

Competition Law and Policy in India Perspectives and Challenges

A Lecture by Dr Geeta Gouri

Transcript of <https://www.youtube.com/watch?v=fTRLP709r1M>

In fact, it is very interesting, it says Ideas for a market economy and this evening I am so happy that our small group has a lot of students, which is always something that is nice to address.

I must thank Professor Subodh Shenoy who invited me and Shri Giridhar Prabhu and the ERC trust which has looked after me so well.

In fact, since this is an area that is completely new, the Competition Law in India and the Competition Act, try to develop as much of the Law and Act as possible, so that you have an understanding of what is happening. Because this Act was enacted in 2002 but it really came into force in 2009. So the first Commission, of which I became the member for a market-oriented economy, started only in 2009. And as Professor Subodh mentioned, many of you may not even remember that we had earlier what is known as the Monopolies and Restrictive Trade Practices Act, MRTP.

The MRTP was a very restrictive Act, very ancient, it believed in trying to prevent anyone from growing big. But in the process, many industries just grew big and grew big and they diversified. So it was felt that with liberalization you need to have a commission, you need to have a law, which is going to help markets. And later on, I will explain to you what is the difference between the Competition Commission of India, which technically speaking is called the market regulator, from SEBI.

SEBI is known as the market regulator, but SEBI is a capital market regulator, not the market regulator, or we shouldn't say the word regulator, we should say Facilitator and things like TRAI where they become important.

I think this evening I feel very privileged to lecture in honor of Professor B R Shenoy. In fact, he was perhaps the only academician in India who not only being a liberal but thought a lot about how the market forces could come into being and how Economics is based on these market forces. And I of course never had the good fortune of meeting Professor B R Shenoy but I did grow up when I was studying at Bangalore to hear of him and the details. And to me, I think, the Competition Commission is an institution, which is very much in his favor and in his liking. So I am really very happy that an Act, which is to usher in liberalization and market policies, is in honor of the late Shri B R Shenoy. I also want to try and give; I will emphasize the last point the maximum that is this Act is a milestone in Industrial Policy.

All of us have to know about it, all the details. It is not just businessmen who have to know about it. As consumers also, you have the right to know about it, because this is a revolutionary Act. And the most important thing is that markets are very complex. They keep changing.

How does one look at a market?

Just now, my friend Mr Pai was saying what about Flipkart and what about Wal-Mart? But that's the market on the net and most of you youngsters don't buy like us like going to the kirana stores. You buy everything on the net and the Competition is very stiff. You get fantastic discounts whether it's Amazon or whether it's Flipkart or whether you want to buy, you can buy from Macy's in the USA.

So, the market is a very complex institution and that is the first thing we are going to look at. The Act is economic based. That's a very important point that one has to remember. Although it is a legal Act, it is economic based. What becomes very difficult is that the Act does not define competition.

You know earlier in your early Economics textbooks you would have been told that if there are a large number of people or a large number of firms or enterprises that is competition. No, that is a very static concept. You might have only two people, two firms, two enterprises, but there is still competition. And therefore, Competition – the concept of Competition has changed. So the Act doesn't define competition; which means that those who implement the act should know

what competition is. And it can be subjective. So it is very important you make sure you use economic theories and the most important economic theory is going to be microeconomics. And when you apply microeconomics, it is very simple. In fact, I will go into detail how one can do it. It is just common sense and then you will understand what it means.

The interesting part of the Act is that it seems very easy to bring in business and competition. Most Industrialists don't want competition. If you have made it big with the support of the Government, why should you want to compete? And there is a tendency for many of these big business houses to come to the Competition Commission and say that there has been a breach of the law so fine them. No one wants to compete because in India we have lost the ability to compete. And it is very important to understand this because as it was said, Bentham is the one who said this, every Industrialist wants to be a monopolist, every consumer wants competition.

But now you have to define what Competition is, I said you could have only two or you could even have only one producer. But make sure the producer has to face the threat of Competition and that is what as individuals and consumers we want. So in this lecture, what I thought would be good is to show with the help of case studies of the Competition Commission, which was set up in 2009 and now it is 2018 so it is almost a decade and please remember that Competition Commission comes 9 years after the liberalization. You know much more than that in 1991 is the first liberalization, 2002 is the Act but we come only in 2009. So that is a much longer time than 9 years. So not only will I try to give you a peep into what the Competition Law does, but to look into how it is implemented, but more importantly, what I will try to look at is, what is there in it for you and how to get introduced to the law as consumers.

And let me tell you, the Commission has vast powers. It is not like that MRTP can go anywhere as it has vast powers to fine. And therefore it becomes a very major institution to pay attention to, and this is what I will take up as we go along.

Now, an important thing as I said is that in terms of looking at competition, in terms of trying to define what is competition, one has to keep into account the changing technology all the time. Whether it is in the telecommunication sector, the hi-tech sector, the patent sector or intellectual property rights. For all of them what is very important is that earlier what is being done in the Competition Commission part of it, was to look at, what we call as a per se approach. They didn't use what is known as a rule of reason. A rule of reason is when you look at economic analysis and then see how the market is functioning. A per se is, I look at a company and I say

this company is a big company and therefore it is abusing its market power. It will raise its prices, it will lower its quality and there is no competition; that is the MRTP. A per se approach is an MRTP approach but it is not a Competition Commission approach at all. One has to use tools of Economics and therefore in trying to understand what could be the possibility of per se to rule of reason there are certain important distinctions one takes up.

There is also one more point I'd like to bring to your notice. As I said right in the beginning, being a monopolist is not a bad thing. It is not necessary if you are a monopolist or you are a dominant power, which means there is nothing wrong in making money but the point is that this money should not be made in a manner that hurts others. And it should be something that the consumers gain from it. So the Competition Commission's emphasis included in the Preamble to the Act is, it is to protect the consumer.

The interesting point here to remember here is while you are a consumer so is an enterprise. A firm is also a consumer. For example, the firm will buy steel, the firm will buy cement. And buying cement and steel also, is a consumer, no? So then, you know, there are overlaps that keep taking place. And the important thing is, while you look at a monopolist's earlier distinction, I don't know if you remember economics, at least the younger people, between the natural monopoly and a normal monopoly.

What is a natural monopoly? A natural monopoly is an organization, which has a very high fixed cost and low marginal cost. Can you think of examples of natural monopoly? Your telephone lines, your Electricity Transmission lines, those are natural monopolies. If you have a high fixed cost, to recover the cost in terms of investments that have been made, only one enterprise can work in an area. That is called a natural monopoly. And therefore, in the beginning immediately after liberalization, the first regulator that came in was a sector regulator - the Telecom Regulatory Authority of India. Then following that came in what is known as Electricity Regulatory Commissions - ERCs, not to be mixed up with the ERC Trust. These are supposed to regulate only natural monopolies.

How many natural monopolies are left now? Railways, absolutely, but the interesting part of the whole thing is that the number of natural monopolies have been reduced. The railway line may be a natural monopoly but not what runs on the line. Similarly, in Telecom, no one goes on telegraph lines, it's all spectrum and when you have spectrums you might have two or three people, 2 or 3 players, 2 or 3 Enterprises. They're natural monopolies to the extent that their fixed costs are high but their variable costs are low, but they have competition. Should TRAI regulate them? TRAI regulates them saying that they have the right to regulate under the law.

As a Competition Commission member, I say no. TRAI doesn't understand the market. It is a Sector regulator whose only job is to fix tariffs, for a natural monopoly. Electricity sector, have a distribution Company; you need a distribution company only for the lines. Do you need a Distribution Company to sell you electricity? No. So the government created a natural monopoly there.

Some of these things may be difficult for you all to comprehend but give yourself some time and let me know. So there is a debate that is going on and we can take it up later. But the important thing that I would like to do today is, to introduce you to the three sections, which are the most important three sections of the Competition Act.

There's Section 3, which deals with prohibiting anti-competitive agreements. What is an anti competitive agreement? It is an agreement for firms to join together and when firms join together, they become a cartel. If you are a cartel, you dominate the market. You fix prices, you lower the quality, and that's a cartel. But that is in 3-3-4, A 3-3 but there's also one thing known as vertical agreements. I will not deal with vertical agreements today because the time is too short. But I think there are, as I have said here, that apart from horizontal cartels you've also verticals with exemptions. Like for example, patents are exempted, designs and trademarks are exempted. But there are clauses within these exemptions.

Then there is Section 4. Section four deals with preventing abuse of dominance. Now, the way the section has been phrased, we look at it, you have to prevent abuse. You don't prevent dominance, you only prevent abuse. And that's the difficult part. And the third section that is important again is mergers and acquisitions. All mergers and acquisitions, also known as combinations, have to get clearance from the Competition Commission of India when it crosses a certain threshold. Now in this entire thing I would also like to introduce you to some other additional features of the Act because you may not be familiar with it.

One important thing about the Act is, any issue concerning Competition has to come to the Competition Commission of India. Even if you go to the High Court, you can't go on a Competition issue. You can go on related issues. You have the right to go to the High Court. But the important point of it is, redress or redressal regarding competition, means, you have to come to the Competition Commission of India. And that is why the Competition Commission now has cleared about 720 cases. That's a lot you know.

The important point is, once a complaint is filed, anyone can file a complaint, I will come to that, no retraction is possible. The case has to go through fully. And the type of cases that are there in the Competition Commission is based either on a filing made by someone who thinks that there has been an abuse and he is at disadvantage or it could be suo moto, the Commission also takes it up. The fee for filing is very low. It is only 5000 rupees for a consumer. So even you, as a college student, see there's something wrong, that there's unfair practice and there's a dominance of abuse, you can file and it's only 5000 rupees. The case will be going through fully and investigation will take place. So you have the Competition Commission. Earlier we were seven members, now they have reduced it to four. And you have a DG of Investigation - Director General and there are different wings.

The Act is agnostic. What you mean by agnostic is the fact that anyone can file a case. You do not need to be a party that has been affected. You do not need to be a consumer who has been affected. You do not need to be an enterprise to be affected. Anyone can file. Because you anticipate, or you thought that there are problems involved in the Competition and the market is not functioning properly, so the Act is agnostic. This is what is known as the private right to file. But the right to file doesn't mean you have the right to any of the judgment of the Commission. The judgment will come but if there's cash compensation, it will not be given.

Investigation of the Commission is appealable. After a decision of the Commission is taken it goes up to a Tribunal, which is compact, then called NCLAT, National Commission of Law Appellate Tribunal and then it can go further up to the Supreme Court. That's how the Judiciary processes worked out.

Under Section 49, Competition advocacy is very important. So any of you want people to come over, in the College, I am telling you, Section 49, right to the Commission, send someone over and I'll tell you everything. Look at it not in terms of calling people over but look at it in terms of the right to private filing, private right and Competition advocacy. So to make the market work everyone has to be involved. It is as much a concern of mine as yours and as a producer, to make market reforms go through and both these sections are not there in any other Act. You

don't have advocacy in any other Act, you don't have it agnostic. It has to be someone who is involved in the case to file a court case or a law case or even in terms of any of the other Commissions.

The Commission can levy very heavy penalties. The right to levy a penalty is with the Commission. If they find abuse in the case of cartels or abuse in the case of dominance, they can levy penalties up to three times the turnover of the last 3 years. That can be very heavy. Or 10% of the profits can also be levied as penalties. It is important to look at it also in terms of the facts. The Commission has the right to suggest remedies. If they feel that the monopolist has got too many other firms and too many other investments then they'll say, divest. In the cement case, we have said, divest.

The Commission can also suggest behavioral remedies. The Commission can suggest remedies that are sent to the Government of India and the Government of India has to accept it. And the Government of India can also come to the Commission and say will you examine this case. It is interesting that in this process when the act is agnostic, the act is competitive neutral. It does not matter whether it is a public sector or whether it is a private sector, whether it is a department of the government or whether it's the High Court. All that the Commission looks for is wherever there is economic activity.

For example, in the High Court, if the High Court is buying and selling computer software and they find in the bidding process there has been a fraud committed, that can come to the commission. See, so the three things, which are now under the liberal atmosphere allowed are, the three basic sovereign rights. There the Commission doesn't interfere. But I think in some of the bidding in auction of defense cases one needs to get into to see what is the problem that comes up. I can see many of you smiling, and the recent controversy that has taken place. So the Act is competitive neutral. This neutrality is very important.

We have had major cases against the Railways, not on the track, but on the containerisation. Jindal had put a case against the Steel Authority of India and the Railways. We have had the Public sector coming in there. Each of them have to be examined from using economic tools of analysis to see whether they've abused their market power. So please remember I am continuously talking about market power. And market power is when you can fix prices, when you can fix quantities, and you can prevent competitors from coming in, which means there is

no competition. This happens in cartels, this can happen in abuse of dominance, it can happen in mergers and acquisitions. When mergers take place, it comes out as a big dominant case. Then again, they can exert market power one is ex-ante. Mergers are ex-ante, abuse of dominance is ex-post.

The Commission's power is the same as that of a Civil Court. That is why it is a quasi judicial body and the Director General of Investigation has the powers to call for data to have dawn raids and undertake any kind of investigation that's required. He can ask for all your whatsapp data. And it has to be given to him. So, that is how an investigation takes place.

Now let me look at some of the cases because I think it is important when you look at cases that you can understand how the market has functioned. So these are all the additional features. Let me look first at cartels. Before I come to the nice cases of cartels let me talk about what is important, the basics of cartels.

I already told you that the cartel is when firms get together to fix prices and output and they may do this either through a written agreement or an understanding. It doesn't need to be written. What is important about a cartel is that a cartel invariably will occur only in products, which are homogeneous. See you can have a cartel in oil; you can have a cartel in cement; because there is certain homogeneity of the product. If there is product differentiation, the market gets differentiated. If there is no product differentiation, you can say, in cement you have white cement and you have normal cement, but still it is more or less homogeneous. And in the case of oil, you know God was kind to some countries, so that's God's gift.

So you find that in cartels the products have to be homogeneous. The other thing that comes up in cartels is, demand is relatively inelastic. It's simple common sense. People need to build houses, buildings have to be built, cement is required. So whatever the price it is, people will buy the cement. So it is easy to form a cartel, no? Because then they have a product which says, look we decide, how much we will sell and what price it will be sold at.

And therefore, all the cartels become a case of these two important factors that come into it. So I have given most Competition authorities to keep a watch for cartels. And there are lots of cartels that keep coming up. And not all are so simple. Products, which are homogeneous, where demand is relatively inelastic, and what is observed, the Commission will observe the data analysis, prices are all moving in one direction. This is known as price parallelism. And so is capacity and out movement and in movement in one direction. But that is not enough, please.

Price parallelism in a highly competitive industry will always be this sort. The business leader sets the price, the others follow. You see, if you find that the shop next door has reduced the price by 5 rupees, other shops will also follow because they have to stay there. So price parallelism is very difficult. If you remember or if you can recollect in your microeconomic theory, when you do econometric analysis you'll get price parallelism. But when you do game theory, which is now what is applied for looking at cartels you find this is the strategy, it is business strategy. Any businessmen, cables for example, there are types of cable companies and you have any number of cable producing companies. But if someone reduces the price by 5%, the competitor will also be forced to reduce the price or increase the price. Otherwise, they won't stay in the market. So it is a business strategy that has to be looked at.

So, what is very important for a cartel is to find evidence. There are lots of cartels but as a quasi-judicial body, we need evidence. And the evidence could be written or the evidence could be just verbal or unstated. The proof of a cartel is in evidence because competitive markets could also lead to price parallelism but not necessarily homogeneous products. So, when you look at a cartel, you take the whole homogeneous product, you take the demand, study the price movements and see what is the evidence involved.

Another important source for the cartel is insider information. Leniency programs have become very important, for the last one we gave 100% leniency for Globecast in the transmission and direct to home airing of programs. Now leniency is nothing but a whistleblower. You know and you get to have information from inside because there is no other way sometimes for getting information. So an incentive is given, either the company gets less of it or the person who is a whistleblower is given some more information. I will tell you, leniency is not easy because sometimes you will only blow a whistle if you find that being outside the cartel is more profitable than being within the cartel. You know it sounds so simple as such.

Let's take the case of the cement cartel. You have just read today's paper, the cartel has been cleared. I think I signed it in 2012 or 2013. I don't remember. They took it to the Comp Act or NCLAT, and we had fined 6300 crores, plus another 400 crores which comes to 6700 crores.

Cement is a big case of a cartel. Cement is a homogeneous product with low elasticity of demand. There were investigations by the MRTP. They said it was only a case of restrictive or unfair trade practices but when the Cement Builders Association came to us, we looked at it.

Now look at cement. 43 cement firms which include Mini cement plants. So from a traditional economics viewpoint it would amount to a fact that it is very competitive. No. Of these 43, the major cement producers are 11 in number. And of the 11, through cross holding between companies there are only two - Holcim or Birlas. So there are only two dominant players in the cement sector, in the country, Holcim or Birlas. Even when the Lafarge came in they went to one of the two and therefore it becomes important. And now an interesting thing which is the case with the Binani Cement, which the insolvency board has taken up, they want clearance in the Competition Commission of India before they clear it further.

What was noticed was parallel behavior, parallel behavior of prices. When an investigation was conducted, although the market used to be divided into four parts of India – North, South, East and West, when you go to buy cement the price quoted is the same. The cement dealer would tell the people, DG of Investigation, my younger colleagues went in with the investigation that the price is set by Birlas or the price is set by ACC or the price is set by Holcim, depending on how they have shared the market among themselves. Even if you are a mini cement plant, you sell at that price.

The other thing is the extent to production and dispatch was also running parallel. You know they kept saying they've built capacity utilization and capacity utilization is only about 50%. Now, cement plants operate between 73 and 96% capacity utilization every time there is a demand they would ramp up the capacity utilization.

Now look at it in these terms, when you have a huge ACC plant spread all over the country, new plants, the fixed costs are very high. If you have a lot of old plants, because they are already

depreciated, costs are very low. So the price according to new plants is not on the basis of the old plants. And they will ramp up the production in old plants and save on money. So capacity utilization also didn't help us much. But when we looked at the basic worry was the price parallelism; Birlas, there is a question of leadership. That is the business strategy followed and then further on the Commission was left with the situation.

Everyone thinks there's a cartel. Everyone knows there is a cartel, but where to get evidence from? The evidence was found in the Cement Manufacturing Association. The Cement Manufacturing Association met almost once a month or once in two months in Mumbai. And there is the famous saying, which people quote of Adam Smith that when industrialists or entrepreneurs meet they don't talk about weather or golf, they talk about prices or they talk about markets. So when the Cement Manufacturing Association met, data used to be collected by the government departments and put on the public site. Which may be a good idea because everyone knows the price of cement and capacity utilization. But these were average prices and average quantity.

What we observed and taking all the minutes of the meeting, every time the price increase went up, there was a meeting the previous day. The last one was held in Mumbai in that famous resort called Sun-n-Sand. That was the evidence. But we couldn't get any agreement, we couldn't find anything. We said - if you are meeting and how is it that every time you meet the next day there is a rise in prices? So it went to the basis of what we called circumstantial evidence.

This was even before Rajat Gupta's circumstantial evidence in the case of the Stock Market came up, ours came up as circumstantial evidence.

The standard of proof that we required was Preponderance of Probabilities. The Commission said evidence in terms of Preponderance of Probabilities proves that there is a cartel and we didn't go on the basis of beyond reasonable doubt, because in India, a cartel is a civil punishment, it is not a criminal offense.

In the US, in Canada and other countries it is a criminal offense. In a criminal offense, you need much more rigorous proof. Of course what was important, please remember, a controlled market. Cement was a controlled market the government encouraged. Because they wanted to encourage cement production. The entire productive policies of the government in terms of encouraging cement and giving them favorable treatment, was they wanted more cement

production. How did ACC come up? How did all these big cement companies come up? ACC, then you have what is the one in Chennai, the cricket man, Madras Cements, it's all government policy.

So the Commission had to break in to make prices competitive and to make the market function and to fine them 6,300 crores, it has been upheld by the Comp Act. Now they will not have any meetings CMA is not allowed to function.

My next cement case is, (do I have enough time? Am I taking up too much time?)

This I have brought in specially because we had a suo moto case of the onion market. And the reason why I love this case is, you won't get a whistleblower from the onion market. You won't get a whistleblower from tomatoes, potatoes and all that. Because, these are markets that are controlled by the same families. It is a clan in business-ship. No one moves out of it because it is not the punishment of money that is worse, but you are going to be removed from your caste, your clan and all that.

What happened in the onion market is that you don't get data, you don't get information. There was an unusual rise in price in December, please remember, in the fruit and vegetable mandi market although you have what is known as the Agricultural Price Committee Markets, which have auctions in the primary mandi, yet when you look at the prices it doesn't show the fluctuation of prices. In December, invariably there's a rise in prices of onions and they blamed bad weather, rains, crops spoiled everything.

Tomatoes will say no, no, no we don't want, we'll throw it in the garbage it doesn't matter. These three crops, we looked at the onion market crops, and then what we found in the onion market crop looking at APMC data - that is the Agricultural Price Market Commission, we found that the correlation between prices and arrivals in the markets matched. That means there is no hoarding. Vegetables can be hoarded. Onions have a shelf life of about 2 months or 3 months. That's right, tomatoes don't have shelf life, they have to give it quickly.

Moreover, our people went across Lasalgaon and Pimpalgaon. You know the main onion markets in India, Lasalgaon and Pimpalgaon and from there it goes to Bangalore at Yelahanka.

From Yelahanka it comes to Azad Mandi in Delhi. And it's a very strange route that is taken. To just give you an example - you have a Primary Mandi, the farmers will collect all the produce and then come to the primary mandi. At the primary mandi, you have what is called Arthiyas. And these Arthiyas conduct the auction with the help of the auction officer who is a government officer.

Okay, I am giving you the background scenario. No evidence was available. The case was dropped. But the youngsters in my economic division didn't accept anything. They said, "No madam, this is not the way it functions". What happens in the APMC and many of you might be aware of this. See, remember, the farmer is invariably indebted to the Arthiyas for small loans. So the produce has already been taken before it comes to the auction. When it comes to the auction, and the auction is a way it is in the BSE, you know I am told that they just scratch their head and the price is fixed. The auction officer is in collusion with the Arthiyas. So you don't have a free market price, which is expected in bidding and trading. And the farmer has no say in the matter, so he continues.

From the primary Mandi when it has to be distributed, we also discovered the transport system is also part of the same group and gang. And there is no evidence, no information available because nothing is written. Whatever's written is some 'katha' in someone's house. There is no way, in which you can get information and without information, you cannot find out. And the last worst thing is the data on the APMC was data that was not given by the APMC officers but the Arthiyas. That is the traders will say, please put this data on the website, one week later. Not when the transaction has taken place.

So you do not know the transaction between the farmer and the trader, you don't know the transaction that took place at the auction office, and you don't have any proof of stocks. So the Arthiyas would put the data and when it comes to us as APMC data, they take the modal. What is the modal? It is only an average. And onions average what, within one week the market is shifted. The prices can crash and fall. And the governments are known to fall and come.

So, what happens is this entire business has to be done, the only way that it can move through is, if you insist on digital payments. And you have to make sure that nothing tampers with those digital payments and transactions and digital payments and now the idea of an e-market and digital payments and people getting information on the phones and WhatsApp becomes important and the Commission can now intervene because they can call for any kind of data possible.

I brought this in because this morning also Mr Giridhar Prabhu talked about the APMC, so there is a long way to go. Informal markets are very difficult to handle unless you make them formal and you make them rule based.

Last case of cartel, very quickly before I go to my favorite one on abuse of dominance of Trade Associations.

I am not taking the other cartels, I have brought these up because cement is interesting and onion is 'in'.

But the trade associations in the pharma sector normally think of trade associations as a welfare organization. Everyone meets to help, labor wants to get a better deal, and everyone wants to get a better deal.

But in the drug industry you have what is known as the AIOCT, which is the main Trade Organisation; then you have wholesalers at the regional level, then you have retailers. The manufacturing companies don't have a say in these trade organizations, this is distribution of drugs and pharmaceuticals. If you need a retailer in Mangalore, in this district, that retailer should only be from the trade association approved by the AIOCT, get an NOC and he has to pay for it.

I must tell you that anyone who selects, who has the right to selection, is a very powerful organization. If you applied for a job and you got on your merits and your ability then there is nothing wrong with it. But if there is a right, which someone has and says, no this person is my nephew's friend, that right is gone.

Similarly, in the trade association this is what happened. And all the drug and retail trade is controlled by AIOCT.

I brought this into account, you can look at it, when you see, because the moment you bring an NOC into account, you control who will be a retailer, not only that, earlier you have to pay a price to the PIS, Public Information System. And margins would be fixed. The manufacturers have no right in deciding who the retail distributors will be or who the wholesale distributors will

be. Everything rests with one Mr. Shinde, who is the Chief or the President of the All India Trade Organisation. And the latest judgment, some of you might have seen, is the case of Glenmark Pharmaceuticals with the Gujarat Retail Traders Association, the Forward and Trading Market Association and they have been fined 43 crores.

One point I want to say about trade associations is how they were getting away. They say you require an NOC because the Mashelkar committee, a very well known scientist, said that it is important to make sure that people who do not have a shady background do not become retailers. That is spurious drugs should not be sold. This is a problem a lot in Punjab.

You know, many of you have seen the movie "Udta Punjab", and along the border area, all the drug distributors deal with different kinds of drugs that come up. So, Mashelkar in all good faith said an NOC is important. But Mashelkar did not say that you should encourage spurious drug manufacturing, just the selection process has to be proper and open.

You cannot have your brother in law be the retail distributor there. But that is what happened in Punjab. In Ferozepur there are 32 retail distribution centers. In that small town of Ferozepur, who have no NOC, who have no right to be a retail distributor, and who form the basis of the movie "Udta Punjab".

So, you know the trade associations are very difficult to figure out because any Association once it crosses a path then it comes into the Competition Law and they have all been fined by the Competition Act.

Once a penalty is levied please let me tell you each member of the association is fined, each firm is fined, and you're liable to it. And if you are a Director on the board of the company, which is being fined, you will also be fined. So that is something all of you should remember, that as a Director you have a responsibility and you cannot say I do not know, because you have to pay and you will have to pay 10% of the turnover or three times the average of assets that have taken place. So watch out for the heavy fines.

Let's look at abusive dominance, we will go through this quickly. Now the abuse of dominance, which one talks about, is in the case of looking at it in terms of monopolization that is the word

that is being used. And I want to spend just a little more time on monopolization, or what is called section four.

You know in India we have an obsession with monopoly. And that obsession if it doesn't leave us then we will never be able to grow in the Hi-Tech area. Hi-tech area is a monopoly. And there is no way of escaping this obsession of monopoly.

Section four, which I told you right in the beginning deals with abuse of dominance. There are two abusers of dominance, one is mergers, later I'll look at it. Now in the case of monopolization which an existing firm permits, per se interpretation, because it says that if there is a question of finding a monopoly then there's no question of bothering about whether there is abuse or not.

So, the Commission has a tendency to look only at whether you are a dominant firm or not rather than abused; and that attitude is now slowly changing. Because of words in the Act says - no enterprise shall abuse its dominant position. "Shall" is very strong. There are disagreements in it, but I think "shall" make it per se, others say, no, "shall" is a more affirmative move rather than "may". But it is being used any number of times.

What is the most important thing to prove dominance? You have to find which is the market in which the Enterprise is working, right? Which is the market in which the enterprise functions? If it is a narrow market, you define the market very narrowly. Then dominance is given. You define the market widely then there is no dominance.

Because following from the market definition you have what is known as market share. If a producer has, say, 80% of the market he is dominant. In Europe, if he has 50% of the market he is dominant. If you are dominant and you intend to follow per se rules, then the abuse follows come what may happen. Now, in this question of how to define the market becomes important; what we use is what is known as the SSNIP test - Small but Significant Non-transitory Increase in Prices.

Let me just stop here for a minute, because in the US they don't look at monopolization. They are not bothered about monopolization. They're only looking at mergers and acquisition mergers. Why? Because in the US, till now, if you are a monopolist and you're making extra profit that helps in innovation and invention to come up. So, the US has emphasized

technological change and they have a great faith in the market. The market will always come in and set things right. Because if one monopolist is making a market and there are no entry barriers, others will follow. By intervening, you may disturb the market balance.

The EU is not like that. The EU is obsessed with monopoly like India and technological development in the European Union has been very little. So it's a very difficult choice that one has to make. In terms of do you allow for the markets to enter, let innovations take place or should we intervene and say that there is an abuse of dominance and then continue with an earlier obsession. Just keep this in mind although I won't be talking about patents today.

Now, when you look at it, the simplest thing about market and abuse is to look at elasticity of demand. If you are a monopolist and your elasticity of demand is high, you will never be a monopolist. Because any increase in price means someone else will come in. You can only be a monopolist if your elasticity of demand is very low.

So, that's an important point that comes into account when we look at monopolies and how they're going to take place. I have been given the question of what SSNIP test is. The relevant product market under the Act is examined purely from substitutability. How do I define the market? Can I substitute my Coca Cola with Limca? Then it becomes the cool drink market. But if as a Commission member I say coca-Cola will only look at markets like Pepsi, then the market gets narrow.

So the SSNIP test is, a hypothetical monopolist when you have the data, if you increase the prices by 5%, will people or consumers shift out or stay within the market? You get the point? It's just elasticity of demand that one looks at but it's in looking at substitutability. This becomes interesting because when I take up the Google case.

Who is a competitor to Google? There is Bing, there is Yahoo, there is Facebook, there is Whatsapp. It is that the entire internet becomes the market. And if that becomes the market then you can't prove the abuse so easily because of what we call in economics as there are competitive constraints on the enterprise. The entrepreneur has to keep on innovating to stay where he is, to keep running where he is. Otherwise, a competitor will come and take over the market. Yahoo lost, Bing lost, Google is there. Google will also lose. So you see how the whole process of market functioning is. But you have to believe that the market will function and that is what the ERC's trust is.

But a lot of people don't believe it because they feel that as a regulator, we can play God and that is a very dangerous area that comes in.

When you go onto this whole thing, this is section 2T which defines the Act, you also have to define the relevant geographic market. This becomes a problem because earlier we would say the geographic market is homogeneous, when goods can move from one place to another. But many of you must be buying from Macy's in the USA. So, is my geographic market the country of India? No. And it is homogeneous because the internet unless it is a Chinese market and in Chinese or Mandarin then there might be a little problem, but the internet has just expanded. This is globalization. The market is no longer domestic. But the problem is because the Act is applicable only within this country. So, there is a question of sharing information that comes up.

What I would like to do is, instead of looking at all these complications I have an approach that uses common sense. A market is where an entrepreneur conducts his business. They're just transactions that are involved in it. If an enterpriser does not conduct any transaction in that market, then he will not be in a position to abuse his market power. That becomes a non-market. Distinction is maintained between a market and a non-market. I am using this term because many others may not have looked into it.

In this market, transactions may be based on price or it could be based on non-price. When you are surfing the net you don't pay a price. So that is a non-price market. But there can be price markets also. What is equally important is that anyone when we look at the market and we look at this as the market for transactions, it is important to be able to see what sort of disruptive technologies are coming up all the time.

As I told you, even if you Google on Facebook, today's paper says Facebook is so worried because there must be others coming up and most of them are from Bangalore or Mangalore; all are software technologists.

So, you know each one is trying to get into the whole business of how to get into this kind of virtual or internet markets. There are two other concepts I will have to introduce to you, one is known as platforms. We have what is known as platforms. In the middle is only an aggregator. Amazon is only an aggregator. He gets people to sell. Amazon could also be a seller. There are variations of it, you could say, you have people on one side of the market, you have people on

the other side of the market. And when you have two sides into the market, the business strategy could be very different than when you have only one side. So you have a platform and very often, the platform is on the internet. So, transactions that take place are very different. Apart from the fact that we will look at platform markets, which is very different from, say, a standard cement market or a steel market. Now you can buy cement online.

There are what are known as Network economies. If you have a market and it is on a platform, you have to create depth. More number of consumers come into the market from the sellers side and the buyers side. The middleman, the aggregator gains from it. So, for the aggregator he can either charge the buyers or he can charge the sellers or he need not charge anyone and earn his revenue from advertisement. And when he earns from advertisements, the advertisement people will only go to the market where there are a lot of people creating depth. This is known as network economics. You have network economics also in a natural monopoly. Ok? I will deal with that a little later.

Let me take the first case, that is nothing to do with platforms but I wanted to bring it up because this is something that has been bothering me a lot in the case of abuse of dominance, which is the DLF real estate case. And why did I bring up this DLF real estate case? How do I define DLF? Any idea? It is a realty firm. But the Commission called this as the market of services for a developer and a builder in the region called Gurgaon. That means you have to distinguish between a contractor and a realty firm.

If you get your definition right, then you know where the abuse is. If you get the definition wrong, you might find where the abuse is but in the wrong place, which statisticians call it as Type 1 error. So defining the market is the most important thing in all abuse dominance.

You don't need to do so much for cartels. Because a cartel in a market par is given as a homogeneous product. No need to bother about the market.

But take the case of DLF. DLF, which came to us, was considered as the services of a developer for high-end residential apartments in the area of Gurgaon. Ok? DLF is one of the biggest real estate companies. I think they came into Bangalore much later. But you have Prestige, you have Puravankara, L&T, these are real estate firms. They are not contractors, they are not like say, I give my land, build one flat for me kind. These are people who get land. They buy land and keep it as Land Banks. Then they build flats.

When the market picks up in certain areas and you are allotted flats on the basis of draws, which means you are allotted a flat like when you apply for an IPO in the stock market. So, a realty firm is like any other manufacturing firm, it uses land, produces flats. It's not a contractor and land please remember in India, all of you will know better, when you buy land, it has to be converted. There are lots of problems involved and there is lots of bribery that goes around all over. And the land mafia has always had very deep pockets.

So, although they were regulators, like, you have the authority in distribution the government will have, the town planning authority and then you have to get clearances from one or the other, all that is taken care of. Basically, it is a realty firm. But if you define it as a contractor and say that this is a contractor for high-end residential apartments in Gurgaon the abuse was saying that it is an unequal agreement.

All the risk was placed on the person buying the flat and not on the DLF. DLF said they have already taken the risk but the problem is not the risk. What happened in these agreements was the definition of the floor space, the definition of the common area. These are definitions, which the town and development authorities should have taken into account - of how many floors you have allowed. All this was put into the agreement that came. But when the case came to the Commission it was Belair people who came saying this is an unequal agreement and DLF has abused its position of dominance.

The Commission during the hearing we treated it as a contractor. On second thoughts, we were thinking we should have treated them as a realty firm, which is like any other investment. You either invest in a flat, either because it is for you to live in your old age or you want rental income. Or you invest in an IPO as the stock market picks up or in gold. Does the consumer have a choice?

Please remember what does Competition mean. If you are not able to buy a shirt from one company, you have another choice. Did those who buy Belair not have a choice? Of course, they had a choice, they had a choice not necessary to sign the agreement and buy the flat. They could have said these are unequal agreements. But no, these are prized properties. You want to get a share of that prized property. And therefore, you are willing for the unequal agreement. And if it is an unequal agreement, can an agreement come to the Commission?

An agreement between two contracting parties has to go to the court. Now having said that and not having looked at it as a kind of real estate firm/realty firm, I think somewhere we got the

definitions slightly mixed up. But what was very important is, with the DLF case, which was fined 600 crores, the regulatory as a Real Estate Regulatory Authority came to be established. So, here was a case with a definition that may have been wrong. Here was a case where realty firms have been brought into, was not looked as a realty firm. But there was an externality that created competitive markets. So I leave it to you.

We have the case of the stock exchange - Currency Derivative Market. This was the MCX Assets which was against the NSE. Why am I taking the cases one by one - I took the real estate case because I thought many of us in Mangalore and Bangalore still buy flats. So one should know where it is. And with these agreements we couldn't get a cartel, which has been looked at as a cartel. But many of you youngsters will no longer invest in flats. I think the return on the land is the lowest now, so says my son. Anyhow, the important thing is why I am bringing three cases to explain to you - platform markets and network, Stock Exchange, the Prince India publishing company and then Google.

Stock exchange case was MCX Assets. MCX Assets was not in the stock exchange but in the commodity exchange. But the RBI had given licenses to set up a currency derivative vertical on the stock exchange. Because what happens on currency derivatives is a hedging instrument, small exporters meet. If you go to a bank, banks are the most unimaginatively protected spoilt institution. They will never give you different instruments of hedging. So, the Reserve Bank of India decided to give it to the stock exchange that is the currency derivative. So, BSE, NSE and MCX were given this thing.

Normally you never have more than one or two stock exchanges. Why? The Commission in its majority order defined the stock exchange as a case of a stock exchange market in the currency derivative. But what is the abuse that MCX came up with? They said, predatory pricing and one of the reasons I take up this NSE case is, the allegation of predatory pricing is so easy to make and so difficult to prove.

In fact, most of the Western countries do not go for predatory pricing at all. There are hardly any cases. Because you can't prove it. In the case of the stock exchange, they said, MCX said, that credit currency derivatives have zero transaction cost. Neither the buyer nor the seller has to pay anything and NSE is leveraging its position in the stock exchange to get into the currency derivatives market, although in terms of market shares, the currency derivatives market MCX was ahead of NSE.

The point is that how is a stock exchange to be defined. This is an important definition. Is it like any other market? Or is it on a platform? And in that, definition lies the abuse. Because the NSE doesn't do anything. It just provides a platform. It could be digitalized trade. So, you just provide you know like, all you can have the transactions taking place.

I don't know if many of you may remember that you tried the small trading platforms also, but that didn't succeed. So all that is required is a place and NSE only provides a place and a facility for trading transactions and closing of the transaction and a few other deals that take place.

But if NSE is treated just like an ordinary stock market or is treated like just any ordinary market, like a cement market, then you can have predatory pricing. But if you have it on a platform predatory pricing becomes very difficult because on a platform or even, it need not be on net, or anywhere platform, the fixed costs are high and the marginal costs are low.

What is predatory pricing? When the price is below the marginal cost - that is predatory pricing. But if there are no marginal costs then what do you price? There is no marginal cost. So what would be the price? Do you take it as equal to fixed price? That's what MCX said, zero transaction costs are not fair because I am not able to recover my fixed cost. But you can't price on the basis of fixed cost. That becomes excessive pricing, which is also an abuse. So you cannot have predatory pricing.

The Commission said it is unfair pricing and then fined the thing. But if you look at as a platform. And the most important of a stock exchange is that the stock exchange needs depth. Many of you are exporters, you need hedges, foreign exchange hedges but you need instruments, which come only when you have large number of sellers and large number of buyers. These are instruments, 2-day instruments of hedging. You will have carry forward agents there. The interest rates varies but that's only possible when there is depth.

As you will know Mr Prabhu that the basic problem in India is that the debt market has no depth. You have to create depth. And how do you create depth by getting more players? How do you get more players? Charge them nothing, earn from elsewhere.

So what should MCX do? MCX can get money from anyone else. What did Yahoo do? Or Google? They didn't charge anyone.

You have to get it from more imaginative value added services, which MCX didn't do, but with this order what happens? The currency derivative market became flat. Am I right?

The opportunity of creating different instruments was lost, it became like the banking sector. And why I keep saying the banking sector is, the interest rate for you on any loan is the same unless you happen to have political power.

You see, you have to be able to offer different instruments of Finance depending upon the credibility, depending on who is present and who is not present. That is the point of Competition in the financial system and the financial instruments and therefore I took up this stand on Stock Exchange. And this is where there is this question of, that a platform is one where you can charge any one of the people or you can get it through advertising. A platform is to take into account network economics, more people come in, there is more depth and you also have a demand curve, which can be backward sloping, which means lower the price the more number of people will come in. So, it's no longer within the traditional economics of looking at a market.

In the case of all virtual and internet markets they're on platforms. I've already explained to you what a platform is. There was the case of an online publishing house Springer. What is the market for online publishing on Springer? Online. The market is not Indian. The market is global. If the market is Global, how to define market shares? Because, Springer you go online publishing scientific journals on the basis of what is known as how many hits. Because these must have journals. But no data was available and I have just introduced this thing because I will show you with the presentation later. The case was dropped because neither the data was available nor could the geographic market be defined. Now this becomes very important when you look at it in terms of things like Flipkart and Wal-Mart.

What is the geographic market? The law only talks about what is applicable in India. Or it has to be a homogeneous market, in which you say everyone speaks English. The internet, leaving out China, I think, all businesses are in English and where business is concerned language is not very important. So having given you NSE, online publishing, I want to go to the case of Google.

Google, I am not going to do the latest case because the latest case has been a division of opinion but on the Google case, and I call this as a case of a non-market.

Because the Commission found abuse of Google in a market in which Google does not operate. It is not in the market for any transaction. If Google is not in the market for transactions, where can abuse come in? This is a similar problem in the EUs also. But they are not bothered about Google than about defining the market. Now let us take the Google case that is coming up.

Bharat Matrimony and CUTS NGO filed a case against Google. Saying that they were not getting a position and Google was billing in its own algorithms. There is a bias in its algorithms, towards its own properties. Bias in its algorithm towards its own property, which means when an advertisement is placed, Google will only favor companies of Google. That is what was claimed by Bharat Matrimony and CUTS.

So Bharat Matrimony and CUTS went out of the market and the Commission defined two markets. Please remember that Google is a platform, Google is one, which has two sides of the market. Its main source of revenue is advertising. It doesn't come from anywhere else.

It is a search engine. It was defined as a general search engine. But there is no distinction between general or specific because any search engine is a search engine. It becomes specific depending on who wants to look at it.

The first market that Google identified is a general search market, the second market that Google identified by the Commission, was the online advertising market. But what is it that when they get the search and where did Google find its whole problem? Let me explain it to you. When you are a search engine there is Yahoo, there is Bing, I'm not taking the other search engines. What does the consumer want? He wants something where you can get information quickly and immediately. And from the data that Google had, they found that most consumers surf the net for shopping and for traveling. So they created special boxes called shopping boxes and travel boxes.

The Commission said, because these travel boxes are special, only Google's companies came into the travel box. MakeMyTrip didn't come in, others didn't come in. Based on what the European Commission says, that consumers are price conscious but they never go beyond the

box. Somehow they tried to use wrong behavioral economics into the Google case. But you know, when you buy a ticket you go on MakeMyTrip, you will go on Cleartrip, you will go on Air India, you go down everything, so that you can get the cheapest fare that is offered.

While those boxes may have some firms because of the advertising policy, because every day they have to bid and come on to the box. If you want to advertise you have a box. So the algorithm there, if it is Google's company, does Google have any interest in travel? No, Google is a search engine. All its money comes from advertising revenue not in the search engine. But they set the search engine as vertical. Because it is a vertical on the net, it is a special company of Google. But on the net, a vertical is when you click on the website. It is not like the vertical say between Microsoft's software-hardware companies and then the distributors. That is a different vertical.

And in this confusion the Commission said, Google was abusing its monopoly position and restricting competition in the travel section. But all the clicks didn't prove anything. The data didn't show Google made any revenue from it. And on the other hand, when you look at data, for example, MakeMyTrip and Yatra, who had complained against Google, their profits had grown very huge.

MakeMyTrip is now in collaboration with Ibibo, which is one of the largest travel companies in the world. So, by doing this what did the Commission say? The Commission used the phrase, on Presumption of Probabilities. Presumption of probabilities was used in the cement cartel. And they said, big dominant companies must have social responsibility, must show forbearance. What social responsibility should any company do?

And they found Google guilty in a market where it doesn't operate at all. It is not in the travel business, it is just a search engine. So, the Google case was the case of non-market.

If they had been able to prove that the companies, which were coming in the box had Google's investment or Google was earning from them or Google by its algorithms was preventing other companies from entering, then that would've been an investigation we would've all looked forward to and it would have been a defining investigation.

But, we went the EU way, which talks about social responsibility and forbearance because EU members, I think, I mean EU consumers, I don't know how they are, but it's an American company. So these are the interesting cases that come up. The last bit was in the question of

mergers. In mergers and acquisitions, the Commission has been much more forward looking, much more dynamic and dominance has not been such a major concern, partly because dominance can be taken later on in abuse.

Only a few points I want to tell, because many of you may have mergers and acquisitions, is that there's a threshold limit and if you cross the threshold, all mergers have to come to the Competition Commission of India. Some of the interesting merger cases, the Sun - Ranbaxy, which defines the market on the basis of molecule, the Jet - Etihad, which defined point to point aircraft flying, and the latest merger and acquisition of Airtel - Indus towers and others. And that is a very progressive measure because although it would make the most dominant Telecom towers, this is known as passive infrastructure, it is not a case of abuse. But they have cleared mergers between Airtel and Vodafone, TRAI is stopping it.

These are the three challenges, the challenges to the commission - you can't be obsessed with monopoly, you have to look at patents, you have to look at standard essential patents. And another important thing is, the sector regulators must get out of areas which are not a natural monopoly and leave it to the Competition Commission.

For producers, they have to learn how to compete and not fire from the shoulders of the Commission.

For consumers, please use Section 90 and whenever you find that there is something that prevents the market functioning come to the Commission.

The Commission is a very important organization and is doing a good job.