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## COMPETITION COMMISSION OF INDIA AND POWER DISTRIBUTION COMPANIES

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### ABSTRACT

“Competition Commission of India and Power Distribution Companies” is directed towards understanding the role that CCI plays in regulating the Power Distribution industry in India. The electricity market usually suffers from monopolization and lack of investment, leading towards consumers being on the receiving end. Through two important research questions, the issue and relation between CCI and Power Distribution Companies and Regulatory laws will be explained along with certain landmark cases which established the importance of CCI.

The scope of the paper is to address the monopolization of the electricity market by power distribution companies and its effect towards customers. Access to electricity has become a basic necessity in modern India and no customer irrespective of whether reside in rural or urban India should have to be on the receiving end. CCI plays a major role in regulating markets to prevent monopoly and customer exploitation.

The research problem **How Abuse of Dominance is taking place in the Indian Power Distribution Market** is addressed in the following procedure.

- Discussing the meaning behind dominant position in the market and its' impact
- An analysis on abuse of dominant position in India and other leading countries around the world
- A comparison between Indian and International perspective of power distribution companies

- Understand and analyze the role of CCI and regulatory laws in place for power distribution companies
- Mention how abuse of dominant position affects consumers
- Conclude by putting forward my own views on power distribution companies and necessary improvements required to improve the market.

Keywords: Electricity, Power Distribution, Competition Commission, Power Distribution Companies, Dominant Market Position, Power Distribution Market, Fair Market

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## 1. Introduction

### 1.1 Background

The *Lex Julia de Annona*<sup>1</sup> is the earliest known ancestor of competition law which was in place due to the Roman Republic<sup>2</sup> in order to protect the corn trade.

After the breakout of World War II, the EC Treaty<sup>3</sup> was signed in Rome in 1957, to regulate and establish competition law in the European Union. The most significant laws which influenced the

<sup>1</sup> Late Prof DV Cowen, "Ancient Origins of Competition Law" (2007) <<https://www.sabar.co.za/law-journals/2007/august/2007-august-vol020-no2-pp38-41.pdf>> accessed 10 October 2018

<sup>2</sup> Donald L Wasson, "Roman Republic" (7<sup>th</sup> April 2016) <[https://www.ancient.eu/Roman\\_Republic/](https://www.ancient.eu/Roman_Republic/)> accessed 10 October 2018

<sup>3</sup> "Consolidated Version of the Treaty Establishing the European Community" (2002), 65 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN>> accessed 10 October 2018

modern competition law are the Sherman Act<sup>4</sup> of 1890 and the Clayton Act<sup>5</sup> of 1914 of the United States of America. The US model has led to several global adoptions of competition law which has made competition law enforceable on a global economy. The *United Nations Conference on Trade and Development*<sup>6</sup> and the *Organization for Economic Co-Operation and Development*<sup>7</sup> are two major international organizations which have been working towards integrating competition law on a global scale.

## 1.2 Competition Law in India and the Competition Commission of India

In India, competitive markets existed since historic times in *Kautilya's Arthashastra*<sup>8</sup> showing existence of statecraft and economic policy. The economy in India became weak under the British, only supplying raw materials for the British empire for their goods. After independence in 1947, the Planning Commission<sup>9</sup> of 1950 placed a five-year plan in order to rebuild the Indian

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<sup>4</sup>“Sherman Anti-Trust Act (1890)”, (2018),  
<[https://www.ourdocuments.gov/print\\_friendly.php?flash=false&page=&doc=51&title=Sherman+Anti-Trust+Act+%281890%29](https://www.ourdocuments.gov/print_friendly.php?flash=false&page=&doc=51&title=Sherman+Anti-Trust+Act+%281890%29)>; accessed 10 October 2018

Gibbons v Ogden, 22 US (9 Wheat.) 1 (1824); United States v EC Knight Co., 156 US 1 (1895)

<sup>5</sup> WHS Stevens, “The American Economic Review” (Vol 5, 1915), 38-54  
<<https://www.jstor.org/stable/pdf/74.pdf?refreqid=excelsior%3Aaf485ec9a8bb73e780b640a49c6ea35c>> accessed 11 October 2018

<sup>6</sup> Karen Mingst, “United Nations Conference on Trade and Development” (1998)  
<<https://www.britannica.com/topic/United-Nations-Conference-on-Trade-and-Development>>  
accessed 10 October 2018

<sup>7</sup> “What is the Organisation for Economic Co-operation and Development- OCED”, Investopedia  
<<https://www.investopedia.com/terms/o/oecd.asp>> accessed 10 October 2018

“What is the OCED?”, US Mission to the Organization for Economic Cooperation and Development  
<<https://usoecd.usmission.gov/our-relationship/about-the-oecd/what-is-the-oecd/>> accessed 10 October 2018

<sup>8</sup> “Economic Thoughts of Kautilya”  
<[http://shodhganga.inflibnet.ac.in/bitstream/10603/15999/15/15\\_chapter%207.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/15999/15/15_chapter%207.pdf)> accessed 11 October 2018

<sup>9</sup> Harsh Vasani, “A Brief History of the life and times of the Planning Commission (1950-2014)” (2014)  
<<https://www.saddahaq.com/a-brief-history-of-the-life-and-times-of-the-planning-commission-19502014>> accessed 10 October 2018

Economy through Article 38<sup>10</sup> and Article 39<sup>11</sup> under Chapter IV<sup>12</sup> of the Constitution as initial steps towards framing the economy where the State was directed to provide ownership and distribution of resources for the common public good and to minimize the inequality in income.

The Monopolies and Enquiry Commissions setup<sup>13</sup> in 1964, had the responsibility of analyzing the extent of major economic forces and forming measures to prevent monopolization and restrictive trade practices in financial activities. This led to the Monopolies and Restrictive Trade Practices Bill in 1965, officially forming into Monopolies and Restrictive Trade Practices Act<sup>14</sup>, 1969.

The Act was brought into force to prevent concentration of economic power and control of monopolies.

The provisions had been derived from the UK Restrictive Trade Practices Act 1956<sup>15</sup> and the UK Resale Price Act 1964<sup>16</sup>, whereas the provisions for unfair trade practices were derived from the UK Fair Trading Practices Act 1973<sup>17</sup> and the antitrust legislations of the United States. The

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<sup>10</sup> Article 38 of the Constitution of India  
<<https://indiankanon.org/doc/1673816/>> accessed 10 October 2018

<sup>11</sup> Article 39 of the Constitution of India  
<<https://indiankanon.org/doc/555882/>> accessed 10 October 2018

<sup>12</sup> Part IV of the Constitution of India: Directive Principles of State Policy  
<<https://www.mea.gov.in/Images/pdf/Part4.pdf>> accessed 10 October 2018

<sup>13</sup> VD Kulshreshtha, "Report of the Monopolies Inquiry Commission: An Evaluation" Journal of the Indian Law Institute (Vol 8, 1966), 413-427  
<<https://www.jstor.org/stable/43949911>> accessed 10 October 2018

<sup>14</sup> Monopolistic and Restrictive Trade Practice  
<<http://www.advocatehoj.com/library/lawareas/mono/monopolistic.php?Title=Monopolistic%20and%20Restrictive%20Trade%20Practice&STitle=Monopolistic%20and%20Restrictive%20Trade%20Practice%20under%20Act,%201969>> accessed 11 October 2018

<sup>15</sup> A Beacham, "Bulletin of Economic Research" (Vol 11, 1959), 79-85  
<<https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1467-8586.1959.tb00303.x>> accessed 11 October 2018

<sup>16</sup> VL Korah, "Modern Law Review" (Vol 25, 1965), 193-197  
<<https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1965.tb01055.x>> accessed 11 October 2018

<sup>17</sup> Committee of Public Accounts, "Thirty Seventh Report- The Office of Fair Trading: Protecting the consumer from Unfair Trading Practices", (2000)  
<<https://publications.parliament.uk/pa/cm199900/cmselect/cmpubacc/501/50103.htm>> accessed 11 October 2018

MRTP Act was in place between 1969 to 2003, and was replaced by the Competition Act, 2002 with the objective of preventing abuse of dominance, regulating partnerships and competition.

Competition Law 2002, had proposed the formation of the Competition Commission of India, as a regulatory body to prevent and regulate anti-competitive practices, which was challenged in the Supreme Court of India in the case of *BrahmDutt v Union of India*<sup>18</sup>, after which the Government changed the regulation structure in the form of Competition (Amendment) Act 2007<sup>19</sup>.

The amendment brought in the following changes to the CCI:

1. The CCI would function as an expert body for regulating market and preventing anti-competitive practices, and would also function as an advisory and advocacy
2. Formation of a COMPAT body to listen to appeals related to CCI decisions.



### **1.3 Power Distribution Companies in India**

#### **1.3.1 The First Phase of Power Distribution Companies**

The first phase of Power Distribution companies runs from the early 1900's till 1948 and was regulated by the Indian Electricity Act, 1910<sup>20</sup>, introduced by the then ruling British Empire to

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<sup>18</sup> Writ Petition (Civil) 490 (2003)

VK Agarwal, "Let there be a Judicial Body Initially", The Economic Times, (13<sup>th</sup> September 2007)

<<https://economictimes.indiatimes.com/news/economy/policy/let-there-be-a-judicial-body-initially/articleshow/2363912.cms>> accessed 10 October 2018

<sup>19</sup>Shardal Thacker, "Introduction of the Competition (Amendment) Bill, 2007", Mondaq, (25<sup>th</sup> September 2007) <<http://www.mondaq.com/india/x/52606/Trade+Regulation+Practices/Introduction+Of+The+Competition+Amendment+Bill+2007>> accessed 10 October 2018

<sup>20</sup> The Indian Electricity Act, 1910

<<http://www.cercind.gov.in/IEA1910.pdf>> accessed 10 October 2018

regulate and lay down the ground work for supply, distribution, transmission, generation and licensing of distribution in major locations.

### **1.3.2 The Second Phase of Power Distribution Companies**

After independence, the Government of India via the Planning Commission enforced the Electricity Supply Act, 1948<sup>21</sup> to regulate Power Distribution in India along with the Monopolies and Restrictive Trade Practices Act, 1969 to prevent monopoly and anti-competitive actions in the competitive market. The second phase of Power Distribution lasted between 1948 to 1991, bringing the public sector to the Power Distribution Market and established the State Electric Boards<sup>22</sup> under the Electricity Supply Act, 1948.

### **1.3.3 The Third Phase of Power Distribution Companies**

The third phase of Power Distribution companies started post 1991 to the present day, where the Government made changes to the structure of the Power Distribution Market. The process of restructure came in the form of the Electricity Act, 2003, which replaced the then in place Indian Electricity Act 1910, the Electricity Supply Act, 1948 and the Electricity Regulatory Commission Act, 1998.



### **1.3.4 Power Distribution Companies- Public or Private?**

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<sup>21</sup> The Electricity (Supply) Act 1948, Universal Law Publishing Co. Pvt. Ltd. <<http://files.pspcl.in/1948.pdf>> accessed 10 October 2018

<sup>22</sup> Chapter III, Section 5 of the Electricity (Supply) Act, 1948, 20-24 <<http://cercind.gov.in/ElectSupplyAct1948.pdf>> accessed 10 October 2018

The Power Distribution Companies in India distribute around 1201.5 BU<sup>23</sup> of Electricity. At present the Central Government and Public Sector units contribute 30% towards the Power Distribution market, State units and corporation contribute 41%, Private Sector Units contribute 26% and FDI's contribute 3%<sup>24</sup>. The Public and Government sectors still own and operate (71%) majority of the Power Distribution Market, making it a public sector market.

## 1.4 Research Question

### **How Abuse of Dominance is taking place in the Power Distribution Market?**

Out of every competitive Indian market, Power Distribution is one of the weakest links that is not monitored rigorously and attracts very little competition in terms of investment. Less competition in any market opens up the possibility of monopoly where one a single company has a strong control over the entire distribution market, thus impacting the prices, rates, taxes, and consumers.

Power is considered as one of the most critical pieces in the puzzle of developing a nation as it impacts economic growth and infrastructure, and the Indian power sector is considered to be one of the most diverse. Within the power sector lies Power Distribution companies more commonly referred to as DISCOMs. The primary responsibility of the Power Distribution companies is to supply and distribute electricity to consumers, whereas secondary responsibilities include issuing, measuring and collecting bills from customers for their monthly power consumption. It should be noted that DISCOMs is considered to be weak link when it comes to the Power Distribution sector mainly due to imploding dues, monopoly, reluctance to invest and not enough regulatory laws in place.

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<sup>23</sup> "Power Sector in India" – IBEF- Indian Brand Equity Foundation (September 2018)  
<<https://www.ibef.org/industry/power-sector-india.aspx>> accessed 11 October 2018

<sup>24</sup>Sumit Kumar- "Indian Power Sector-Overview" IndianPowerSector.com, (19<sup>th</sup> September 2010)  
<<http://indianpowersector.com/home/about/>> accessed 11 October 2018

To answer the question the research subject is carefully divided into two sub-categories with each having its own importance and validation related to the subject of power distribution companies being discussed

2.1 Abuse of Dominance in the Indian Power Distribution Market

2.2 What measures have the CCI and Regulatory laws taken to control Power Distribution Companies?

### **1.5 Current Legal Scenario**

The existing structure for Power Distribution Companies is the result of several schemes and initiatives implemented by the Government since Independence, in order to improve the operations and finances of DISCOMs. These schemes include the Ahluwalia Committee 2001, Central FRP Scheme, 2012, APDRP 2001, R-APDRP/IPDS 2008, DDUGJY & SAUBHAGYA 2014/2017, Smart Grid Pilot project & NSGM 2012-15, Electricity Act, 2003 and UDAY Scheme 2015. Despite these schemes, their impact on the DISCOM sector have been limited due to financial stress and accumulated debt.

### **1.6 Literature Review**

1. AjaiNirula, in his article titled “India’s Power Distribution Sector: An assessment of financial and operational sustainability” uses data to determine the efficiency of the schemes that were initiated, their limitations and how future schemes can focus on key areas to make DISCOMs better

2. David Fickling in his article titled “India’s Power Market is booming. But it’s bad for business” has critically analyzed the growth of power sector in India, the constant rise in power demands and the ownership of DISCOMs.

3. ET Energy World, in the article “Five trends that will dominate Indian Power Sectors” have analyzed trends and data to compile five important pointers that will be at the forefront in 2021 when it comes to DISCOM and Power Generation.

The Literature Review uses documentary and statistical data to point out the issues with the DISCOM sector in India and how dominant power is being abused. Based on these findings established in the literature the author advocates for necessary reforms and vigilance to prevent Dominant Position abuse.

### **1.7 Scope and Objective**

The author has chosen this topic as Power Distribution plays a very important role in the infrastructure and development of a nation. Access to proper electricity has become a necessity in modern India as it accelerates towards the Digital Age. To ensure proper and fair distribution of electricity, DISCOMs need to be monitored and not have any ownership tussles or affiliations to any regional political or discriminatory practices. With the nation advancing at a rapid rate, the demand for power consumption keeps on increasing and in order to meet this need, distribution companies need to be regulated and monitored efficiently.

The primary objective of the paper is to seek a valid presentation to restructure the regulations in place for DISCOMs, and reduce the debts. The secondary objective is to analyze the current laws and regulations in place, and their effectiveness towards improving the Power Sector in India.

### **1.8 Research Methodology**

The research paper is based on doctrinal analysis method and the data is collected from primary and secondary sources. Primary sources include legal resources such as regulatory laws, and judgements. Secondary sources of data collection include articles, books, reference journals, opinions and blogs.

## 2. Research Findings: How abuse of dominant position is taking place in the Indian Power Distribution Market?

### 2.1 What is Abuse of Dominant Position?

*“Dominance- defined as authority or power over others; Supremacy”*

Abuse of Dominance is covered under Section 4<sup>25</sup> of the Competition Act 2002. When an enterprise in a dominant position abuses its position it takes part in anti-competitive practices which restricts the market and affects the consumers. The importance of dominance position was held in *MrRamakantKini v Dr L. Hiranandani Hospital*<sup>26</sup>, where the defendant held a dominant position in the maternity services section of hospitals and accused of anti-competitive practices. The CCI was of the view that since the defendant held a dominant position in providing maternity services by hospitals within 0-12 km of the hospital, it was guilty of abusing its dominant position under Section 4(1)<sup>27</sup>, Section 4(2)(a)(i)<sup>28</sup>, Section 3(1)<sup>29</sup> and Section 3(4)<sup>30</sup> of the Competition Act, 2002. The law while regulating competition, allows several enterprises to maintain a dominant position in the market under certain obligations regulated by the Competition Commission as provided under Section 28<sup>31</sup> of the Competition Act 2002.



<sup>25</sup> Abuse of Dominant Position- Section 4 of the Competition Act.

(a) Dominant Position means a position of power enjoyed by a group in the relevant market, enabling it to operate independently or affecting the competitors and consumers in its favour  
<<https://indiankanoon.org/doc/1780194/>> accessed 11 October 2018

<sup>26</sup> CCI Case Number 39 Of 2012

<sup>27</sup> Section 4(1) of the Competition Act 2002- No enterprise or group shall abuse its dominant position  
<<https://indiankanoon.org/doc/1203770/>> accessed 11 October 2018

<sup>28</sup> Section 4(2)(a)(i)- There shall be an abuse of dominance if an enterprise or group directly or indirectly imposes unfair or discriminatory- condition in purchase or sale of goods or service  
<<https://indiankanoon.org/doc/132031/>> accessed 12 October 2018

<sup>29</sup> Section 3(1)- Anti Competitive Agreements  
<<https://indiankanoon.org/doc/93344/>> accessed 12 October 2018

<sup>30</sup> Section 3(4)- Anti Competitive Agreements  
<<https://indiankanoon.org/doc/251194/>> accessed 12 October 2018

<sup>31</sup> Section 28 of the Competition Act 2002- Division of Enterprises enjoying Dominant Position  
<<https://indiankanoon.org/doc/97981/>> accessed 11 October 2018

An important factor in defining Abuse of Dominant Position under Competition Law is defining the relevant market which can make it easier for the CCI to understand the position and abuse of position by enterprises. Section 2(r)<sup>32</sup> of the Competition Act 2002, defines relevant market in terms of the Product that the market offers and the Geographical extent of the market is covered under Section 19(6)<sup>33</sup> of the Competition Act.

### 2.1.2 Section 4 of the Competition Act and Power Distribution Companies

A majority of Power Distribution companies are held by the Public Sector units where they enjoy a dominant position in the relevant market. This has led to several cases for Power Distribution Companies under Section 4 of the Competition Act.

The most significant case under Section 4 is the *Neeraj Malhotra Advocates v North Delhi Power Limited*<sup>34</sup> case, where the CCI was able to differentiate between dominant position and abuse of dominant position. In the said case, Delhi was divided into three distribution companies which was run as a partnership between private and public sectors. The three distribution companies NDPL, BSES Yamuna and the BSES Rajdhani provides power to the North and North West, Central and Eastern and South and Western parts of Delhi respectively, unbundled the SEB and formed a new SERC under Section 82<sup>35</sup> of the Electricity Act 2003. Since these three bodies are the only suppliers of Power in their regions they hold a dominant position and must follow certain obligations set by the CCI under Section 28 in order to maintain the dominant

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<sup>32</sup> Section 2(r)- Definitions- Relevant Market  
<<https://indiankanoon.org/doc/594114/>> accessed 12 October 2018

<sup>33</sup>Section 19(6) of the Competition Act 2002- The commission shall while determining the “relevant geographic market” have due regard to all or any of the following factors.  
<<http://www.advocatehoj.com/library/bareacts/competitionact/19.php?Title=Competition%20Act,%202002&STitle=Inquiry%20into%20certain%20agreements%20and%20dominant%20position%20of%20enterprise>>accessed 12 October 2018

<sup>34</sup> CCI Case Number 06/2009

<sup>35</sup> Section 82- Constitution of the State Commission  
<<http://www.advocatehoj.com/library/bareacts/electricity/82.php?Title=Electricity%20Act,%202003&STitle=Constitution%20of%20State%20Commission>> accessed 12 October 2018

*Hindustan Petroleum v Gujarat Electricity Board*, AIR 2005 Guj 164; 1 GLR 519 (2005)

position without abusing it which is CCI's first view in the case where it establishing that a dominant position is perfectly valid. The three DISCOM's were accused of Abuse of Dominant Position under Section 4 of the Competition Act, where they were over-charging consumers by using their exclusive meters instead of the BSI recommended meters. The CCI found the three parties to be guilty of abuse of dominant position and charged them according to Section 149<sup>36</sup> of the Electricity Act 2003 and Section 4 of the Competition Act 2002.

### 2.1.3 European Union- Abuse of Dominant Position

In the European Market, the Competition laws are governed by the Treaty on the Functioning of the European Union<sup>37</sup>. Abuse of Dominance is covered under Art 102<sup>38</sup> of the TFEU. The TFEU follows a set of defined guidelines<sup>39</sup> and key elements in order to determine cases related to abuse of dominant position.

The concept of Dominant Position in the European Market was derived from the *United Brands Case*<sup>40</sup> and the *Hoffman La Roche Case*<sup>41</sup> where the EU, determines dominant position based on market share, where having more than 70% or 80% of the market leads to a dominant position. Market Share is important in the European Perspective and is useful in cases where the share of



<sup>36</sup> Section 149- Offences by Companies, Electricity Act 2003  
<<http://www.advocatekhaj.com/library/bareacts/electricity/149.php?Title=Electricity%20Act,%202003&STitle=Offences%20by%20companies>> accessed 12 October 2018

<sup>37</sup> "Treaty on the Functioning of the European Union", UIO Faculty of Law  
<[https://www.jus.uio.no/english/services/library/treaties/09/9-01/tfeu\\_cons.xml](https://www.jus.uio.no/english/services/library/treaties/09/9-01/tfeu_cons.xml)> accessed 10 October 2018

<sup>38</sup> Martin Herz, Hans Vedder, "A Commentary on Article 102 TFEU" (2<sup>nd</sup> June 2017)  
<<https://ssrn.com/abstract=2977195>> accessed 10 October 2018

<sup>39</sup> Guidance on the Commission's enforcement priorities in Applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009)  
<[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2009.045.01.0007.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2009.045.01.0007.01.ENG)> accessed 10 October 2018

<sup>40</sup> Court of Justice of the European Union, Case (27/76) (1978)  
<<https://www.quimbee.com/cases/united-brands-company-v-commission-of-the-european-communities>> accessed 10 October 2018

<sup>41</sup> European Court of Justice- Case 85/76, (1979) 00461

the dominant firm is less than 40% of the market share as observed in *British Airways v Commission*<sup>42</sup>.

In the *Mainova*<sup>43</sup> case, the German Federal Court of Justice had held a judgement against the Mainovacompany for abuse of dominant position. In the said case, Mainova, the only power distribution company in Frankfurt had received requests from operators to gain access to its medium voltage power grids between in order to distribute power to customers who had low voltage grids. The request was denied on the basis of rising costs for distribution which would lead to higher costs for Mainova. The court held that rising costs was part of the market expansion process and was quite beneficial towards competition as it would allow more competitors to enter into the market while targeting profitable areas which would again benefit the power distribution market and the competition. The court had decided that by refusing to permit access, the Mainova Corp had abused its dominant position.

#### 2.1.4 USA- Abuse of Dominant Position

In USA, Section 2 of the Sherman Act<sup>44</sup> and Section 7 of the Clayton Act<sup>45</sup> are used to define monopolistic practices which results in abuse of dominant position. Unlike European Law, the US Law does not have a set of guidelines to determine monopoly and rather uses judgements and

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<sup>42</sup>Freshfields Bruckhaus Deringer LLP, “European Court of Justice upholds fine on British Airways for abuse of market dominance”, Lexology (19<sup>th</sup> March 2007)  
<<https://www.lexology.com/library/detail.aspx?g=2cfb1807-4d54-4b63-a9e1-4a46d01471a7>> accessed 10 October 2018

ECJ Case C-95/04 P

<sup>43</sup> ECJ B8- 27/04- Mainova AG

“Minority shareholdings: An overview of EU and National Case Law”- National Competition News Bulletin  
<[http://ec.europa.eu/competition/consultations/2013\\_merger\\_control/cadwalader\\_en.pdf](http://ec.europa.eu/competition/consultations/2013_merger_control/cadwalader_en.pdf)> accessed 10 October 2018

<sup>44</sup> “Sherman Act, Section 2: Concentrations of Market Power” (2006)  
<[https://saylordotorg.github.io/text\\_legal-aspects-of-marketing-and-sales/s26-06-sherman-act-section-2-concentr.html](https://saylordotorg.github.io/text_legal-aspects-of-marketing-and-sales/s26-06-sherman-act-section-2-concentr.html)> accessed 10 October 2018

<sup>45</sup> Stephen Mann & Thomas M Lewyn, “The Relevant Market under Section 7 of the Clayton Act: Two New Cases, Two Different Views”, Virginia Law Review (Vol 47, 1961), 1014-1032

evidence provided to determine an abuse of dominant position. The US Anti-Trust laws considers three important factors<sup>46</sup> as evidence:

1. The market share of the dominant firm should be above 70%
2. The action affects Barrier of Entry
3. The relevant market structure which leads towards monopoly.

These factors for evidence was established in *United States v American Tobacco Company*<sup>47</sup>, where the Supreme Court had held that evidence for determination of abuse of dominant position is important according to the Federal Energy Regulatory Commission.

In the case of *Otter Tail Power Co v United States*<sup>48</sup>, the appellant was charged by the FERC<sup>49</sup> for anti-competitive practices where they were charged for violating Section 2 of the Sherman Act by preventing towns from developing their own Power Distribution services after the distribution and retail license of Otter Tail had expired, prevented the use of Otter Tail's equipment to establish municipal power systems and also prevented the distribution of power from other companies on the basis of contractual obligations. The court held that Otter Tail Power was not exempted from the antitrust regulations and were guilty of anticompetitive practices by trying to monopolize the market and abuse dominant position.

### **2.1.5 UK- Abuse of Dominant Position**

In the United Kingdom, private sector dominates the electricity market and have two different laws applicable for Abuse of Dominant Position, depending upon the relevant market. If a company or group which is dominant in the UK market is guilty of abusing its position, it is charged under Section 18 of the UK Competition Act 1998, and if any UK based company is dominant in the European market and abuses its position, then it is charged under Section 102 of the TFEU. In the UK Competition Law, there is no minimum market share measured irrespective

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<sup>46</sup> *United States v American Tobacco Company*, 221 US 106 (1911)

<sup>47</sup> 221 US 106 (1911)

<sup>48</sup> FERC No. 71-991; 410 US 366 (1973)

<sup>49</sup> Office of the Federal Register, "Federal Energy Regulatory Commission", (15<sup>th</sup> May 2018) <<https://www.archives.gov/federal-register>> accessed on 11 October 2018

of the market in its geographical area. The UK Law puts emphasis on the geographical extent of the market and also the objective behind the alleged abuse of dominant position. The view of determining the geographical area and objective was held in the *British Airways Case* by the Competition Authority, CFI and the ECJ.

In the case of *National Grid v Gas and Electricity Markets Authority*<sup>50</sup>, the National Grid held a dominant position in the market of Gas and Electricity distribution. The National Grid was alleged to have abused its position by making its consumers enter long term contracts which included several anti-competitive clauses for providing gas and electricity meters. The Gas and Electricity Authority<sup>51</sup> had charged the National Grid for abuse of dominant position and the order was appealed at the Competition Appellate Tribunal. The CAT<sup>52</sup> upheld the previous decision along with damages to be paid by National Grid and also laid down the importance of considering markets, dominance, competition and counter facts while dealing with competition cases.



## **2.2 What measures have the CCI and Regulatory Laws taken to control Power Distribution Companies?**

The Power Distribution market is dominated by State controlled distributors who enjoy a dominant position due to lack of competition. To ensure that Power Distribution Companies don't abuse their dominant position, the CCI and the COMPAT under the Competition

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<sup>50</sup>CAT 14 (2009)

<sup>51</sup>SatyenaDhana, Christine Graham, Jacqueline Vallt, "Antimonopoly and Unilateral Conduct- United Kingdom", (5<sup>th</sup> September 2016), 2  
<<https://globalcompetitionreview.com/jurisdiction/1000460/united-kingdom>> accessed 12October 2018

<sup>52</sup> Practical Law Competition, "Appeals and reviews in the Competition Appellate Tribunal" (2015)  
<[https://uk.practicallaw.thomsonreuters.com/5-200-1646?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/5-200-1646?transitionType=Default&contextData=(sc.Default))>  
accessed 12 October 2018

(Amendment) Act 2007, the Electricity Act 2003, the Ministry of Power, the CERC, SERC and the CEA, control Power Distribution companies.

The CCI is the Competition Regulator in India, and dealt with several cases under abuse of dominant position in the Power Distribution market. The CCI utilizes Section 3<sup>53</sup> and Section 4<sup>54</sup> of the Competition Act 2002 in order to charge any DISCOM for abusing its dominant position and taking part in anti-competitive practices<sup>55</sup>. When the CCI was formed, its constitutional validity was challenged in the *BrahmDutt Case*<sup>56</sup>, where the judiciary powers of the CCI was challenged to be against the spirit of the constitution. After the judgement was passed, the Government passed the Competition (Amendment) Act 2007, leading to the formation of the COMPAT<sup>57</sup> - which is responsible for hearing appeals against orders passed by the CCI. The CCI plays an advocacy role under Section 49<sup>58</sup>, in order to hold the principles of Competition Law. It gives power to the CCI to investigate combinations and mergers taking place under Section 5 and Section 6 of the Act, as the CCI did in the *Shell Gas BV, GAIL (India), Suez Energy and Andhra Pradesh Gas Distribution*<sup>59</sup> where the proposed merger for electricity and gas



<sup>53</sup>Section 3 of the Competition Act 2002- Anti Competitive Practices

<<http://www.advocatekhaj.com/library/bareacts/competitionact/3.php?Title=Competition%20Act,%202002&STitle=Anti-competitive%20agreements>>accessed 12 October 2018

<sup>54</sup>Section 4 of the Competition Act 2002- Abuse of Dominant Position

<<http://www.advocatekhaj.com/library/bareacts/competitionact/3.php?Title=Competition%20Act,%202002&STitle=Anti-competitive%20agreements>>accessed 12 October 2018

<sup>55</sup>XYZ v REC Power Distribution Co. Pvt. Ltd., CCI 33 of 2014 (2014)

<sup>56</sup> Writ Petition (Civil) 490 Of 2003 (2003)

<sup>57</sup> Rahul Goel, "Supreme Court Confirms Abuse of Dominance by Multi System Operators", (7<sup>th</sup> March 2018)

<<https://competition.cyrilamarchandblogs.com/2018/03/supreme-court-confirms-abuse-dominance-multi-system-operators/>> accessed 11 October 2018

<sup>58</sup> Section 49 of the Competition Act 2002- Competition Advocacy

<<http://www.advocatekhaj.com/library/bareacts/competitionact/49.php?Title=Competition%20Act,%202002&STitle=Competition%20advocacy>> accessed 12 Oct 2018

<sup>59</sup>CCI- Combination Registration No C- 2015/10/33

<[https://www.cci.gov.in/sites/default/files/Notice\\_order\\_document/C-2015-10-333-Order.pdf](https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2015-10-333-Order.pdf)> accessed 12 October 2018

distribution under Section 6(2)<sup>60</sup> was investigated by the CCI for dominant position in the market and passed the approval under Section 31(1) of the Competition Act.

The COMPAT which is the appellate tribunal for appealing against CCI orders has the authority to dismiss or uphold the CCI order. In the *BSES Case*<sup>61</sup>, the CCI had passed an order for abuse of dominant position under Section 4 of the Competition Act for exclusive dealing with their own meters instead of BSI standard meters. The COMPAT took up the appeal and upheld the decision of the CCI, staying the order of abuse of dominant position against BSES and the order for issuing only BSI approved meters.

The Electricity Act 2003 is the main statutory law in place to regulate the Power Distribution market. Section 2(5)(a)<sup>62</sup> covers the scope of Central Government involvement in the Electricity Sector, where it is involved only when it owns a distribution company or in matters related to Inter-State Transmissions and any national sources of energy which is utilized in the electricity sector. The Electricity Act 2003 helps in regulating the power distribution sector under Part VI of the Act which covers power distribution. Under Part VI, Section 42<sup>63</sup> covers the duties which all distribution companies have to follow in order to honor their license. The distribution sector in the power generation market requires licenses in order to operate which is granted under Section 14<sup>64</sup> of the Act. Section 45<sup>65</sup> gives Power Distribution companies the power to recover charges

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<sup>60</sup> Section 6 of the Competition Act 2002- Regulations of Combinations  
<<http://www.advocatekhaj.com/library/bareacts/competitionact/6.php?Title=Competition%20Act,%202002&STitle=Regulation%20of%20combinations>> accessed 12 October 2018

<sup>61</sup> ET Bureau, "Power Companies Overcharging 90% of consumers: CCI", Economic Times (13<sup>th</sup> April 2010)  
<<https://economictimes.indiatimes.com/industry/energy/power/power-companies-overcharging-90-of-consumers-cci/articleshow/5789951.cms>> accessed 10 October 2018

<sup>62</sup> Section 2(5)(a) of the Electricity Act 2003- Definitions  
<<http://www.advocatekhaj.com/library/bareacts/electricity/2.php?Title=Electricity%20Act,%202003&STitle=Definitions>> accessed 12 October 2018

<sup>63</sup> Part VI, Section 42 of the Electricity Act 2003- Distribution of Electricity, Duties of distribution licensee and open access  
<<http://www.advocatekhaj.com/library/bareacts/electricity/42.php?Title=Electricity%20Act,%202003&STitle=Duties%20of%20distribution%20licensee%20and%20open%20access>> accessed 12 October 2018

<sup>64</sup> Section 14 of the Electricity Act- Grant of License  
<<http://www.advocatekhaj.com/library/bareacts/electricity/14.php?Title=Electricity%20Act,%202003&STitle=Grant%20of%20license>> accessed 12 October 2018

<sup>65</sup> Section 45, Electricity Act 2003- Power to Recover charges

from consumers in the form of tariffs which is fixed by the Central and State Regulatory boards under Section 61 Part VII<sup>66</sup> of the Act. Power Distribution companies also need to follow a uniform Electricity Supply Code under Section 50<sup>67</sup> which sets out the terms for recovery of charges, billing period and disconnection in case of non-payment. If any DISCOM is not performing up to standards laid out in Section 57<sup>68</sup>, it can have its license revoked. The most important provision comes under Section 60 of the Act, dealing with Abuse of dominant position in the market<sup>69</sup>.

The Electricity Act has also led to the formation of several independent regulatory bodies.

The Central Electricity Authority set up under Section 70<sup>70</sup> of the Act is responsible for setting up targets and strategies for the development of the electricity sector. It also advises the Central Government in the planning procedure under Section 73<sup>71</sup>. The CEA also has the responsibility of determining standards, safety and conditions for the transmission, supply and distribution of electricity.

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<http://www.advocatekhaj.com/library/bareacts/electricity/45.php?Title=Electricity%20Act,%202003&STitle=Power%20to%20recover%20charges>> accessed 12 October 2018

<sup>66</sup> Section 61, Part VII, Electricity Act 2003, Tariff Regulations

<http://www.advocatekhaj.com/library/bareacts/electricity/61.php?Title=Electricity%20Act,%202003&STitle=Tariff%20regulations>> accessed 12 October 2018

<sup>67</sup> The Electricity Supply Code- Section 50 Electricity Act 2003

<http://www.advocatekhaj.com/library/bareacts/electricity/50.php?Title=Electricity%20Act,%202003&STitle=The%20Electricity%20Supply%20Code>> accessed 12 October 2018

<sup>68</sup>Section 57 Electricity Act 2003- Standards of Performance of licensee

<http://www.advocatekhaj.com/library/bareacts/electricity/57.php?Title=Electricity%20Act,%202003&STitle=Standards%20of%20performance%20of%20licensee>> accessed 12 October 2018

<sup>69</sup> Section 60 Electricity Act 2003- Market Domination

<http://www.advocatekhaj.com/library/bareacts/electricity/60.php?Title=Electricity%20Act,%202003&STitle=Market%20domination>> accessed 12 October 2018

<sup>70</sup>Section 70- Central Electricity Authority, Electricity Act 2003

<http://www.advocatekhaj.com/library/bareacts/electricity/70.php?Title=Electricity%20Act,%202003&STitle=Constitution,%20etc.,%20of%20Central%20Electricity%20Authority>> accessed 12 October 2018

<sup>71</sup> Section 73-Functions and Duties of the Authority, Electricity Act 2003

<http://www.advocatekhaj.com/library/bareacts/electricity/73.php?Title=Electricity%20Act,%202003&STitle=Functions%20and%20duties%20of%20Authority>> accessed 12 October 2018

The State Electricity Regulatory Commission formed under Section 82<sup>72</sup> of the Act came into force to replace the SEB's. Its purpose is to determine and regulate the tariff for intra-state distribution and the distributing licenses under Section 86<sup>73</sup> for intra-state distribution. The CERC and SERC have an advisory committee under Section 80<sup>74</sup> and Section 87<sup>75</sup> respectively which will be responsible for advising the respective governments and the authorities in matters related to Power Distribution.

The importance of regulatory laws was held in the recent *HPCL-Mittal Pipelines Ltd.v Gujarat Energy Transmission &Ors*<sup>76</sup>, case where the defendant was accused of violating Section 4 of the Competition Act, Section 60 and Section 17 of the Electricity Act, by abusing its dominant position through exclusive contracts and anti-competitive practices. The CCI after thorough investigation under Section 26(1) of the Competition Act, charged the defendant for abuse of dominant position and gave a time period of 60 days to stop all anti-competitive activities.

### 3. Comparison between Indian Perspective and International Perspective on Power Distribution Companies

The Indian Power Distribution sector has evolved, increasing the number of Private Sector Units. The Power Distribution Companies in India are formed on Private and Public Partnerships where Private owns 49% of a company and the public sector owns 51%. These changes came into effect after the Electricity Act 2003 which caused the unbundling of State Electricity Boards and

<sup>72</sup> Section 82- Constitution of State Commission, Electricity Act 2003

<<http://www.advocatekhaj.com/library/bareacts/electricity/82.php?Title=Electricity%20Act,%202003&STitle=Constitution%20of%20State%20Commission>> accessed 12 October 2018

<sup>73</sup>Section 86- Functions of the State Commission, Electricity Act, 2003

<<http://www.advocatekhaj.com/library/bareacts/electricity/86.php?Title=Electricity%20Act,%202003&STitle=Functions%20of%20State%20Commission>> accessed 12 October 2018

<sup>74</sup> Section 80- Central Advisory Committee, Electricity Act 2003

<<http://www.advocatekhaj.com/library/bareacts/electricity/80.php?Title=Electricity%20Act,%202003&STitle=Central%20Advisory%20Committee>> accessed 12 October 2018

<sup>75</sup> Section 87- State Advisory Committee, Electricity Act 2003

<<http://www.advocatekhaj.com/library/bareacts/electricity/87.php?Title=Electricity%20Act,%202003&STitle=State%20Advisory%20Committee>> accessed 12 October 2018

<sup>76</sup> CCI Case No 39 of 2017 (2017)

encouraged Private investments. The main issue with Indian Power Distribution companies is the lack of differentiation between distributor and retail suppliers, which creates dominant positions in the market, affecting the customers in return. To address these issues the Government introduced the UDAY scheme to encourage private investments and proposed the Electricity Act (Amendment) Bill 2018 to bring several changes to the structure and functioning of the act in order to make distributors more accountable and create clear jurisdictions for the CCI and regulatory authorities.

In the United Kingdom the Power Sector is privatized and a clear distinction exists between distribution and retail suppliers which is established via the separate licensing system<sup>77</sup>. Through this system only licensed distributors supply power to their respective locations, where the consumers have the flexibility to choose their preferred licensed supplier. This system creates a distribution system where consumers have the freedom to choose their own supplier.

In USA, a clear movement towards the Chicago school of thought has led to the practice of deregulation<sup>78</sup> in the Power Distribution market. This provides open and free access to consumers to all sorts of power distribution options available, preventing any emergence of monopoly or dominant position in the market.



In Bulgaria<sup>79</sup> the three dominant power distribution companies namely- CEZ Distribution Bulgaria AD, EVN Bulgaria Electricity Distribution EAD and Energo-pro Nets AD, were accused of abusing their dominant position by over-charging and setting a very high tariff rate for their low voltage supply sectors. This led to an investigation by the Competition Protection Commission which found evidence for abuse of dominant position and charged the dominant companies under Section 102 of the TFEU.

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<sup>77</sup> Licenses- Ofgem

<<https://www.ofgem.gov.uk/licences-industry-codes-and-standards/licences>> accessed 11 October 2018

<sup>78</sup> “Energy Deregulation in the United States and Canada”

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#### 4. Conclusion

The Indian Power Distribution market is evolving towards efficient power supply. An increase in renewable sources of energy and the introduction of smart meters are some of the most significant changes proposed. There are still issues to address in order to encourage competition and investment in the Power Sector namely:

1. Setting a clear distinction between the jurisdiction of the CCI and the Regulatory Bodies. This issue was raised in the *Anand Prakash Agarwal v Dakshin Haryana Bijli Vitran*, where the CCI's ruling was overruled by the COMPAT on the basis of CCI not having the jurisdiction for dealing with cases related to tariffs
2. Fulfillment of Rural Electrification Program which attracts investment from the private sector and foreign investments in order to improve competition.
3. A clear differentiation between Distributors and Suppliers in order to prevent monopolization and give the consumers the option of choosing their own power supplier
4. Proper planning for Power distribution to generate and distribute power according to demand and prevent surplus generation of power.
5. A plan of action to shift focus towards Green Energy that will reduce reliance on Non-Renewable Sources of energy.
6. Develop a proper payment structure to clear debts and ensure consumers pay bills on time.
7. A fine balance between privatization and government owned DISCOMs

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