TIE- IN AGREEMENTS: HOW THE C.C.I. GOT IT ALL WRONG?

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This article examines the tryst of the Competition Commission of India with tie-in agreements in India, both, as an abuse of one's dominance which can only be perpetrated by a dominant entity (under section 4(2), Indian Competition Act, 2002) and as a vertical restraint (under section 3(4)(a)). Although, dominance is not a prerequisite in the latter, the Competition Commission has erred in distinguishing between these two circumstances and has introduced the prerequisite of dominance in an enquiry under section 3(4)(a) of the Act. This article attempts to highlight and mitigate the catch-22 situation that this has created for all the tie-in agreements that are to follow. It further suggests that akin to rule of reason, an 'effects-based' approach must be resorted to, with scope for objectively justifying tying under section 4(2). In doing so, a comparative analysis of Indian competition scenario with that of the U.S. and E.U. has been undertaken.

I. Introduction

Tying takes place *simpliciter* when a seller conditions the sale of a desirable product (tying) upon the sale of a not so desirable one (tied), thereby abusing the need of a consumer for the desirable product in order to facilitate sales of the not so desirable one.[1] What is inherent in this understanding of tying arrangements is that, (1) there should be in existence two products in order

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[1] J Dianne Brinson, 'Proof of Economic power in a Sherman Act Tying Arrangement Case: Should Economic Power be Presumed When the Tying Product is Patented or Copyrighted?', (1987) 48 La L Rev 29, 29, citing *Northern Pacific R Co v United States* [1958] 356 US 1.

for conditioning the sale of one upon the other; (2) consumer must be dependent upon the seller for the desirable product and the seller must be in a position superior (dominance) to that of the consumer by virtue of the latter's need for the former's product; (3) and that such dependence or position of superiority is abused. Such abuse is condemned by antitrust laws for varied reasons, primary being the exploitation of the consumers[2] and the exclusion of competitors in the tied market by the seller.[3] It is facilitated by *leveraging* the dominance possessed in the tying market to foreclose the market for the competitors in the tied market.[4]

Therefore, in order for a seller to successfully tie, it must above all, possess dominance which may then be leveraged. Another assumption which is apparent and has become the most important point of contention is that tying is only used for such leveraging and it is never used as a means of achieving better standards of competition.[5] This is contentious since this position stands altered in the wake of the expanding scope of acknowledging efficiency defences in particular and shifting towards an 'effects-based' approach in general (Chicago School). Nevertheless, considering that the objective of antitrust laws is the subsistence of fair competition upon merits and proscription of activities having anti- competitive effects both actual (*ex post*) or potential (*ex ante*) what is implicit in this argument is the fact that once dominance is shown in a claim for tying, the seller would invariably be held liable, for such tie- in would be anti- competitive as it would lead to market foreclosure and the competition would not be on merit. It is for this reason that many jurisdictions have proscribed tying as an instance of abuse of one's dominance.[6]

Some jurisdictions have also proscribed tying as an instance of vertical restraint facilitated through an agreement without prescribing dominance as

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[2] Alison Jones and Brenda Suffrin, *EU Competition Law: Text, Cases and Materials* (4th edn, OUP 2014) 458.
[3] DG Competition Discussion Paper On The Application Of Article 82 Of The Treaty To Exclusionary Abuses, Brussels, December 2005, 55, paras 180, 181 (DG COMP Discussion Paper) <http://europa.eu.int/comm/competition/antitrust/others/discpaper2005.pdf> accessed 1 September 2016.
[4] *Jefferson Parish Hospital Division 2nd v Hyde* [1984] 466 US 2, 14, fn 20.
[5] *Standard Oil Company of California v United States,* [1949] 337 US 293; *Northern Pacific R Co v United States* [1958] 356 US 1; Joseph P Bauer, 'A Simplified Approach to Tying Arrangements: A Legal and Economic Analysis', (1980) 33 Vanderbilt L Rev 283, 286.
[6] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics*, (2nd edn, Hart Publishing 2011) 628, 629.

a prerequisite. What may be inferred here is that, a tie-in may still be illegal (as a vertical restraint), even if dominance as a prerequisite has not been established i.e. even if a seller may not be dominant in the tying market, tying may still lead to anti-competitive effects. However, in such a scenario, market foreclosure will have to be depicted by the plaintiff and such foreclosure will have to be weighed against countervailing pro-competitive efficiencies if any exist similar to a rule of reason approach under Section 1 of the Sherman Act, 1890 in the United States ("U.S.") or as agreements having as their effect the "*prevention, restriction or distortion of competition*" are treated under Article 101 of the Treaty on the Functioning of the European Union ("TFEU") in the European Union ("E.U.").

A similar distinction exists in India as well, since tying has been proscribed as an abuse of one's dominance under section ("u/s.") 4(2) of the Indian Competition Act, 2002 ("Act") wherein it can only be perpetrated by a dominant entity and as a vertical restraint u/s. 3(4)(a), wherein it can be perpetrated by any entity irrespective of its standing in the market (dominance is not a prerequisite). However, this statutory distinction has been blurred by the C.C.I. by introducing the prerequisite of dominance in an enquiry u/s. 3(4)(a)[7] setting a bad precedent for subsequent tie-in related litigations in India.

This article is divided into three parts. In the first part of the article, the authors have traced the jurisprudential history behind tying arrangements in the U.S., considering that it was here that they were first realised as having anti-competitive effects and also because it was here only that the foremost observations with regard to them being treated under a rule of reason were made and therefore it ideally serves as the inception point for any enquiry into tying arrangements. This part also brings forth how the element of market power has been assessed by the U.S. courts and how the standards have changed so far. This is important for the mere fact that as per the authors it is essentially the distinction in the quantum of market power that is pivotal in determining whether a tie-in is to be proscribed *per se* or considered under a rule of reason.

The second part incorporates a detailed discussion on the position with regard to tie-ins in the E.U., for the Indian law is closer to the E.U. in text and in scope as compared to the U.S. The authors have specifically observed as to

[7] *Shri Sonam Sharma v Apple Inc.* & *Ors*, Case No 24/2011 (CCI).

how the scope for objective justifications under Article 102 has been provided for by the European Commission and the European courts when textually none exists. This may give an insight into whether it is possible even for the Competition Commission of India ("C.C.I.") to incorporate a similar 'effects-based' approach u/s. 4, thereby providing scope for proving pro-competitive efficiencies of a tie-in.

The third part is a critique on C.C.I.'s tryst with tying arrangements as documented in two of its verdicts in *Shri Sonam Sharma v Apple Inc. & Ors.*[8] and *Ramakant Kini v Dr. L.H. Hiranandani Hospital*[9], forming the bedrock of the analysis therein. Further, the authors highlight the possible ramifications that will ensue now that dominance is introduced as a prerequisite in an enquiry u/s. 3(4)(a). *Firstly*, in doing so the C.C.I. has incorporated a *per se* proscription of tie-ins u/s. 3(4)(a), although s. 3(4)(a) prescribes a rule of reason enquiry (based upon factors enumerated u/s. 19(3)) for treating tie-ins and thus has taken a step backwards rather than moving forward towards a rule of reason approach to be applied generally for tie-ins. *Secondly*, the distinction in scope for offence of *tying by a dominant firm* u/s.3(4)(a) and section ("s.") 4(2) shall be blurred to the extent that s. 4(2) would be rendered virtually otiose. *Thirdly*, a distinction in the standards for proscription of *tying by a non- dominant firm* u/s. 4(2) and s. 3(4)(a) shall be created i.e. different standard of proscription for the same offence would be created.

In conclusion, the article states that the C.C.I. has fundamentally misinterpreted the scope of tie-ins under the Act. As per the authors, tie-ins by dominant firms are *per se* proscribed as abuses u/s. 4(2), whereas u/s. 3(4)(a) the defendants who facilitate a tie-in and do not possess any position of dominance maybe tried under a rule of reason approach to deduce actual or potential Adverse Appreciable Effect on Competition ("AAEC") in the market. Any presumption of AAEC upon the existence of dominance would entirely vitiate this rule of reason approach u/s. 3(4)(a). Therefore, there simply exists no reason as to why the element of dominance should be introduced u/s. 3(4)(a) to identify "*anti-competitive*" tie-ins. Lastly, this article suggests a course for the inquiry into the claims of tie-ins which should be employed by the C.C.I. in order to successfully delineate the scope u/s.

[8] *Ibid*.
[9] [2014] CompLR 0263 (CCI).

3(4)(a) and s. 4(2) for their frictionless functioning. The authors are also mindful of the raging debate with regard to a rule of reason approach being met out to tie-ins even when they constitute unilateral abuse of dominance in both these jurisdictions. Therefore, the article further suggests that the time has come for the C.C.I. to identify broadly the scope for objective justifications to be considered in claims of abuses u/s. 4(2) so as to shift to a more “effects-based” approach similar to article 102 of TFEU in order to streamline the Indian competition regime according to the international standards.

II. Tie-Ins in the US

As per the U.S. jurisprudence, claims against tying can be brought under any of the following provisions of the relevant antitrust laws:

> (1) section 1 of the Sherman Act, which prohibits contracts ‘in restraint of trade’, (2) section 2 of the Sherman Act, which makes it illegal to ‘monopolize’, (3) section 3 of the Clayton Act, which prohibits exclusivity arrangements that may ‘substantially lessen competition’, and (4) section 5 of the FTC Act, which prohibits ‘unfair methods of competition’.[10]

However, since section 5 of the FTC Act is only limited for being invoked by the Federal Trade Commission[11], primary consideration under this article is limited to the Sherman Act and the Clayton Act. It was first considered, based upon the ruling[12] of the United States Supreme Court ("U.S.S.C."), that there existed a difference in the standards set by these legislations, with regard to tying agreements. However, position since then has been cleared to the extent that these standards, ‘have become so similar that any differences remaining between them are of interest to only antitrust theologians’.[13] Moreover, ‘whichever U.S. statute is invoked, the underlying economics of the relevant agreements is the same, and each statute effectively imposes the same

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[10] US Department of Justice, 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008)' (September 2008) (US Department of Justice Report) <www.usdoj.gov/atr/public/reports/236681.htm> accessed 20 August 2016.
[11] Federal Trade Commission Act 1914, s 5; Elhauge and Geradin (n 6) 513.
[12] *Times-Picayune Publishing Co v United States* [1953] 345 US 594.
[13] US Department of Justice Report (n 10) 78, citing Robert H Bork, *The Antitrust Paradox* (2008).

requirement of proving the agreement is anticompetitive'.[14] Tying in the U.S. since its known inception as an alleged attempt of extending patent monopoly over unpatented products[15] has plummeted from almost absolute *per se* illegality[16] to a rather modified approach, with various pre requisites and noted exceptions in place. The Chicago school thinkers must be credited for the same. The difference in opinion vests in the apprehension that the 'leverage theory'[17] as idealised by the Harvard school thinkers was not in sync with the economic reality and a tad too much dependent upon the empirical analysis of the 'industrial organization, the field of economics that [studied] monopoly questions'.[18]

This led to Chicago School thinkers[19] to conceptualise the 'single monopoly profit theorem' whereby, the apprehensions of the leverage theory were busted, upon critical analysis under the scrutiny of economic understanding of antitrust issues and called for a 'rule of reason' approach for treating the tie-in claims, 'pursuant to which a restraint is judged illegal only if a full consideration of the relevant facts establishes that the restraint is "unreasonable" because it suppresses or destroys, rather than regulates and thereby possibly promotes, competition'.[20] Nevertheless, the precedent set by the U.S.S.C. strongly favours a *per se* approach, with various alterations and modifications as it has deemed fit[21], even going to the extent of stating it to be, 'far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of

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[14] Elhauge and Geradin (n 6) 513.
[15] *Henry v AB Dick Co* [1911] 224 US 1 in WL Baldwin, David McFarland, 'Tying Arrangements in Law and Economics', (1963) 8 Antitrust Bull 743, 744; Donald F Turner, 'The Validity of Tying Arrangements Under The Antitrust Laws', (1958- 1959) 72 Harv L Rev 50, 50-51.
[16] *International Salt Co v United States* [1947] 332 US 392; *Standard Oil Company of California v United States,* [1949] 337 US 293; WL Baldwin & David McFarland, 'Tying Arrangements in Law and Economics', (1963) 8 Antitrust Bull 743, 754.
[17] *International Salt Co v United States* [1947] 332 US 392; *Northern Pacific* (n 5); *Jefferson Parish* (n 4).
[18] Richard A Posner, 'The Chicago School of Antitrust Analysis', (1978) 127 University of Penn Law Review 925, 928-929.
[19] Ward S Bowman Jr, 'Tying Arrangements and the Leverage Problem', (1957- 1958) 67 Yale LJ 19.
[20] Macdonald Flinn, Willis B Snell, et al, 'The Per Se Rule, Report of Special Subcommittee of Sherman Act Committee', (1968-1969) 38 Antitrust LJ 731 (Special Subcommittee Report).
[21] Christopher R Leslie, 'The Commerce Requirement in Tying Law', (2015) 100 Iowa Law Review 2135, 2138.

stifling competition and therefore are unreasonable *per se.*'[22] In the same case however, it was also observed that, 'not every refusal to sell two products separately can be said to restrain competition'.[23]

It should be mentioned here that some have claimed that such an approach with all its modifications, to not be a *per se* approach at all, at least in the literal sense of the term[24] and as *per se* rule applies to other anti-competitive practices.[25] This modified or the *quasi- per se* approach as it is now known, has also been endorsed by various academicians (Post Chicago school) who believe that market power in the market for tying product indeed leads to revenue over and above monopoly profits in the form of consumer surplus and thereby believe the 'single monopoly profit theory' to be too idealistic and requiring various restrictive assumptions[26], considering it to be a mere exception rather than the law by which the antitrust policy should be determined.[27]

However, they consider such modified *per se* rule as a, 'structured rule of reason that correctly identifies the elements necessary to prove certain anticompetitive effects'[28] and not a *per se* rule at all. Perhaps it is true since such consistent application of this *per se* rule, has not stopped the U.S. courts from acknowledging economic efficiencies[29] and business justifications[30] *inter alia* as exceptions to this rule[31] or to employ the rule of reason itself whenever the modalities of a case such as when it involves 'novel categories of dealings'[32] so demand.

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[22] *Jefferson Parish* (n 4) 9.
[23] *Ibid* 11.
[24] WL Baldwin and David McFarland, 'Some observations on Per se and Tying Arrangements', (1961) 6 Antitrust Bull. 433, 435; Leslie, 'The Commerce Requirement in Tying Law' (n 21) 2158.
[25] *Jefferson Parish* (n 4) 33-34; Leslie, 'The Commerce Requirement in Tying Law' (n 21) 2158.
[26] Einer Elhauge, 'Tying, Bundled Discounts, and the Death of The Single Monopoly Profit Theory' (2009) 123 Harv L Rev 397, 400.
[27] *Ibid*.
[28] Einer Elhauge, 'Rehabilitating Jefferson Parish: Why Ties Without a Substantial Foreclosure Share Should Not be Per Se Legal', (2016) 60 Antitrust Law Journal 463, 464.
[29] *International Business Machines Corporation v United States* [1936] 298 US 131; WL Baldwin & David McFarland, 'Tying Arrangements In Law And Economics', (1963) 8 Antitrust Bull 743, 749-750.
[30] *United States v Jerrold Elecs Corp* 187 F Supp 545 (ED Pa 1960), affmd *per curiam*, [1961] 365 US 567.
[31] Einer and Geradin (n 6) 571.
[32] *United States v Microsoft Corporation,* 253 F 3d 34 (DC Cir. 2001), 84 (*Microsoft III*).

Therefore, it may be stated that the approach towards tie-ins in the U.S. is still in a phase of transition with the courts being open to acknowledging and employing economic analysis as the basis for forming judicial opinions wherever it seems justified, indeed there exists a need for an all-inclusive policy to be put in place which is both economically (theoretically) coherent and legally viable to serve as precedence for subsequent litigations. Nevertheless the position as of now is that even if a *quasi-per se* tying claim is not successfully proved, it can still be considered under the rule of reason under Section 1 of the Sherman Act,1890.[33] Since, 'Sherman Act §1 remains available to cover cases where defendants have some lesser amount of market power'[34] and rule of reason is also to be preferred over a simplistic *per se* enquiry when the latter carries 'undue risks of error and of deterring welfare-enhancing innovations'[35] usually in cases with 'no close parallel in prior antitrust cases'.[36]

1. The Per Se Rule

The application of the *per se* rule presupposes that certain practices shall always yield only anticompetitive effects[37] thereby making it imperative for the regulatory authorities to condemn the same upon their happening itself, 'without any consideration (or with very little consideration) of the amount of commerce involved, the effect of the particular restraint on competition, the motive of the participants, any social or economic benefits resulting from the restraint, or other surrounding facts.'[38] It generally, relieves the plaintiff from proving anticompetitive effects and only a probability of anticompetitive effects has to be shown.[39] The reasoning behind such approach may be understood from the following syllogism drawn from the various judicial pronouncements by some commentators:

> Major premise: it is illegal per se to foreclose competitors from a substantial market (*International Salt*). Minor premise: tying

[33] Einer and Geradin (n 6) 513-14; *Jefferson Parish* (n 4) 18; *Fortner Enterprises, Inc v United States Steel Corp ET AL* [1969] 394 US 495, 499-500; Leslie, 'The Commerce Requirement in Tying Law' (n 21) 2139.
[34] Einer and Geradin (n 6) 513-14.
[35] *Microsoft III* (n 32) 89-90.
[36] *Ibid* 84.
[37] *Northern Pacific* (n 5) 5-6.
[38] Special Subcommittee Report (n 20) 731.
[39] *Jefferson Parish* (n 4) 15-16.

> arrangements have 'hardly any purpose' but to foreclose competitors from a substantial market (*Standard Oil*). Conclusion: tying arrangements are illegal per se (*Northern Pacific*).[40]

Tie- ins lead to the foreclosure of the tied product market, whenever a seller in the tying product market is in a position such as to coerce the buyers in the tied product market to opt for his product (tied) rather than his competitor's product i.e. *leveraging* his position in the tying product market to distort market conditions in the tied product market. Based upon this, the probable anticompetitive results which are apprehended and sought to be prevented by employing this rule include, '(1) Buyers are deprived of the opportunity to select the '*best bargain*' in the tied product market; and (2) other sellers of the tied product are deprived of the opportunity to have their versions of the tied product compete '*on the merits*' with the tying seller's tied product'.[41]

Although, as already mentioned the application of the *per* se rule to tie-ins has been criticised extensively, the U.S.S.C. had justified its application stating that:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity of an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable- an inquiry so often wholly fruit-less when undertaken.[42]

However, how far do these reasons go in justifying the *quasi* application of this rule is debatable, as was pointed out by O'Connor J, that:

> The '*per se*' doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangements. As a result, tying doctrine incurs the costs of a rule of reason approach without achieving its benefits: the doctrine calls for the extensive and time consuming economic analysis characteristic of the rule of reason,

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[40] Baldwin and McFarland, 'Some Observations on Per se and Tying Arrangements' (n 28) 436, citing *Standard Oil* [1949] 337 US 293.
[41] Brinson, 'Proof of Economic power in a Sherman Act Tying Arrangement Case' (n 1) 30, citing *Jefferson Parish* (n 4).
[42] *Northern Pacific* (n 5) 5.

> but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial.[43]

As already stated, the *per se* rule enunciated for tie-ins has been modified in its scope. In its current form, in order for a tie-in to invite *per se* condemnation, there should exist two separate products tied together[44], there must exist with seller market power (in the tying product market) which is being used to restraint competition in a separate market (tied product market)[45] by restricting the freedom of choice of the consumers to only purchasing the tied product[46] and a 'not insubstantial' dollar volume of commerce in the tied product market should be affected.[47] However, given the limited scope of this article, it is only the element of sufficient economic power which has been discussed in greater detail.

2. Economic Power

The application of leverage theory presupposes the existence of such power with the seller in the tying product market so as to facilitate market distortion in the tied product market. 'If there is no economic power or control over the tying product market, one seller's decision to sell two products as a package does not have any anticompetitive effects'[48] and therefore 'in the case of tying arrangements, leverage and price discrimination are both impossible without market power'.[49] Yet, the threshold for the realization of this requirement has generated much controversy over the time. Initially, the standard set was that legally acquired monopolies such as patents provided the requisite market power in order for an illegal tie-in to materialise.

However, generally the position with regard to tie-ins involving non- patented products (or services) remained relatively unclear. In *International Salt*, although the claim pertained to a patented salt-dispensing machine(tying product), 'the district court had assumed, for purposes of the summary

[43] *Jefferson Parish* (n 4) 34.
[44] *Microsoft III* (n 32) 85, para 54.
[45] *Illinois Tool Works Inc ET AL v Independent Ink, Inc* [2006] 547 US 28, 13.
[46] *Jefferson Parish* (n 4) 12-13.
[47] Leslie, 'The Commerce Requirement in Tying Law' (n 21).
[48] Gary Myers, 'Tying Arrangements and the Computer Industry: Digidyne Corp v Data General Corp', [1985] Duke LJ 1025, 1034-35.
[49] *Ibid* 1037.

judgment motion, that lessees could obtain competitive machines and equipment'[50], perhaps, treating patented and non- patented products to be at par and since the same was affirmed by the U.S.S.C. without any reservations, it was believed that may be the court had done away with the requirement of proving market power or at least had watered down the requirement to mean nothing more than 'some element of distinctiveness- some unique aspect- which probably, though not necessarily, would be enough to cause some purchasers to prefer it over competing products at comparable prices'.[51] The same commentator advocated for this interpretation of the court's opinion since according to him there existed a dichotomy between distinctiveness and dominance, the latter entailing, 'power over price and power to exclude competition'[52] whereas the former, 'though likely to confer some slight power to vary price within narrow limits, may confer no power at all'.[53] He further contended that legal monopolies such as patents only imparted the element of distinctiveness (and nothing more), which was susceptible to 'be wholly offset by other attractions of competing commodities'[54] and since the same satisfied the requirement of market power (in patented tie-in claims), the standard should not be any different in claims pertaining to unpatented products (or services).

Such analysis seems right in the perspective of the U.S.S.C.'s pronouncements since *International Salt*. Although, initially it raised the standard of economic power to mean 'dominance' in the relevant market[55], subsequently it limited its economic power analysis to unique attributes of the product (land[56] and copyrighted films[57]) that enhanced its desirability with the buyers. Thus by a process of evolution, the court had, 'liberalised the economic power standard, once requiring "*market dominance*", but later declaring that a mere inference from the "*desirability*" or "*uniqueness*" of the product is sufficient'.[58] This led to the court to vacate a district court order

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[50] Donald F Turner, 'The Validity Of Tying Arrangements Under The Antitrust Laws', (1958-1959) 72 Harv L Rev 50, 54.
[51] *Ibid* 53.
[52] *Ibid.*
[53] *Ibid.*
[54] *Ibid.*
[55] *Times-Picayune Publishing Co v United States* [1953] 345 US 594.
[56] *Northern Pacific* (n 5).
[57] *United States v Loew's Inc* [1962] 371 US 38.
[58] Aimee Frances Fisher, 'Antitrust: Per se Doctrine- Tying Arrangements and the Market Power Requirement', (1972) 8 Tulsa LJ 235, 238.

rejecting a claim for tie-in agreement due to lack of seller's dominance in the tying product market (and remand the same for jury trial) wherein a 100% credit financing contingent upon purchasing prefabricated houses from the financing company's group company was alleged to be a tie-in arrangement.[59]

The court pointed out that, 'uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitor'[60] indicating 'that a seller's economies of scale and advantageous legal position may be indicia of economic power'.[61] As per the court, sufficient economic power existed with a seller, whenever the seller was in a position to either successfully raise prices or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market[62] (in the instant case, the houses were priced above market cost), invariably implying that economic power could be inferred whenever the seller was in a position to impose a tie-in upon an appreciable number of buyers.

This position was subsequently revisited in *Fortner II*[63], wherein the court firstly clarified that:

> [I]f the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit- or to incur greater risks- than its competitors, that kind of uniqueness will not give rise to any interference of economic power in the credit market.[64]

The court further rejected the claim that the acceptance of the tie-in by a significant number of customers in itself was sufficient to prove the seller's economic power, clarifying that this approach depended upon the absence of other explanations for the willingness of buyers to purchase the package (as was the case in *Northern Pacific*).[65]

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[59] *Fortner Enterprises Inc v United States Steel Corp ET AL* [1969] 394 US 495 (*Fortner I*).
[60] *Ibid* 505.
[61] Raymond J Brassard, 'Tying Arrangements: Requisite Economic Power, Promotional Ties and the Single Product Defense', (1970) 11 BC L Rev 306, 314, <http://lawdigitalcommons.bc.edu/bclr/vol11/iss2/10> accessed 10 September 2016.
[62] *Fortner I* (n 59) 503-504.
[63] *United States Steel Corp v Fortner Enterprises, Inc* [1977] 429 US 610 (*Fortner II*).
[64] *Ibid* 622.
[65] *Ibid* 620, fn 13.

Fortner II could as well be considered to be a step in the direction of revitalizing the economic power requirement to its earlier standard (not merely an uniqueness), this becoming more obvious with *Jefferson Parish*[66] and *Illinois Tool Works Inc.*[67], whereas in the former the market share of the defendant hospital was considered far from being overwhelming to impart any 'dominance' in the market for 'hospital's sale of services to its patients'[68], in latter the court overturned its earlier stand[69] and stated that the possession of a legal monopoly by a seller did not raise any presumption of market power in the market for the tying product. However, whether this requirement of market power u/s. 1 is same as that required u/s. 2 of the Sherman Act or not is still shrouded with ambiguity.[70]

III. Tie-Ins in the EU

Tie-ins in the E.U. have been proscribed under the TFEU both as an instance of vertical restraint under Article 101(1)(e) and an instance of abuse under Article 102(d).[71] Article 102 proscribes tying only when committed by a dominant undertaking (in the tying market).[72] 'Thus while Article 81[now 101] prohibits anticompetitive tying regardless of the undertaking's market power, Article 82[now 102] prohibits tying by an undertaking in a dominant position regardless of actual anticompetitive effect.'[73] Further under Article 101, tying is block exempted when the market share of the supplier, on both the market of the tied product and the market of the tying product, and the market share of the buyer, on the relevant upstream markets, do not exceed

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[66] [1984] 466 US 2.
[67] [2006] 547 US 28.
[68] *Jefferson* (n 4) 18.
[69] *United States v Loew's Inc* [1962] 371 US 38.
[70] Myers, 'Tying arrangements and the Computer Industry' (n 48) 1040.
[71] Commission Guidelines on Vertical Restraints, [2010] OJ C 130/01, 43, para 214 (Guidelines on Vertical Restraint) < http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:130:FULL&from=EN> accessed 1 September 2016.
[72] Commission Guidance On The Commission's Enforcement Priorities In Applying Article 82 Of The EC Treaty To Abusive Exclusionary Conduct By Dominant Undertakings, [2009] OJ C45/7, 15, para 50 (Guidance on Applying Article 82) <http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN> accessed on 1 September 2016.
[73] James F Ponsoldt & Christohper D David, 'Comparison between US and EU Antitrust Treatment of Tying Claims against Microsoft: When Should the Bundling of Computer Software Be Permitted', (2006-07) 27 Northwestern J Int'l L & Bus 421, 441.

30 %.[74] Unlike the U.S., not much controversy has accrued with regard to the quantum of market power (dominance) which should justify a *per se* proscription of tie-ins in the E.U. as most claims of anti-competitive tying have been brought under Article 82.[75] However, it must also be pointed out that claims for tying are not limited to article 82(2) (d):

> [T]ying practices may also be caught by Article 82 where they do not fall within the precise terms of Article 82(2) (d); in *Tetra Pak v Commission* the Court concluded that there was an unlawful tie even though the products in question were connected by commercial usage, a situation not covered by the express wording of paragraph (d).[76]

Since, article 101 and 102 correspond to article 81 and 82 of the Treaty establishing the European Community ("TEC"), respectively, they have been referred to interchangeably.

1. *Per Se* or Rule of Reason (The United States' *Leverage* Problem)

Tying (under the E.U. law) is interpreted as analogous to what it entails in the U.S., it, 'usually refers to situations where customers that purchase one product (the tying product) are required also to purchase another product from the dominant undertaking (the tied product). Tying can take place on a technical or contractual basis'.[77] What is also analogous is the debate as to what approach must be adopted while dealing with tie-in agreements i.e. a formalistic 'form- based' approach similar to a *per se* proscription or an 'effects- based' approach similar to the rule of reason, in the U.S. Initially:

> The European institutions tended to be doctrinaire in their approach to assess tying arrangements by reference to their form rather than their effects: the tendency [was] to say a tying [had] this form, therefore it [was] exclusionary- even if there [was] manifest evidence that this [was] not the case.[78]

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[74] Guidelines on Vertical Restraint (n 71), 43, para 218.
[75] Richard Whish and David Bailey, *Competition Law* (6th edn, OUP 2012) 681.
[76] *Ibid* 681-682.
[77] Guidance on Applying Article 82 (n 72), 15, para 48.
[78] Christian Ahlborn, David Bailey, Helen Crossley, 'An Antitrust Analysis of Tying: Position Paper' in Damien Geradin (ed), *GCLC Research papers on Article 82 EC*, l, 166, 185-186 (GCLC, 2005)

The criticism levelled in this regard pertains to the fact that in being so formalistic, the Commission or the courts 'often fail to demonstrate how a particular practice could have significant effects on the market: too often they fail to articulate a convincing theory of economic harm and/or to produce evidence that adverse effects would follow from the practice under investigation.'[79] As in the U.S., even in E.U., 'a simplistic objection to tying is that it involves the dominant firm *leveraging* its position in relation to the tying product to achieve increased sales in the market for tied product, thereby extending its market power'.[80] In doing so:

> [A]n undertaking which is dominant in one product market (or more) of a tie or bundle (referred to as the tying market) can harm consumers through tying or bundling by foreclosing the market for the other products that are part of the tie or bundle (referred to as the tied market) and, indirectly, the tying market.[81]

This apprehension insinuated the Commission to proscribe tying claims in various cases[82] without first analysing their effects on the market in which the undertakings were dominant (tying market), including:

> [T]wo leading cases which concerned consumables in an aftermarket tied to a primary product, *Hilti* and *Tetra Pak II*, [establishing] tying as a *per se* abuse. In both cases the Commission found an abuse after very little analysis of the market. Once it had found dominance, separate products and no objective justification, the finding of abuse followed almost automatically. In both cases the appeals to the Community Courts concentrated on the issues of market definition and objective justification.[83]

This was even considered to be a steady extension of the leverage theory in the E.U. Competition Law as against the U.S., where it had already lost

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<https://www.coleurope.eu/content/gclc/documents/GCLC%20Research%20Papers%20on%20Article%2082%20EC.pdf> accessed 1 September 2016.

[79] Whish and Bailey (n 75) 195.

[80] *Ibid* 680.

[81] Elhauge and Geradin (n 6) 626.

[82] *Eurofix –Bauco v Hilti* OJ [1988] L 65/19; *Napier Ground v British Sugar* OJ [1988] L 284/41; *Société Alsacienne et Lorraine de Télécommunications et d'Electronique (Alsatel) v SA Novasum* [1988] ECR 5987; Case 333/94 P, *Tetra Pak Int'l SA v Commission* [1996] ECR I-5951; *De Post- La Poste* OJ [2002] L 61/32.

[83] Jones and Suffrin (n 2) 459.

considerable ground[84], with sufficient scope for justifying the conduct objectively.

2. What Constitutes a Condemnable Tie-In?

In light of the above, tie-ins under article 102 were condemned whenever market power was attributable to the undertakings in the tying market (not necessarily in the tied market[85]), there existed separate products which had been tied together (which were or were not connected by commercial usage[86]), and consumers were strong armed into purchasing the tied product in order for them to secure the tying product. Another prerequisite was added subsequently[87], namely, any foreclosure effect of the tie-in on the market. This was believed to be a step towards an 'effects- based' approach:

> While in classical tying cases, the Commission and the Courts considered the foreclosure effect for competing vendors to be demonstrated by the bundling of a separate product with the dominant product, in the case at issue, users can and do to a certain extent obtain third party media players through the internet, sometimes for free. There are therefore indeed good reasons not to assume without further analysis that tying WMP constitutes conduct which by its very nature is liable to foreclosure competition.[88]

This position was reaffirmed by the General Court in appeal[89] and subsequently was further substantiated with the Directorate-General for Competition, European Commission's ("DG COMP") discussion paper.[90] It stated that although tying was considered to be a common practice that generally did not have any anti-competitive effects[91], it could lead to possible anti-competitive effects such as 'foreclosure, price discrimination and higher

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[84] Scott M Kareff, 'Tetra Pak International SA v Commission (Tetra Pak II): The European Approach to Monopoly Leveraging' (1996-97) 28 Law & Policy Int'l Bus 549, 549.
[85] DG COMP Discussion Paper (n 3), 55, para 184.
[86] Case C- 333/94 P, *Tetra Pak International SA v Commission* [1996] ECR I-5951 in Jones and Suffrin (n 2) 461-62.
[87] *Commission v Microsoft* (COMP/C-3/37.792) Commission Decision 2007/53/EC of 24 March 2004 [2007] OJ 32/23.
[88] *Ibid*, para 841.
[89] Case T-201/04, *Microsoft v Commission* [2007] ECR II- 3601 (*Microsoft*).
[90] DG COMP Discussion Paper (n 3).
[91] *Ibid* 54, para 178.

prices'[92] when the pre requisites including foreclosure effect as stated above were fulfilled.[93] However, considering this to be a half- baked effects- based approach of the Commission, it has been criticised *inter alia* for the following:

> [T]hat the rules on who bears the burden of showing efficiencies and the standard of proof that must be met to discharge this burden are weighted so heavily against the dominant firm that, as a practical matter, it is very questionable whether adequate consideration will be given to the efficiencies or other consumer benefits that may result from a particular tie or bundle. Indeed, the Discussion Paper adopts an approach in which certain proxies are used to measure anticompetitive effects, with certain older presumptions against tying remaining embedded in the analysis.[94]

3. Defences for Tying: Scope for Objective Justification and Economic Efficiency

Courts in the U.S. have always been open to acknowledging the scope for objective (business) justifications necessitated by economic efficiencies or otherwise[95] when it comes to addressing claims of anticompetitive tie-ins, generally with the rider that less restrictive alternatives to tying are not available.[96] Even the U.S. Dept. of Justice and the Federal Trade Commission have acknowledged the same.[97] Position under the E.U. regime is no different. 'Hardly a case has gone by before the European Courts dealing with

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[92] *Ibid* 54, para 179.
[93] *Ibid* 55, para 183.
[94] The Computing Technology Industry Association, Inc, 'Competition, Competitors, and Consumer Welfare: Observations on DG Competition's Discussion paper on Article 82' (Brussels, February 2006), 18, <http://ec.europa.eu/competition/antitrust/art82/092.pdf> accessed 1 September 2016.
[95] *United States v Jerrold Elecs Corp* 187 F Supp 545 (ED Pa 1960), affmd *per curiam*, [1961] 365 US 567.; *International Business Machines Corporation v United States*, 298 US 131; *United States v Microsoft Corporation,* 253 F.3d 34 (DC Cir 2001); Myers, 'Tying arrangements and the Computer Industry' (n 48) 1047.
[96] Myers, 'Tying arrangements and the Computer Industry' (n 48) 1047- 48.
[97] 'U.S. Deparment of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property' (2005), 26 <https://www.justice.gov/atr/antitrust-guidelines-licensing-intellectual-property> accessed 3 September 2016.

article 82 that has not made some mention of “objective justification”.’[98] Moreover, although 'there is no Article 82(3), in the way that Article 81(3) provides an efficiency defence for agreements that infringe Article 81(1). However, it is clear that a dominant undertaking can raise a defence to an accusation of abuse where it can show that it had an "objective justification" for its behaviour.'[99]

The position therefore seems to be that the Commission and the courts do in fact acknowledge and consider objective justifications as an exception to abusive conduct, however, whether such practice is warranted as per the language of article 102 is contentious. What is not being suggested here is that abusive conduct should be condemned even in the face of countervailing objective or economic justifications as a *per se* violation rather what is being questioned is as to whether such approach can be implemented under the instant provision as it now stands. Even the Commission has acknowledged the same, claiming that, ‘Article 82 does not expressly foresee the possibility of “exempting” abusive behaviour under Article 82 because of efficiencies.'[100] As per some commentators, the genesis for legally justifying the inclusion of objective justifications under article 102 resides in the Commission's own interpretation of abuse[101]. According to them, for a conduct to amount to an abuse, ‘It must, (1) have the effect of hindering the maintenance or growth of competition on the market, and (2) be the result of methods different than “*normal competition*” in products or services’.[102] This is referred to as the ‘*two-tier*’ analysis which must be carried out under article 102.[103]

The second part of the test thus provides scope to employ *non-normal* techniques in order to meet *non- normal* competition with abuse being merely

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[98] Paul-John Loewenthal, 'The Defence of "Objective Justification" in the Application of Article 82 EC' (2005) 28(4) World Competition 455, 456.
[99] Whish and Bailey (n 75) 206.
[100] Neelie Kroes, 'Preliminary Thoughts on Policy Review of Article 82', SPEECH/05/537 (New York, 23 September 2005) <http://europa.eu/rapid/press-release_SPEECH-05-537_en.htm?locale=en> accessed 1 September 2016.
[101] Case 85/75, *Hoffmann La Roche & Co AG v Commission*, [1979] ECR 461, para 91.
[102] Loewenthal, 'The Defence of "Objective Justification"' (n 98) 458.
[103] Luc Gyselen, 'Rebates: Competition on the Merits or Exclusionary Practice?' (8th EU Competition Law and Policy Workshop on What is abuse of dominance?, European University Institute, June 2003), 5-6, paras 11-12 (6 June 2003) <http://apps.eui.eu/RSCAS/Research/Competition/2003(papers).shtml> accessed 1 September 2016; Ibid 458.

a collateral effect. The idea seems to be to first assess the foreclosure of the concerned practice by either showcasing exclusionary (eliminatory) intent or potential effect (actual effect not necessary)[104] and then to assess whether such effect may be justified upon the instance of the party[105], somewhat analogous to article 101(3)[106] with difference in burden of proof as specified earlier. However, the same is contentious for:

> [A] defence does not exist in Article 102 TFEU and the fact that exception criteria exist in Article 101(3) TFEU but not the former strengthens the argument that they cannot simply be read into it by the enforcer. It has been argued elsewhere that this omission in Article 102 TFEU is not a silent refusal of efficiencies since efficiency was one of the main concerns, if not the main concern, of the drafters of Article 102 TFEU. Hence there is support inherent in Article 102 TFEU to include efficiencies in the assessment. Yet, this cannot be done by inserting an exception clause into Article 102 TFEU.[107]

Perhaps, then such justification should be considered as a factor while determining the abuse itself so that article 102 traps only actually abusive (in this context) practice without providing any exceptions (as mandated by the text of the provision).[108] Moreover, even intent as a factor[109] and the scope for justifying it objectively[110] are debatable so to speak and lack considerable clarify.

Such objective justifications are only valid upon fulfilment of certain prerequisites: 'It must pursue a legitimate aim, be reasonable and be proportionate to the aim sought'.[111] 'Legitimate aim' seems to refer to the intent of the undertaking while indulging in the alleged anti-competitive activity, reasonableness is a matter of facts and proportionality is to be

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[104] Gyselen, 'Rebates: Competition on the Merits or Exclusionary Practice?' (n 103).
[105] Loewenthal, 'The Defence of "Objective Justification"' (n 98) 458.
[106] Ibid 459- 62.
[107] Pinar Akman, 'The European Commission's Guidance on Article 102 TFEU: From Inferno to Paradiso?' (2010) 73 The Modern Law Review 605, 622 <http://www.jstor.org/stable/40865467> accessed 2 September 2016.
[108] Loewenthal, 'The Defence of "Objective Justification"' (n 98) 463.
[109] Thomas Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-Competitive Abuses', (2005) 42 CM L Rev 129, 146, para 4.
[110] Loewenthal, 'The Defence of "Objective Justification' (n 98) 470.
[111] Ibid 465.

determined upon the economic strength of the undertaking.[112] They may be in the form of a legitimate business behaviour: this is in sync with the objective of E.U. competition policy, namely, to protect the 'competitive process and to this extent also the opportunities of competitors to compete on the merits'[113]; or for a legitimate public interest objective, it must however be pointed out that it is not the task of a dominant company 'to take steps on its own initiative to eliminate products which it regards, rightly or wrongly, as dangerous or inferior to its own product.'[114]

Therefore, the Commission had rejected the attempt of justifying the practice of tying the sales of nails and cartridge strips with the nail gun upon safety considerations claiming compatibility and quality concerns in *Hilti*[115] since the safety concern was for the local authorities (United Kingdom) to consider; or in the form of efficiency gains outweighing the alleged anti-competitive effects[116] as was claimed by Microsoft as *distribution efficiencies*, in the form of economies saved in not maintaining a distribution system for the second product (Windows Media Player)[117], and *technical efficiencies* in the form of its '*successful business model*' providing for the integration of new functionality into operating systems in response to technological advances as per changing consumer demand leading to increasing use of digital media, were the *real benefits* that the Commission had not sufficiently considered[118], only to be rejected by the Commission (and the Court of First Instance) as a misinformed argument based on confusion between 'the benefits to consumers of having a media player pre- installed along with the client PC operating system, and Microsoft selecting the media player for consumers'[119] and upon failure to justify that it 'leads to superior technical product performance'[120] respectively.

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[112] Ibid 465- 66.
[113] Eilmansberger, 'How to Distinguish Good from Bad Competition under Article 82 EC' (n 100) 133, para 2.2.
[114] Whish and Bailey (n 75) 207.
[115] *Eurofix –Bauco v Hilti* OJ [1988] L 65/19.
[116] *Microsoft* (n 89).
[117] Ibid, para 1095.
[118] Ibid, para 1108.
[119] Ibid, para 1125.
[120] Ibid, para 1159.

IV. Tie-Ins in India

Tie-ins in India have since long been acknowledged as 'restrictive trade practices' finding mention both under the MRTP Act, 1969[121] and The Consumer Protection Act, 1986.[122] As per the newly established Competition regime in India, tie-in as a means of distorting competition has been acknowledged in the form of a vertical restraint to be facilitated by an agreement to this effect u/s. 3(4)(a) of the Competition Act, 2002. It has also been incorporated as means of unilateral abuse of one's dominant position u/s. 4(2)(c-e) of the Act. To this extend, the Indian competition law is in conformity with both the U.S. and the E.U. law since both have recognised a tie-in as a vertical restraint as well as an abusive conduct by a dominant firm.

As has already been highlighted that in both the U.S. and the E.U., immense jurisprudential controversy has accrued with regard to the presupposition that tie-ins invariably would lead to only anticompetitive effects and positions in both the jurisdictions have seen a significant shift with the consistent efforts of academicians on both sides of the debate, most of this controversy accruing in the U.S. However, this does not seem to be the case in India, primarily for two reasons. Firstly, the law makers in India had experiences of both the jurisdictions with tie-ins to begin with and therefore the Act was devised so as to incorporate the provisions which did not entail friction with either economic analysis or judicially set precedence (internationally). Secondly, there have not been very many instances wherein the C.C.I, has had an opportunity to adjudicate upon claims of tie-ins, for any controversy or contradictory view points to ensue.

However, the facts that the Act is well crafted and that the C.C.I. has not come under criticism, should not be construed to mean that the opinions rendered by the C.C.I. with regard to tie-ins are judicially accurate and in sync with the aspirations of the lawmakers as documented in the high level Committee report[123] and codified subsequently in the Act. Needless to say, this section is aimed at changing this position, i.e. to making tie-ins controversial even in India and explaining the immediately preceding paradox i.e. highlighting

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[121] Monopolies and Restrictive Trade Practices Act, 1969, s 33 (1)(b).
[122] Consumer Protection Act, 1986, s 2 (nnn)(b).
[123] Report of the High Level Committee on Competition Policy & Law (Chairman SVS Raghavan, 2000) (Raghavan Committee Report).

C.C.I.'s failure in respecting the mandate of the Act while dealing with tie-in agreements.

The inception point for this critique is the opinion of the C.C.I. in the case of *Shri Sonam Sharma v Apple Inc.*[124] followed by its rather contradictory (majority) opinion in the case of *Ramakant Kini v Hiranandani Hospital*[125] and the opinion of the Competition Appellate Tribunal ("COMPAT") in *Hiranandani*[126] (in appeal). Since it is in these cases that the C.C.I. has most comprehensively documented its understanding of the tie-in agreements. This is not to say that these are the only claims of tie-ins that have been brought before the C.C.I. and therefore references wherever necessary have also been made to such cases wherein the C.C.I. has substantially delved into claims of tie-ins. It must also be understood that this is not a critique of the output of these cases rather the reasoning of the C.C.I. leading to these outputs.

1. Scheme of Tie-In Arrangements under the Competition Act, 2002

The Competition Act, 2002 has different approaches towards horizontal and vertical agreements as u/s. 3. Whereas horizontal agreements as falling u/s. 3(3) are '*presumed*' to have an AAEC, thereby incorporating a *per se* proscription[127], vertical agreements as falling u/s. 3(4) on the other hand are proscribed only if it be shown that such agreements do in fact cause or are likely to cause AAEC in India[128], thereby incorporating a rule of reason approach as in the U.S.[129] It further provides u/s. 19(3), similar to the E.U. law in this regard[130], factors both positive and negative for evaluation of AAEC.[131] Thus, a tie-in agreement u/s. 3(4)(a) has to tested for its actual or

[124] *Sonam Sharma* (n 7).
[125] *Ramakant Kini* (n 9).
[126] *L.H. Hiranandani Hospital, Mumbai v Competition Commission of India, New Delhi and Anr* [2016] CompLR 0129 (CompAT).
[127] Raghavan Committee Report (n 123), para 4.3.8; D P Mittal, *Competition Law & Practice,* (3rd edn, Taxmann Publications 2011) 172-173.
[128] Raghavan Committee Report (n 123), para 4.4.0; DP Mittal, *Competition Law & Practice,* (3rd edn, Taxmann Publications 2011) 172-173.
[129] Tilottama Raychaudhuri, 'Vertical Restraints In Competition Law: The Need To Strike The Right Balance Between Regulation And Competition', (2011) 4 NUJS L Rev 609, 609.
[130] Ibid.
[131] Abir Roy & Jayant Kumar, *Competition Law in India* (2nd edn, Eastern Law House 2014) 48.

probable adverse effect on the competition[132], this being the only determining factor as per the instant provision, to be calculated in light of the enumerations made u/s. 19(3) of the Act. It should be clarified here that as per the C.C.I., 'vertical agreements' as u/s. 3(4) do not include consumers[133] since, 'a manufacturer/service provider and the consumer cannot ever be said to be part of any "production chain" or even operating in "different markets" because a consumer does not participate in production…'[134] However, the same is not without dissent.[135]

A tie-in as a unilateral abusive act by a dominant firm has been proscribed *per se* u/s. 4(2)[136] by virtue of being prohibited u/s. 4(1).[137] Specific instances of tie-ins have been trapped under clauses (d)[138] and (e)[139] of s. 4 and if denial of market access *inter alia* as a consequence of a tie-in is also to be considered then even under clause (c).[140] Dominance has to be assessed on the factors enumerated u/s. 19(4) in the relevant market which comprises of the relevant product and the relevant geographic market[141] to be delineated upon consideration of factors as enumerated u/s. 19(7) and 19(6) respectively.

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[132] *Ajay Devgn Films Through Naik Naik Films v Yashraj Films Pvt Ltd*, Case No 66/2012 (CCI), 3, para 5.
[133] *Financial Software and Systems Pvt Ltd v M/s ACI Worldwide Solutions Pvt Ltd and Ors*, Case No 52/2013 (CCI), 57, para 10.67.
[134] *Consumer Online Foundation v Tata Sky & Ors*, Case No 02/2009 (CCI), 104, para 18.32.
[135] *Consumer Online Foundation v Tata Sky & Ors*, Case No. 02/2009 (CCI), 15, para 15 (Dissent). <http://www.cci.gov.in/sites/default/files/DissentingOrderConsumer250411_0.pdf> accessed 2 September 2016.
[136] Cyril Shroff and Nisha Kaur Uberoi, 'Unilateral Conduct: The Competition Commission of India's Enforcement Priorities', <http://xbma.org/forum/indian-update-unilateral-conduct-the-competition-commission-of-indias-enforcement-priorities/> accessed 5 September 2016.
[137] T Ramappa, *Competition Law in India: Policy, Issues and Developments* (3rd edn, OUP 2014) 157.
[138] D P Mittal, *Competition Law & Practice* 325 (3rd edn, Taxmann Publications 2011) 325.
[139] Ibid 329.
[140] Ibid 318-21.
[141] The Competition Act, 2002, s 19(5).

2. *Sonam Sharma* and *Ramakant Kini*: Relevant Facts

a. Shri Sonam Sharma v Apple Inc. and Ors

The allegations in this case pertained to distribution agreements entered into between Apple India Pvt. Ltd., Indian subsidiary of Apple Inc. U.S.A. ("Apple") and Vodafone Essar Limited ("Vodafone") and Bharat Airtel Limited ("Airtel"), by virtue of which Apple iPhones (3G/3GS) could only be purchased on the GSM network of Airtel or Vodafone and only through their respective distributors. iPhones purchased from other sources or 'unlocked' i.e. reconfigured to run on other GSM networks were susceptible to lose their warranty cover since they were not accepted for repair at the respective service centres. It was further alleged that both Airtel and Vodafone had also 'tweaked' their mobile internet services in order to make them incompatible to be used with iPhones and subsequently notified iPhone specific internet services at relatively higher price than what they charged for use on other smartphones. Further, Apple was also accused of allowing only applications approved by it and available on its online application store 'App Store' to be used on iPhones and if in case iPhones were 'unlocked' to make other third party applications workable with the same it rendered the warranty of such iPhones worthless, moreover any upgrade of the operating system of such iPhones caused for 'relocking' of such iPhones and deletion of all such unapproved, third party applications from the iPhones.

The allegations were compounded to have offended provisions both u/s. 4 i.e. provisions condemning abuse of dominance and u/s. 3 i.e. provisions condemning anti- competitive agreements likely to have AAEC in the market. The alleged tie-in as identified by the C.C.I. was a 'distribution/ sales arrangement between Apple and Airtel/ Vodafone is a case of "contractual tying" wherein the handset manufacturer and service provider have joined hands to offer a packaged product to the customer.'[142]
Upon an order of the C.C.I. u/s 26(1), the Director General ("DG") undertook an investigation into these allegations. Amidst various objections raised against the jurisdiction of the C.C.I. in the instant case, which included *inter alia* the fact that subject- matter of the dispute was better suited to be tried before the Telecom Regulatory Authority of India ("TRAI") rather than the

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[142] *Sonam Sharma* (n 7) 24, para 70.

C.C.I.; that the informant did not have a *locus standi* in the instant case; that the Competition Act, 2002 did not have retrospective application and the concerned aberrations if at all happened, happened prior to the notification of sections 3 and 4 of the Act. Moreover, 'collective dominance' (assessing jointly the standing of Vodafone and Airtel in the market) was not recognised under the Act and thus the prerequisite of dominance with regard to Vodafone and Airtel was not made out.

As per the DG, the arrangement between Apple, Airtel and Vodafone of selling 'locked' iPhones was a Tie-in arrangement u/s. 3(4)(a). However given the miniscule market share of Apple in the 'smartphone' market in India (1%- 3% in terms of volume) at the time of the aberrations i.e. between 2008- 2010, such tie-in could not have caused any AAEC in the said market in India. With regard to violations u/s. 4, the DG identified two relevant markets namely, '(i) relevant market for smartphones in India and (ii) relevant market for GSM cellular services in India'[143] and further deduced that Apple or Airtel and Vodafone (individually) were not dominant in these markets respectively.

b. Ramakant Kini v Dr. L.H. Hiranandani Hospital

In this case, an exclusivity agreement whereby Dr. L.H. Hiranandani Hospital ("Hiranandani") did not allow for any stem cell bank apart from Cryobanks International India ("Cryobank") to offer stem cells banking services (collection of umbilical cord at the time of birth and preserving it at sub- zero temperature for 21 years) on its premise was the cause for the dispute to arise. The informant in this case had already approached M/s Life Cells India Pvt. Ltd. ("Life Cell") for its services and then had engaged *Hiranandani* for maternity related services and delivery of her child. However, as was averred, she was not notified of the special arrangement that existed between *Hiranandani* and Cryobank at this point, it was only subsequently when she requested *Hiranandani* to allow Life Cell to collect the umbilical cord at the time of the delivery of her child that she was refused the same and Cryobank as an alternative was suggested to her. This caused for the Informant to engage another hospital for its maternal services.

[143] Ibid 12-13, para 26.

Based upon the above mentioned, allegations u/s. 3(4), s. 4(2)(a)(i) and 4(2)(c) were registered with the C.C.I., who instructed an investigation of the DG u/s. 26(1). As per DG's investigation, the agreement between *Hiranandani* and Cryobank was anti- competitive as u/s. 3(4) and the same was likely to have AAEC in the market. Further, *Hiranandani* was considered to be dominant in the market of 'provisions of maternity services by super speciality hospital in the geographic market of 0-12 km from the *Hiranandani* Hospital covering S, L, N, K/E, T & P/S wards of Municipal Corporation of Greater Mumbai as per Section 2(r) of the Act'[144] which it had abused by imposing unfair conditions on expecting mothers coming to it for maternity services. It must be clarified here that subsequently the Commission had assessed a violation only of s. 3(1) of the Act in the case as an agreement causing AAEC but not falling expressly within s. 3(3) or 3(4) i.e. the claim for tie-in did not materialise.

3. C.C.I.'s Assessment: A Critique

As per C.C.I.'s order in *Sonam Sharma:*

> A tying arrangement occurs when, through a contractual or technological requirement, a seller conditions the sale or lease of one product or service on the customer's agreement to take a second product or service. In other words, a firm selling products X and Y makes the purchase of product X conditional to the purchase of product Y. Product Y can be purchased freely on the market, but product X can only be purchased together with product Y. The product that a buyer is required to purchase in order to get the product the buyer actually wants is called the tied product.[145]

Further in the order, C.C.I. acknowledges that tie-ins are not *per se* anti-competitive as 'economics literature suggests that there are pro-competitive rationales for product-tying. These include assembly benefits (economies of scale and scope), quality improvement as also addressing pricing inefficiencies'.[146] Thus, it seems clear that C.C.I. in essence acknowledges that tie-ins should be dealt with under the rule of reason approach as is the

[144] *Ramakant Kini* (n 9) 0267, para 4.
[145] *Sonam Sharma* (n 7) 24, para 66.
[146] Ibid 24, para 69.

scheme u/s. 3(4) of the Act. Thereafter, C.C.I. very categorically goes on to identify '*necessary and essential conditions*' in respect of '*anti-competitive tying*', these being:

> (1) Presence of two separate products or services capable of being tied; (2) The seller must have sufficient economic power with respect to the tying product to appreciably restrain free competitions in the market for their product; (3) The tying arrangement must affect a not insubstantial amount of commerce,[147]

it then applies these standards cumulatively to the instant case to identify whether the (tie-in) arrangement in question i.e. tying of the sale of iPhones to the subscription of mobile network services of Airtel and Vodafone, is *anti-competitive* or not (as is the practice in the U.S. and the E.U.). The use of the phrase '*anti- competitive tying*' is of great import here, for it invariably leads to the conclusion that if in a situation the conditions as enumerated above are fulfilled the tie- in arrangement in question would become illegal or *anti-competitive*. This understanding of tie-ins is highly contentious and gravely problematic, for in doing so the C.C.I. has simply introduced the standards for *quasi- per se* proscription of tie-in agreements as prevalent in the U.S. (explained earlier) and documented in copious pronouncements of the U.S.S.C. including *Northern Pacific*[148] in the enquiries u/s. 3(4)(a) even though, s. 3(4) clearly envisaged a rule of reason approach wherein it was only the causing or the likelihood of causing of AAEC which determined the anti- competitiveness of a tie-in and not the fulfilment of any prerequisites as the C.C.I. seemed to have implied.

Moreover, 'dominance' as a factor *per se* cannot be considered while determining AAEC in a claim u/s. 3(4) since as per the C.C.I., 'whether an agreement restricts the competitive process [AAEC] is always an analysis of the balance between the positive and the negative factors listed under section 19(3)(a)-(f)'[149] and 'dominance' has not been included as a factor therein. It may further be argued that unlike clause (m) u/s. 19(4) which has rendered the list of factors enumerated therein (for determining one's dominance) as

[147] Ibid 23-24, para 69.
[148] [1958] 356 US 1.
[149] *Shri Ghanshyam Dass Vij v M/s Bajaj Corp Ltd and Ors*, Case No 68/2013 (CCI), 68, para 81.

open- ended (inclusive)[150], no such clause exists u/s. 19(3) thereby hinting at the legislative intent of self- sufficiency or exhaustiveness of the list of factors enumerated therein, thus vanquishing any scope for the C.C.I. to consider external factors. Perhaps, this is the reason why, it has also been suggested that instead of applying the same factors (u/s. 19(3)) for evaluating the different kinds of vertical restraints (for AAEC) mentioned in the Act, C.C.I. should have the liberty to consider and specify different standards for evaluation, suitable to the respective restraint.[151]

In contradiction to this, in the case of *Ramakant Kini*, while dealing with the alleged tie-in the C.C.I. at least opined (majority) in conformity with the scheme of s. 3 in general and s. 3(4) in particular, when it acknowledged the distinction with regard to the treatment to be met out to agreements u/s. 3(3) and 3(4) going on to further accept that 'Section 3(3) categories are examples of agreements which are considered in violation of Section 3(1) and the Commission, under law, has to presume that these agreements have an appreciable adverse effect on competition'[152] and 'in case of an agreement of the nature under Section 3(4), it has to be shown that an agreement covered under Section 3(4) has or is likely to cause an appreciable adverse effect on competition in India'[153] respectively. This was with no reference to 'dominance' being a prerequisite for a claim of anti-competitiveness u/s. 3.[154] However, in appeal before the COMPAT, the position was re-established to as it was in *Sonam Sharma*, namely that existence of a tie-in between two separate products by a dominant firm which involves a substantial amount of commerce in the market, would lead to a presumption of *anti-competitiveness* of the tie-in arrangement.[155]

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[150] *Belaire Owner's Association v DLF Ltd, Haryana Urban Development Authority Dept of Town and Country Planning, State of Haryana*, Case No 19/2010 (CCI), 4, para 4(supplementary).
[151] Raychaudhuri, 'Vertical Restraints In Competition Law' (n 129) 622-23.
[152] *Ramakant Kini* (n 9) 0268, para 8.
[153] Ibid 0268, para 9.
[154] Ibid 0274, para 29.
[155] *Hiranandani* (n 126) 0175, para 35.

a. Dominance as a prerequisite u/s. 3(4)

In *Sonam Sharma*, as per C.C.I., one of the prerequisites for an *anti-competitive tying* was '*sufficient economic power with respect to the tying arrangement*'[156], which was deduced upon factors enumerated u/s. 19(4) similar to 'dominant position' as defined under the explanation attached to Section 4.[157] C.C.I. based upon the investigation undertaken by the DG and upon the evidence adduced before it by the parties, firstly identified the relevant markets as '*Market for smartphones in India; and Market for mobile services in India'.* It then considered whether Apple was in a dominant position in the relevant market for smartphones or not. It acknowledged the business model employed by Apple in India, whereby Apple used to sell locked iPhones through Mobile Network Operators ("MNOs") and Authorized Premium Resellers ("APRs") by virtue of non- exclusive agreements, this arrangement being beneficial to both Apple and MNOs (Airtel and Vodafone) since 'the former did not have to incur establishment/ marketing expenditure while the latter were guaranteed of turf- client for the period of the lock- in'.[158]

However, it was further acknowledged that the customers could get their iPhones unlocked by paying some extra fees. It concluded that Apple was not dominant in the said market by stating that neither Apple's share in the smartphone marker in India nor any other factor as specified u/s. 19(4) imparted any dominance to Apple. The C.C.I. then considered the dominance of Airtel and Vodafone, and stated that neither of the two possessed the requisite market power or any other factor u/s. 19(4) which could have imparted dominance to them. The claim that they were collectively dominant since they collectively possessed 52% market share in the market for mobile services in India was considered untenable since, 'they are horizontal competitors who fight for greater market share'.[159] It further concluded that 'for a vertical agreement to be anti competitive requires the monopolization claim to hold, and given the miniscule market share of the tying party the monopolization claim will be contrived'.[160] Thus, it could be inferred from this approach that, although dominance as a prerequisite is not required u/s.

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[156] *Sonam Sharma* (n 7) 23, para 69.
[157] Ibid 20, paras 58- 59.
[158] Ibid 20, para 56.
[159] Ibid 20, para 59.
[160] Ibid 24, para 70.

3(4)(a), it was considered to be so by the C.C.I. and it was only when the claim of dominance did not materialise that C.C.I. subsequently considered the factors u/s. 19(3) to identify if the alleged tie-in caused or likely would have caused an AAEC in the market.

In essence, this approach of the C.C.I. is akin to the approach now generally employed by the courts in the U.S. and explained by a commentator as *The Two-Hurdle Doctrine*.[161] As per this practice, an alleged tie-in is to be first tested for the prerequisites of a *per se* proscription and if the same are absent it is to be then considered under the rule of reason to identify its foreclosure tendencies (if any) in the market.[162] At this point it may be argued, that in the instant case, had Apple or Airtel/Vodafone been found to be dominant in the respective markets, C.C.I. perhaps, would not have gone on to further consider the factors u/s. 19(3) in order to gauge their tendency of causing AAEC in the market, since the prerequisites of an *anti-competitive tying* would have been satisfied (assuming that the other two were fulfilled as well) and there existed a vertical relationship as required u/s. 3(4). It is interesting to note that, although mindful of the *leverage* theory of anti-competitiveness of tie-in arrangements[163], the C.C.I. has generally limited its enquiry to the factors u/s. 19(3) to a finding of actual or potential AAEC in the market and without enquiring about the market position of the defendants to establish a presumption of anti-competitiveness[164], this is not to say that leverage theory is not endorsed at all since it forms the basis for proscription u/s. 4(2).

b. Potential Ramifications of such Interpretation

Firstly, as already stated, in doing so C.C.I. is replacing the rule of reason approach as mandated u/s. 3(4) by a *per se* proscription. In doing so, the C.C.I. has not only contradicted the legal mandate of s. 3(4), it has taken the Indian competition jurisprudence to the wrong side of the ensuing debate with regard to the proscription of tying arrangements in various jurisdictions.

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[161] Kenneth W Dam, 'Fortner Enterprises v United States Steel: "Neither a Borrower, nor a Lender Be"' [1969] The Supreme Court Review 1, 32- 36.
[162] Ibid.
[163] *Arshiya Rail Infrastructure Ltd v Ministry of Railways and Ors*, Case No 64/2010 (CCI), Case No 12/2011 (CCI) and Case No 02/2011 (CCI), para 4.2.5.
[164] *Consumer Online Foundation* (n 134) 100-01, paras 18.28- 18.29; *ESYS Information Technologues Pvt Ltd v Intel Corporation (Intel Inc), Intel Semiconductor Ltd and Intel Technology India Pvt Ltd* [2014] CompLR 0126 (CCI), 0138, para 7.3.8; *Ajay Devgn Films* (n 132) 3-4, paras 5-6.

Whereas in both the U.S. and the E.U. rapid changes have taken places and tie-ins are now more often than not found to be treated under a rule of reason or an 'effects- based' approach, respectively (even when the seller possesses significant economic power in the tying product market) considering that 'most concerns about tying are misplaced'[165], in India where tie-ins irrespective of possession of dominance or not, ideally should have been subject to a rule of reason enquiry u/s. 3(4)(a) would now be presumed to be *anti-competitive* upon the proof of existence of dominance (*quasi per se* rule) which is both unique and textually unwarranted for the mere fact that under the Act either agreements are *per se* anti- competitive u/s. 3(3) or may be proscribed as anti- competitive u/s. 3(4)(a) after successfully showing of AAEC upon consider of factors u/s.19(3) (rule of reason), with no scope for incorporating this *quasi* rule within the existing scheme of the Act. Notwithstanding the role of s. 3(1) as a blanket cover trapping agreements causing AAEC but not falling within either s. 3(3) or s. 3(4), as was held by the C.C.I. in *Ramakant Kini*.

Secondly, in light of such interpretation, what remains of the scope of tie-ins u/s. 4(2) *vis-à-vis* s. 3(4)(a) has become ambiguous. As per the authors, there existed a clear distinction under the Act to the extent that tying by non-dominant firms was to be trapped u/s. 3(4)(a) and tendered a rule of reason approach whereas tying by dominant firms was to be trapped u/s. 4(2) and made subject to a *per se* proscription. Even as per the Raghavan Committee Report, in any case an agreement of tie-in imposed by a dominant firm was "likely to attract the provisions of the law relating to abuse of dominance".[166] This position has been endorsed by various practitioners.[167] Perhaps, it is for this reason that C.C.I. had stated that:

> [F]or the purposes of Section 3, the Commission is not supposed to enter into a discussion of market dominance, which exercise is necessarily to be done in respect of violation of Section 4…The

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[165] David S Evans, 'The Poster Child for Antitrust Modernisation', *Antitrust Policy and Vertical Restraints* (Robert H. Hahn (ed), Brookings Institution Press, Washington DC 2006).

[166] Raghavan Committee Report (n 123), para 4.4.0.

[167] Amitabh Kumar, Farhan Sorabjee and Amit Kapur, 'Getting the deal Through- Vertical Agreements 2012', *Global Competition Review*, 149 <http://www.jsalaw.com/wp-content/uploads/2015/09/VA2012-India.pdf> accessed 3 September 2016.

> Commission has to look into freedom of trade, consumer welfare aspects and adverse effect on competition of the agreement…[168]

This position is analogous to the position in the U.S. wherein:

> [T]hey can be challenged under the Sherman Act §1 because they involve agreements that constitute restraints of trade if they are on balance anti-competitive. But they can also be challenged under the Sherman Act §2 if the defendant has monopoly power (or a dangerous probability of acquiring it) and the exclusionary agreements anti-competitively help obtain or maintain such monopoly power.[169]

No doubt s. 4(2) would remain open to trap unilateral instances of abuse absent a vertical relationship for instance when a firm imposes the tie-in directly upon the consumer. However, for tying claims involving vertical relationship and market dominance, s. 4(2) has for all practical purposes been rendered otiose. One may argue that the C.C.I. had incorporated the element of dominance within S. 3(4)(a) only as a factor in deducing the actual or potential AAEC to be considered along with other factors u/s. 19(3), and thus the scheme of a rule of reason approach u/s. 3(4) remains intact and to this extend a distinction still exists with regard to the standard of proscription of tie-ins under the two provisions. However, not only is this interpretation skewed, the distinction based upon the same is only likely to further complicate the situation. Since, as already stated, there is no scope for the C.C.I. to consider additional factors u/s. 19(3).

Moreover, such a distinction is only going to give rise to different standards of treatment for the same offence of *tying by a dominant firm*. This is so because u/s. 3(4)(a) *tying by dominant firm* would be treated under a rule of reason approach with scope for objective justification in light of countervailing pro-competitive efficiencies whereas *tying by a dominant firm* u/s. 4(2) shall be met with a *per se* condemnation with no scope for objective justification. If this may not be the case and it be said that uniform standard of rule of reason shall be applied to tie-ins under the Act generally, it will be unsuitable equally since s. 4(2) provides for an exhaustive list of instances of abuse by a dominant firm and no scope for objectively justifying them (apart from the exception provided therein[170]), however, a rule of reason based

[168] *Ramakant Kini* (n 9) 0268- 0269, paras 10-11.
[169] Einer and Geradin (n 6) 513.
[170] The Competition Act, 2002, Explanation to s 4(2)(a).

approach would open avenues for justifying tying even u/s. 4(2) objectively and upon the non- likelihood of it causing AAEC and since similar avenues would not be available for other instance of abuse mentioned therein, a different standard of proscription shall be created between tying as an instance of abuse *vis-à-vis* other instances of abuses enumerated u/s. 4(2).

Thirdly, such interpretation has further led to a distinction in the standards of proscription for *tying by a non- dominant firm* u/s. 4(2) and s. 3(4). A claim of tying as an abuse u/s. 4(2) shall not materialise if dominance is not proved since the C.C.I. shall not then delve into the allegation of tying as an abuse. However, in light of what C.C.I. has done in *Sonam Sharma*, if the prerequisite of dominance is not fulfilled u/s. 3(4)(a) the C.C.I. would then also subject the alleged tying arrangement to a rule of reason enquiry to gauge actual or potential AAEC in the market. Thus, for the same offence that is of *tying by a non- dominant firm*, there exists a single enquiry u/s. 4(2) whereas a dual enquiry u/s. 3(4)(a). One may argue that this may not be the case, since even if the C.C.I. records no finding of dominance u/s. 4(2), it can treat the same as *tying by a non- dominant firm* u/s. 3(4)(a) subjecting it to a rule of reason approach and therefore no such distinction exists. However, if this was true, then C.C.I. could very well have upon a finding of dominance treated the case as that of tying as an instance of abuse u/s. 4(2) rather than incorporating the element of dominance u/s. 3(4)(a) itself and vitiating its legal mandate.

V. Conclusions

The C.C.I. as an Indian antitrust regulator has to go a long way in streamlining the Indian competition practice along the internationally acclaimed standards. This is not to mean that it has to blindly incorporate foreign legal standards simply because they have been found to be relevant elsewhere, within the Indian scenario without justifying or apprising itself of the viability of doing so. It also has to be mindful of the limits that the law has set in place for it to do the same. Whish's rationale for not incorporating the American rule of reason under Article 81(1) of the TFEU may be relevant in this regard, for as per him, doing so is 'misplaced', since the 'EC law is different in many ways

from U.S. law, not least in that it has the "bifurcation" of Article 81(1) and 81(3)'[171] which is absent in the U.S. law.

Similarly, the Indian law is fundamentally different as compared to the US law (for different reasons). This was also acknowledged by the Supreme Court of India while comparing the Indian law on competition with that of the U.S. law (Clayton Act).[172] It is so since unlike the U.S. law's liberal literature providing immense scope for interpretation to the judges, the Indian law has clear textual guidelines to be followed as and when a situation so demands. It clearly provides for separate approaches to be incorporated while dealing with *tying by dominant firms* (*per* se) and *tying by non- dominant firms* (rule of reason) and the C.C.I. is duty bound to sustain the same. This is not to mean that the C.C.I. cannot incorporate international principles at all, for this would be absurd in the light of the fact that most of the jurisprudence behind the Indian Competition Act, 2002 has been borrowed from the relatively advanced jurisdictions of the U.S. and the E.U. This also does not mean that the authors support the existing *per se* proscription of tie-ins u/s. 4(2). However, this is how the law in the present day stands. The underlying assumption here is that the C.C.I. must do so only when the principle intended to be so incorporated would augment the position of the Indian law with regard to the issue that the principle deals with and not to shift it a step back in the process of evolution.

The rule of reason or the 'effects- based' proscription of tie-in has now internationally been recognised as the right way ahead. As seen, the nomenclature may vary, it may be considered to be *quasi per se* or a figment of a traditional rule of reason enquiry but the essence remains the same, i.e. to proscribe tie-ins only after confirming actual AAEC and weighing it against any pro- competitive tendencies that the tie-in may exude. To this extend it must be stated that it should not be an incorporation of foreign principles of law in abstract, rather a constructive incorporation aimed at painting the best suited antitrust regulatory scenario on the canvas of the Indian market (it maybe to provide scope for objective justifications u/s. 4(2)). C.C.I. in the cases discussed herein however, seems to have been lost upon this objective and rather solely has concerned itself with incorporating

[171] Whish and Bailey (n 75) 131.
[172] *Competition Commission of India v Steel Authority of India Ltd and Anr*, Civil Appeal No 7779/2010 (Supreme Court of India).

alien doctrines presuming for them to suit the Indian scenario perfectly even if it is in defiance of the express mandate of the law.

In light of existing inconsistency in the law on tie- in arrangements, the authors believe that the C.C.I. must, analogous with the spirit of the Indian Constitutional Courts and the legislators of moulding international principles of law to suit the Indian ethos, mould this aspect of law in such a way so as to bridge the gap between the two provisions namely, s. 3(4)(a) and s. 4(2). To achieve the same, the authors suggest a course for the inquiry into claims of tie-ins which should be employed by the C.C.I. Firstly, irrespective of what provision has the Informant relied upon while challenging an alleged tie-in as being anti- competitive, the C.C.I. should at the very beginning assess the dominance of the defendant in the market for the tying product. If C.C.I. records a finding of dominance, then it must treat the claim as *tying by a dominant firm*, an instance of abuse of dominance u/s. 4(2). On the other hand, if the C.C.I. fails to record a finding of dominance, then it must treat the claim as *tying by a non- dominant firm* u/s. 3(4)(a) of the Act (if facilitated in vertical relationship) subject to a rule of reason enquiry with the help of factors u/s. 19(3). Moreover, even if the C.C.I. is unwilling in incorporating the same, the least it could do is to not consider the dominance of a firm in the market for the tying product as a factor leading to a presumption of anti-competitiveness u/s. 3(4) and the tying arrangement should nevertheless be considered for its AAEC in the market as per the factors u/s. 19(3). However, considering the general acceptance that tie-ins facilitated through dominance are generally anti-competitive, the likelihood of not presuming the same even when dominance is proved, seems rather unlikely.

It is sensible to suggest that the C.C.I. should, analogous to the European Commission (providing scope for objective justification and countervailing economic efficiencies under Article 102, which otherwise is suggestive of a *per se* proscription), also provide scope for objective justifications based upon economic efficiencies or otherwise to be made in support of the alleged activity. The idea is not novel, for authors have speculated possible defences which the C.C.I. may and ideally should acknowledge while dealing with tying.[173] It has also been asserted that the language contained u/s. 4(2)(d) suggests that 'tying of the two products would not violate [s. 4(2)(d)] if they are so integrated that they could be taken as components of a single product

[173] Roy and Kumar (n 131) 364- 367.

or service'[174], thereby also providing scope of justifying 'innovation' as an objective for tying. Such pragmatism is what is expected out of the C.C.I. and not an attempt at straight jacketing a foreign principle upon Indian laws. It has to be receptive to pragmatic changes in order for actual subsistence and protection of fair competition in India.

[174] Mittal (n 138) 328, para 4.18-3.