v Commission came the debate of the importance defining accurately the product market and decide United Brands position as dominant position in RM (Relevant Market), which would have allowed the commission to put allegation of Abuse of dominance under Art 102 of TFEU. This was a case where the debate of relevant product market to determine dominance was discussed. This study will be limited to understand how RPM, which is different from geographical market, defined. Central focus of the Paper will be defining the RPM and how consumer Behaviour plays a role in defining it.

Keywords: Relevant Product Market, Relevant Market, Consumer behaviour, Competition Law

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Introduction

In this study, the researcher is going to assess how consumer behaviour plays a role while understanding RPM (Relevant Product Market), in context with competition law. The researcher will see two cases, *United Brands v. Commission*² and *CCI v. Coordination Committee of Artist and Technicians of WB Films and Television*³. During the case of *United Brands v Commission* came the debate of the importance defining accurately the product market and decide *United Brands* position as dominant position in RM (Relevant Market), which would have allowed the commission to put allegation of Abuse of dominance under Art 102 of TFEU.

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Relevant Market

Challenges come with progress. Indian competition watch dogs had to face challenges with the enactment of Competition Act 2002, as they were the once entrusted with the job of making it sure that Indian market operated in a competitive environment and market. RM is defined in different statues around the world but it will not be justified to restrict the scope of RM to few theoretical definitions.

In an order dated 7th Mar 2017 “*CCI v. Coordination committee of Artist & Technicians of West Bengal Film & Television*”⁴ supreme court of India made an observation on issues inclusive of the function and scope of applicable markets, the definition of a 'company' and what would constitute a settlement in determining violations of the provisions of Sec.3, Anti-Competitive Agreement, of the Competition Act, 2002 (hereinafter called the "stated Act").

² *United Brands Company and United Brands Continentaal BV v Commission of the European Communities. Case 27/76.*

³ *Competition Commission of India v. Co-ordination Committee of Artists and Technicians of W.B. Film and Television and Others. AIR 2017 SC 1449*

⁴ *Supra n.2*





Brief Facts:

Producers of “Mahabharat”, M/s BRTV had given exclusive rights to dub the serial in Bangla language to M/s Magnum TV Serials. Magnum TV Serials had also the till September 2016. Thereafter, M/s. Magnum TV Services to dub the serial in Bangla language appointed M/s. Hart Video (hereinafter referred to as *Hart Video*) as the sub-assigner. an agreement was entered into for telecasting it on two TV channels viz., 'Channel 10' and 'CTVN+' for the purpose of broadcasting the dubbed version.

However, two associations, specifically the Eastern India Motion Picture Association (herein after referred as *EIMPA*) & coordination committee of Artist & Technicians of WB Film and Television (hereinafter known as Coordination Committee), adversarial the screening of the dubbed series due to the fact it would adversely affect the artists and technicians working in West.

EIMPA and the Coordination Committee threatened non-cooperation to 'Channel 10' and 'CTVN+', if they telecast the dubbed serial through written letters. Hart Video filed a complaint with the CCI, requesting the CCI to take actions against the two associations for violations of the provisions of the said Act.

CCI formed a prima facie opinion that there existed an anti-competitive concern and as a consequence directed the DG to analyse the complaint. The DG at some point of the route of investigation discovered that the information contained in the records provided with the aid of Hart Video were factually accurate.

The DG in his document defined the RM as the market for 'film and television enterprise of WB “and concluded that acts of the coordinate committee and EIMPA amounted to foreclosure of opposition by means of hindering access into the relevant market. Therefore, the actions of the 2 associations amounted to an anti-competitive agreement and violated the sec 3 (b) of the said Act.

Major issue raised by coordinate committee was that it comprised of artists and technicians that worked in the West Bengal Film & TV industry. It consisted of WB Motion Picture Artist Forum & Federation of Cine Technicians and workers of East India only and was in fact, a trade union of artists and technicians.





It was argued that the said committee was neither a person or association of persons or enterprise who was involved in the business of production, supply or distribution of service etc. Further, the argument was that their action would not fall under Sec3 (b) of the said act. It was instead their constitutional right to protest.

The majority order of the CCI agreed with the findings of the DG and held that the association has led the TV channels not broadcasting the TV Serial which violated Sec 3 (3) (b) of the said Act. The coordination committee appealed to the Competition Appellate Tribunal (hereinafter referred as "COMPAT"). COMPAT held that the CCI and DG had erred in defining the relevant market with the RM being telecasting of dubbed serial on television in West Bengal and not the film and television industry of West Bengal.

The COMPAT held that the complaint couldn't be investigated underneath Sec.3 and accordingly there could be no negation of Sec3 of the Act. COMPAT presumed that for the reason that Coordination Committee was not purchasing and moving in any associations, or arrangements of any services, no settlement as visualized under the arrangements of Section 3 of the expressed Act moved toward becoming entered into. The CCI appealed before the Supreme Court. The Supreme Court identified that there were two issues:

- i. Firstly, what was the exact RM for purpose of inquiry?
- ii. Secondly whether the actions of coordination committee covered under Sec 3 of the said Act?

Supreme Court observation⁵:

What was the exact RM for purpose of inquiry?

The Supreme Court held that COMPAT had taken a myopic view of the relevant market and referring to letters written by the Coordination Committee which themselves stated that the proposed broadcast of the dubbed serial would adversely affect the 'TV and Film Industry of West Bengal', held that this would be the relevant market in which an assessment would need to be made on the question of whether competition was affected.

⁵ Supra n.2



Whether the actions of coordination committee covered under Sec 3 of the said Act?

The Supreme Court found that the Coordination Committee was an 'enterprise' as it was engaging in an economic activity. Further, the Supreme Court held that the prohibition of exhibition of dubbed serial prevented competing parties pursuing their commercial activities and also hindered competition in the market. Therefore, the Supreme Court affirmed the CCI's order and set aside the COMPAT's judgment and observed that the activities of the Coordination Committee amounted to violation of Sec. 3(3)(b) of the said Act.

This is one of the first cases of the Supreme Court about the Competition Act, 2002 and the observations made within the present case are possibly to have huge reaching implications on how investigations and checks might be carried out by CCI and DG in case complaints are made bearing on violations of the provisions of the said Act.

What is Relevant Product Market?

Determining of the RPM is important to evaluate the position of the company with respect to its competitors. To prove that there has been abuse of dominant position by a company there is Dominant position of the said company in RPM. This can be done by firstly analysing the marketed product and then finding out how many competitors exist and what is the market share of each of them.

“According to United Brands⁶ case to be dominant, dominance is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.⁷

⁶ Supra n.2

⁷ Supra n.2





Brief Facts:

UBC owned Chiquita banana and in 1974 was the largest group. it owned 35% of global share of banana market. It sold 2,000,000 tons of banana in 1974 in Latin America. UBC had 40 refrigerator ships with 10 million cubic feet capacity. UBC supplied unripen bananas in EU to various ripeners who were also acting as its distributor. They would ripen the bananas and distribute them. Chiquita was sold on around 40 % higher price than other bananas. Allegations by Commission were relevant as the fact showed that UBC had a dominant Position.

Commission alleged that UBC was violating Arti. 102 of TFEU. Below are the allegations by which it has alleged dominant position:

- i. Imposing supply conditions
- ii. Refusing Supply
- iii. Price discrimination
- iv. Exploitative Abuse

Certain elements were required by the article to be complete: a) existence of dominant position, b) abuse of such dominant position has been done, c) there has been an effect on trade and member states. Before any allegations were to be shown first it was to be shown that UBC had a dominant position and there was a dominant market where it was dominant and then began the debate of RPM. Commission's ground was that UBC operated in banana market so banana market should be the RPM.

Argument of the UBC was that it competed in the fruit market, so entire fruit market should be the RPM and by doing this they wanted show a smaller market share which would prevent Article 102 to apply. Thus, the Courts faced the issue of defining the RPM accurately and perfectly to which they resorted to parameters that brought the discussion of consumer behaviour.



Consumer Behavior and Relevant Market

Cross elasticity of demand has to be there for two products to be substitutes. It means that if price of one product increases it should result in increase in demand for either product. Consumer behaviour has to be first gauged by the simplicity of price & demand and after establishing a correlation, rational of consumer behaviour have to be looked in detail and dept.

In UBC case consumer behaviour was brought in front to understand RPM. The issue was whether banana had their own market or they belong to fresh fruit market. UBC contended that for assessing completion a in realistic market. Limiting the RPM will not give broader and bigger perspective with reference to judging competition. UBC challenged commission contention, as it increased the possibility that court might find the in dominant position. So, they asserted that fresh fruit market was the RPM. They justified it by saying that for consumers banana was interchangeable with other fruit market.

“Commission countered by saying that they never said that other fruits and bananas are not or almost never interchangeable.”⁸ “There exists a substitute for every product. A relevant market cannot meaningfully encompass that infinite range, so the circle must be drawn narrowly”⁹

This brings in light the importance of finding:

- a) a higher degree of substitutability
- b) focusing on market narrowly for gauging the Dominance in market accurately

And same was considered by commission and clarified further that substitutability is a matter of degree. Another point to be taken into consideration was the unique characteristic of the banana itself. It was a rich source of potassium and was used by babies, elderly and sick as it was easily digestible. It was also stated that bananas were produced throughout the year and so this fact does not allow the bananas to compete with seasonal fruits. So, it is stated that it was not substituted by a strawberry or apple. These bananas had a particular and consisted demand because of its characteristics which were not in other fruits.

⁸ Supra n.2

⁹ Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953)



Courts laid down following test for marketing definition:

“For the banana to be viewed as framing a market which is adequately separated from other fruits in markets it must be able to be singled out by such exceptional features distinguishing it from other fruits that it is interchangeable to a restricted degree with others and is just presented to their opposition in a way that is not really noticeable.”¹⁰

Lot of market study was done and hence was noted that the bananas hardly and rarely got effected by price of other fruits, the only rare exception was grape and peaches in summers and there was no long-term elasticity.

To see the long-term effect of price variation economic analysis was done. This analysis also gauged the correlation between products. Evaluation of market was also done by the court through consumer behaviour. It was found that the banana had a special preference in the demographic of elderly, young and sick because of its uniqueness.

It was found that this demand for bananas was particularly focused on bananas and not just a demand for any fruit, because of its special features. From these considerations it was derived that large number of consumers were hardly affected by arrival of other fruits only the personal peak period of other fruits effected it a little for a limited period and from the point of view of substubility it effected to very little extent.¹¹

This case provided for test to assess pertinent item market, it took into consideration of economic analysis. It also considered the unique feature of product which somewhere effected the consumer behaviour to allow the products to be reasonably interchangeable. This gave grounds to judge UBC’s position accordingly. But the debate of defining RPM did not ended here.

This test faced criticism. It prompted wide vulnerability as a presumption of the economic assessment and reports can be evaded by the way that the attributes of the item may scatter the surety of the economic evidence and Courts get discredatory powers to frame RPM. There was a problem, if subjective analysis of product and its characteristics are involved then requirement for consistency and certainty in the law which can be provided by economic analysis can be done away with.

¹⁰ Supra n.2

¹¹ Supra n.1



The fact that bananas due to its unique feature caters a specific market brings a problem that this specific market is not being separately catered to as it is in fact part of the general market for bananas. This brings up an issue about whether the particular market requirements for bananas as a seedless, delicate natural product with wholesome advantages makes the particular interest for those properties, a market unmistakable from the general utilization of bananas as fruit. If so then it requires an investigation that would isolate the specific medical needs of bananas or any fruit as an uncommon interest though the interest for bananas as an organic product for general utilization be regarded separately. In the Vitamins case¹², it was found that a product can belong to two separate markets¹³. It was said that there is separate market for each vitamin and if a product has multiple use then it can be considered for two separate market. So, bananas can also be traded in two different market which can be market as source of nutrition and market as dessert. So basically, when economic analysis or investigation can give empirical data which can be used to clarify and define RPM, adding factors deriving out of characteristics of product may bring uncertainty which may bring additional problems which may be solely on discretion of Court rather than economic analysis. This puts law at disadvantage.

The Commission faced with the difficulties cited, brought out a Notice taking an effort to define the Relevant Market. Due to the difficulties face by commission, it brought out a notice taking an effort to define relevant market. It said RPM included all those product /services which are interchangeable or substitutable by consumer because of reasons which are product, characteristics, price and intended use of the product¹⁴. The interpretation by commission of RM by using SSNIP test or Hypothetical Monopolistic Test is explained in the notice. This test would involve assessing the existence of substitute and whether consumers readily switch to them or not¹⁴. It sees that does a small increase in price effects consumer and do the consumer switch to other product and if this price is increase will they result in decrease or loss of sales then the substitute which consumers choose would be part of the relevant market. However, this test was also criticised which can be seen in the case of Cellophane Fallacy¹⁵.

¹² Hoffmann-La Roche & Co. AG v Commission of the European Communities. Case 85/76.

¹³ http://www.europedia.moussis.eu/books/Book_2/5/15/04/01/index.tkl?all=1&

¹⁴ [http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from EN](http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from EN) accessed on 4-2-18

¹⁵ Sabbatini, Pierluigi, The Cellophane and Merger Guidelines Fallacies Again (May 24, 2001). Available at SSRN: <https://ssrn.com/abstract=271113> or <http://dx.doi.org/10.2139/ssrn.271113>



It said that if there was a dominant position being enjoyed by a product and already a monopolistic price was being charged and maximum profit was being gained. So, any increase in price will result in merely not buying of the product by consumers and this change in price might not depict the market condition accurately which will falsely widen the market which would include the product which might be poor competitors and substitutes. This might result into diminishing the possibility of finding an undertaking into dominant position and would defeat the purpose of trying to find and judging a factual dominant position.

Conclusion

There prevails a confusion on defining relevant market in a faultless manner. From the SSNIP test it is evidently clear that understanding consumer behaviour to assess the market is important though the manner and scope will be different from case to case. If necessary, then adopt the way as UBC case by first analysing the preference of customers for banana after which understand the try and understand the want of banana because of its specific characteristics, by the customer. This allows fair judgment on RPM and accurate use of consumer behaviour analysis.