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CCI's Market Definition in Esaote 'MRI' Case: Technological Differentiation Outweighs Consumer Preference

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In a section 27 order delivered in September 2018, the Competition Commission of India, while penalising Esaote for abusing its dominant position, may have laid down a landmark precedent in respect of market definition in India. The majority noted that the relevant product market in the instant case was the market for 'Dedicated Standing/Tilting MRI Machines; while the chairperson in his harsh dissent, emphasising that the majority had taken a narrower outlook and failed to consider the relevant market conditions, held the relevant product market to be the market for 'All MRI Machines'.

The Majority's Definition

The majority's market definition was primarily premised on the fact that the dedicated MRI Machines were technologically more advanced and loaded with superior features. Based on the opinions of various hospitals and diagnostic centres, the CCI noted that the dedicated machines were capable of scanning the patient in a standing (weight-bearing) position, which was otherwise not possible with the conventional MRI machines. This feature allowed better diagnosis for certain body parts, i.e., joints and spine, that could be scanned for more accurate and efficient treatment when under pressure from the patient's body weight.

Placing reliance on scientific evidences based on literature, opinions of the consumers i.e. diagnostic centres and hospitals, and claim of the opposite parties on their website, the CCI held that the dedicated MRI machines had technological advantages over conventional MRI machines and therefore, formed a separate relevant market. It also relied upon the fact that some diagnostic centres had both conventional and dedicated MRI machines, evidencing their non-substitutability. The relevant factors that the CCI relied upon were physical characteristics and consumer preference. Although differentiation based on 'physical characteristics' seemed prudent, the conflict with the dissenting chairperson arose with respect to the usage of the factor of 'consumer preference'.

It is interesting to note that in the list of relevant factors for product market definition under Section 19(7) of the Competition Act, 'technological advancement' does not find a place. In addition to this, this list is an exhaustive and not an indicative one. The fact that the legislature in

the list of relevant factors for assessing dominance under section 19(4) has provided a residuary sub-clause 19(4)(m) that gives Commission the power to use any other factor that it deems relevant, leads credence to the argument that the list under section 19(7) is exhaustive. However, the authors believe that technological advancement as a separate factor could be read into 'physical characteristics' suggesting the usage of terms in a wider import under section 19(7)(a), as done by the majority in the current case.

The Dissent

The Chairperson, in his dissent, relied upon the prong of 'consumer preference' to elaborate his argument that the relevant product market would be the market for 'All MRI Machines'. He noted that several factors would decide the demand for the MRI machines by the hospitals and diagnostic centres whose paramount consideration would be effective diagnosis, cost, and patients' demand. Relying upon the fact that the patients are not informed enough while choosing the scan machine, there is sufficient interchangeability between conventional and dedicated MRI machines for the patients and that affects the hospitals' demands.

He also stated that since there was no single factor which shaped diagnostic centres choice, the most important factor would be the frequency of demand in the relevant patient population. While referring to the sale of only 10 Dedicated MRI machines in the past 11 years and the absence of other manufacturers in India, the Chairperson noted the presence of a very small market with negligible independent demand for them, which would rebut both the argument of consumer preference and presumption of incentive to monopolise the market. He also cited two instances where diagnostic centres, despite a favourable offer from the alleged infringers, had chosen to buy conventional MRI machines from other manufacturers, which suggests substitutability of Dedicated MRI machines with the Conventional MRI machines.

However, the two most sweeping arguments forwarded were:

1. Even when Dedicated MRI Machines form a separate market with reference to technical characteristics, the difference between the two types of MRI Machine is blurred when viewed from the lens of intended use.
2. Even the difference in technological characteristics could be overcome by the use of a compression device with the conventional MRI machine, thereby allowing scans in weight-bearing positions.

Key Takeaways: Points for Consideration

1. **No Economic Test Applied**

The CCI, while defining the relevant market failed to observe any tested economic methods like the 'SSNIP or Hypothetical Monopolist Test' or the 'Critical Loss Analysis Test' used worldwide, which left scope for conflicting determination of the relevant market. The usage of such tests, though not always necessary in market determination as in *Michelin II Case*, takes into account the economic realities of the market alongside the theoretical evaluations.

2. **Size of the market**

The size of the market that is subject to antitrust intervention to be 'substantial' has been a debatable issue for long, especially in the US. Where a 'substantial' market does not exist, the Courts implicitly ignore the smaller markets. An example would be the *Idaho First National Bank Case* where a market in a city with a population of 25,000 was considered economically insignificant to merit intervention. However, no general minimum threshold for an economically substantial market has emerged and renowned scholars have often taken the view that 'no market is too small' (See: Phillip Areeda & Herbert Hovenkamp).

3. **Easy portability between the products**

For two products to form part of the same relevant market, the EU prescribes that they should be 'sufficiently substitutable', which could even be lowered to partial interchangeability. The CCI failed to acknowledge how the two devices were partially interchangeable, at the least; further, the attachment of a compression device, whose price was relatively very low compared to the dedicated MRI machine, could allow the conventional MRI machines to scan patients in weight-bearing positions, which was the only significant difference in technical characteristics.

4. **Unique Features leading to a separate product**

The most striking outcome of the present case is the fact that technical advancements or unique features in a product could lead to it being a separate product in a standalone market. This approach is clearly not in line with the *Sonam Sharma Case* wherein the CCI held the Apple IPhone to have certain unique features and still be a part of a larger smartphone market. It will be very interesting to observe how such a precedent applies and holds in future cases, specifically in high technologically driven markets.

5. **Presence of an Alternate Remedy**

This case also presented a situation where the informant could have directly approached the relevant authority under the Consumer Protection Act, 1986 for unilateral changes in the terms of the sale contract as well as the maintenance contract. However, the act of informant choosing to go to the CCI only emphasises more upon the intersection of consumer welfare and competition law.

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