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REASSESSING ABUSE OF DOMINANCE: INDIA'S SHIFT TO AN EFFECTS-BASED ANALYSIS

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Abstract

This paper examines the evolving approach to abuse of dominance under Indian competition law, focusing on the transition from a traditional form-based assessment toward an effects-based analytical framework. The study is grounded in the hypothesis that an effects-based approach, while economically sound, requires careful calibration to avoid both under-enforcement and legal uncertainty. To evaluate this proposition, the paper undertakes a doctrinal and comparative analysis of recent Indian jurisprudence under Section 4 of the Competition Act, 2002, alongside developments under Article 102 of the Treaty on the Functioning of the European Union. Key judicial decisions, including *Google LLC v CCI*, *CCI v Schott Glass India*, and *Alphabet Inc. v CCI*, are examined to trace how Indian courts have increasingly emphasized demonstrable or potential anti-competitive effects as central to establishing abuse.

The analysis reveals that Indian jurisprudence now recognises that dominance alone is not unlawful; rather, liability arises only where conduct causes or is capable of causing harm to competition. At the same time, courts have cautioned against purely speculative findings, requiring that the conduct under scrutiny be real and objectively assessable. A comparative review of the European Union's trajectory from formalistic presumptions to a more nuanced economic assessment further highlights both the strengths and limitations of a strict effects-based model.

The paper argues that a hybrid framework combining structured legal presumptions with rigorous economic analysis offers a more balanced solution for India. Such an approach would improve legal certainty while preserving flexibility for effective enforcement. The findings underscore the importance of clear guidelines, stronger economic expertise within enforcement institutions, and statutory clarification to ensure that abuse of dominance law promotes

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competition, consumer welfare, and sustainable market development.

Keywords: Abuse of Dominance, Effects-Based Analysis, Competition Law, Anti-Competitive Effects, Article 102 TFEU

Introduction

At its heart lies the prohibition on abuse of dominance which is to prevent market players from engaging in conduct that distorts competition and concentrates market power. Yet, the manner in which such abuse is assessed has been debated extensively, across jurisdictions.

Existing scholarship on abuse of dominance in India has largely focused either on descriptive analyses of statutory provisions or on isolated judicial decisions, without systematically examining the doctrinal implications of India's gradual shift toward an effects-based framework. This paper addresses that gap by critically evaluating how recent judicial developments have reshaped the interpretation of Section 4 of the Competition Act, 2002, and by situating these developments within broader comparative trends in European Union competition law.

The central argument advanced is that Indian competition jurisprudence is moving toward a hybrid model that combines effects-based economic reasoning with certain structural presumptions, yet the absence of clear doctrinal standards risks inconsistency and uncertainty in enforcement. Beyond summarising case law, the paper contributes by identifying emerging principles, highlighting unresolved tensions, and proposing a more coherent framework for future application of effects-based analysis in India.

Despite its appeal, one of its most pressing difficulties is that the boundaries of what constitutes "anti-competitive effects" remain unclear in several contexts, leading to uncertainty for regulators, businesses, and courts. Without clear guidelines and legal standards, the approach risks inconsistency, unpredictability, and increased litigation burdens. This research therefore seeks to critically reassess the application of the effect-based approach in India, situating it within the broader cross-jurisdictional experience of the EU. It argues that a **hybrid model,** which combines the clarity of form-based presumptions with the rigour of effect-based analysis, would better serve the dual goals of certainty and effectiveness.

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India's Stance on Effect-Based Analysis

The Competition Act, 2002 ("the Act"), contains two central provisions aimed at regulating market behaviour. **Section 3**[3] addresses anti-competitive agreements, declaring void any arrangement that has or is likely to have an appreciable adverse effect on competition ("AAEC"). **Section 4**,[4] in contrast, focuses on abuse of dominance by identifying specific practices which, if undertaken by a dominant enterprise, would constitute abuse and render the entity liable to penalties imposed by the Competition Commission of India (CCI), the principal regulatory and adjudicatory authority under the Act.

For a considerable period, the enforcement of Section 4 largely adhered to the literal wording of the statute. However, recent judgements reveal a discernible shift to an **effect-based analysis** i.e. a determination of abuse of dominance under **Section 4 of the Competition Act, 2002** must rest upon demonstrable anti-competitive effects. It reaffirms the principle that mere possession of dominance is not prohibited; it is only the **abuse of such dominance**, established through evidence of an appreciable adverse effect on competition (AAEC) and actual economic impact, that attracts regulatory intervention.

This trend has been affirmed in some recent cases such as ***Google LLC & Anr. v Competition Commission of India & Ors.***,[5] where the National Company Law Appellate Tribunal (NCLAT), while upholding the CCI's penalty of INR 1337.76 crore for abuse of dominance, explicitly held that matters under Section 4 must be assessed through an **effects-based approach**. And finally, the Supreme Court in *Competition Commission of India v Schott Glass India Pvt. Ltd. & Anr.*[6] also affirmed that an effects-based analysis is an obligatory component of every inquiry under Section 4 of the Act. However, *Alphabet Inc. & Ors. v Competition Commission of India & Anr.*[7] adopted a broader perspective. The court held that effect analysis should entail not only conduct resulting in demonstrable harm but also conduct that is **capable of causing such harm**. At the same time, the court introduced an important caveat: the analysis must relate to conduct that has already occurred. In other words, a contravention cannot be established merely on the basis of **likely or hypothetical conduct** of a dominant entity.

[3] The Competition Act, 2002 (12 of 2003) s 3.
[4] The Competition Act, 2002 (12 of 2003) s 4.
[5] ***Google LLC & Anr. v Competition Commission of India & Ors.*** 2023 SCC OnLine NCLAT 147.
[6] *Competition Commission of India v Schott Glass India Pvt. Ltd. & Anr.* 2025 INSC 668.
[7] *Alphabet Inc. & Ors. v Competition Commission of India & Anr.* 2025 SCC OnLine NCLAT 604.

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Google LLC & Anr. v Competition Commission of India & Ors.[8]

In an appeal filed by **Google LLC and Google India Private Limited**, the companies challenged the order of the Competition Commission of India (CCI) in NCLAT, which had held Google guilty of abusing its dominant position in violation of **Sections 4(2)(a)(i), 4(2)(b)(ii), 4(2)(c), 4(2)(d), and 4(2)(e) of the Competition Act, 2002.** The CCI had directed Google to **cease and desist** from engaging in the anti-competitive practices identified and imposed a penalty amounting to **INR 1337.76 crore**. On appeal, a Division Bench upheld the penalty imposed on Google for abuse of dominance in the Android mobile device ecosystem, though it set aside certain specific directions issued by the CCI.

Google LLC contended that the CCI's order was tainted by confirmation bias, asserting that it had been heavily influenced by the European Commission's 2018 decision in a similar matter. It further argued that its agreements did not prevent device manufacturers from pre-installing rival applications with similar functionality.

Exercising its powers under **Section 27 of the Competition Act**, the CCI directed Google to **cease and desist** from practices found to be in contravention of **Section 4**. It further held that Google had leveraged its dominance in the **online search market**, thereby denying market access to competing search applications.

On appeal, the **NCLAT** addressed the core issue by affirming that a **finding of abuse under Section 4 requires an effects-based analysis**, **with the test being whether the impugned conduct is anti-competitive in nature**. It observed that the CCI had duly examined the evidence and submissions of both parties across the relevant markets before arriving at its conclusions. Rejecting Google's claim of confirmation bias, the Tribunal upheld the CCI's findings under **Sections 4(2)(a)(i) and 4(2)(d)**, holding that the conduct in question was indeed harmful to competition as per the evidence on record.[9]

[8] *Google LLC* Case (n 3).

[9] '[Google-CCI Case] | NCLAT upholds Rs 1,337 crore penalty on google for abuse of dominant position in Android Mobile Device Ecosystem' (*SCC Online Times*, 29 March 2023) https://www.scconline.com/blog/post/2023/03/29/penalty-on-google-nclat-sets-aside-certain-directions-by-cci but-upholds-inr-1337-crore-penalty-on-google-for-abuse-of-dominant-position-in-android-mobile-device-ecosystem-legal-news-legal-researc-up/ accessed 7 September 2025.

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The Court, thus, held that Section 4 expressly carves out an exception for discriminatory conditions or pricing adopted in order to meet competition. In light of the statutory scheme set out in the Explanation, it becomes necessary to undertake an analysis to determine whether such discriminatory conditions or pricing are genuinely aimed at meeting competition or whether they are anti-competitive in nature. As emphasized earlier, the overarching object of the Competition Act is to curb practices that have an adverse effect on competition. Consequently, for a finding of abuse of dominant position under Section 4, it must be established that the impugned conduct is anti-competitive. Any conduct of a dominant enterprise or group deemed abusive must qualify as anti-competitive conduct, and such determination necessarily entails an effect-based analysis.

The decision marks an important doctrinal shift in Indian competition law by clarifying that abuse under Section 4 cannot be inferred merely from the existence of dominance or from the formal structure of agreements. Instead, the focus moves toward evaluating whether the impugned conduct produces anti-competitive effects in the relevant market. This interpretation aligns Section 4 more closely with economic analysis and reinforces the principle that enforcement must be grounded in demonstrable competitive harm. For future cases, the ruling signals that the CCI must substantiate findings of abuse through evidence-based assessment rather than presumptive reasoning.

***Competition Commission of India v Schott Glass India Pvt. Ltd. & Anr.*[10]**

The Dispute

The information was filed against **Schott Glass India Pvt. Ltd.** ("Schott"), a wholly owned subsidiary of Schott AG, Germany. In 2008, Schott entered into a joint venture with **Kaisha Manufacturers**, forming **Schott Kaisha Pvt. Ltd.**, the largest converter in India, and signed a **Long-Term Tubing Supply Agreement (LTTSA)** requiring Schott Kaisha to source **80% of its needs** from Schott India in exchange for price concessions, a three-year freeze, and priority supplies.

Schott operated in both the **upstream market** for borosilicate glass tubing and the **downstream market** for pharmaceutical containers. To strengthen its position, it introduced two rebate schemes: (i) **volume rebates** linked to annual purchases, and (ii) **functional**

[10] *Schott Glass India* Case (n 4).

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rebates, offering an 8% allowance to converters that met purchase targets, avoided Chinese tubing, and complied with "fair-pricing" commitments.

Kapoor Glass India Pvt. Ltd. ("informant") alleged that these arrangements were **abusive**, as they tied customers, restricted access to cheaper alternatives, and gave preferential treatment to Schott Kaisha. Schott was also accused of rationing supplies to independent converters while fully meeting Schott Kaisha's demands, thereby **foreclosing competition** and distorting the market.

Procedural history of the dispute

The Competition Commission of India (CCI) preferred a statutory appeal before the Supreme Court under **Section 53T of the Competition Act, 2002**, challenging the order passed by the Competition Appellate Tribunal (COMPAT). The proceedings had originated from the information filed by Kapoor Glass on 25.05.2010 by alleging that **Schott Glass India Pvt. Ltd** had abused its dominant position by offering exclusionary volume-based discounts, imposing discriminatory contractual terms, and, at times, refusing to supply.

Acting on this information, the CCI formed a prima facie opinion under **Section 26(1)** and directed the Director General (DG) to investigate. The DG's report concluded that Schott had abused its dominant position in contravention of **Section 4** of the Act. After considering the report, Schott's objections, and submissions from the parties, the CCI held Schott guilty of abuse of dominance. It imposed a penalty of approximately **INR 5.66 crore** and issued a **cease-and-desist order** restraining Schott from engaging in discriminatory practices against converters.

Schott appealed the decision before COMPAT. COMPAT allowed the appeal, quashed the CCI's findings, and additionally imposed a **cost of INR 1,00,000** on the informant, Kapoor Glass.

Effect-based Analysis is crucial for determining Abuse of Dominance

The central issue of this analysis which was before the Supreme Court was **whether an effects-based (harm) analysis constitutes an essential component of an inquiry under Section 4 of the Competition Act, 2002, and, if so, whether such an analysis had been omitted in the present case.**

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Section 4 of the Competition Act does not prohibit the mere existence of dominance; rather, it restricts the **abuse of such dominance**. Abuse, by its very nature, refers to conduct that disrupts the competitive process or harms consumers. An effects-based analysis must assess the actual harm caused to competition, and unless such harm is established, a violation of Section 4 cannot be determined.

The Act itself contains **three clear legislative indicators** that highlight the necessity of an "effects requirement."

1. First, the **Preamble** expressly states that the purpose of the Act is "to prevent practices having adverse effect on competition."
2. Second, the **definition of dominant position** in the Explanation to Section 4 describes it as the ability of an enterprise "to affect … the relevant market in its favour," making it essential to ask whether such power has actually been exercised in an anti-competitive manner.
3. Third, **Section 19(4)(l)**[11] directs the CCI, while assessing dominance, to consider the "relative advantage, by way of contribution to economic development." This provision acknowledges that certain conduct associated with market power may, in fact, promote consumer welfare and should not be automatically penalised.

The **Raghavan Committee Report (2000)**,[12] which laid the foundation for the Act, also adopted this **effects-oriented approach**, posing questions such as: "How will the practice harm competition? Will it deter entry? Do consumers benefit from lower prices and greater availability?" Parliament carried forward this approach, and nothing in the statutory language suggests an automatic or irrebuttable presumption of abuse.

Furthermore, the Parliament clearly adopted an **effects-oriented approach**, and the statutory text of Section 4 of the Act does not support any notion of an irrebuttable presumption. The Supreme Court has consistently rejected extremely strict rules, even when the statute explicitly provides for the presumption of harm. For instance, in *Rajasthan Cylinders v Union of India*,[13] the Court held that the presumption of appreciable adverse effect on competition (AAEC) under Section 3(3) of the Act is **rebuttable**. By that logic, a presumption that is not even explicitly

[11] The Competition Act, 2002 (12 of 2003) s 19(4)(l).
[12] The Raghavan Committee
[13] *Rajasthan Cylinders v Union of India* (2020) 16 SCC 615.

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contained in Section 4 cannot be treated as conclusive. Thus, it would be incorrect to hold that a conduct is an abuse of dominance or anti-competitive merely because it has the likelihood of causing it since it cannot be presumed so.

Section 4(2)14 of the Act, framed as a "deeming provision" that automatically condemns specified practices, cannot be sustained in such absolute terms. Furthermore, Section 32 empowers the CCI to examine conduct outside India only when such conduct "has, or is likely to have, an AAEC in India." It would be illogical to mandate an effects-based analysis for foreign conduct while exempting domestic conduct from the same requirement. The legislature cannot be presumed to have intended such an inconsistency.

Economic analysis of Schott's conduct

The Supreme Court mandated the CCI to demonstrate how the alleged conduct adversely impacts competition, whether through price increases, output restrictions, or exclusion of rivals. The Court criticized the CCI for failing to meet this standard, highlighting its reliance on outdated evidence and its disregard of data indicating stable prices and robust competition. The **majority decision of the CCI** claimed to have conducted an effects-based analysis but presented no economic evidence regarding price increases, output restrictions, or market foreclosure. In contrast, the **minority member of the CCI**, after examining converter sales, EBITDA, and price data from FY 2007-08 to FY 2011-12, concluded that (i) all independent converters experienced growth in output and margins, and (ii) pharmaceutical buyers paid the same or higher prices for containers from the joint venture compared to other converters. This evidence **undermines any assertion of competitive harm**.

Decision

The Court held that conducting an **effects-based analysis** is essential for every examination under **Section 4** of the Act. The CCI's reliance on unverified statements and outdated correspondence meant it **did not properly evaluate potential harm** and the evidence considered by COMPAT, showing growth among converters, stable prices downstream, and no market foreclosure demonstrated that there was **no appreciable adverse effect on competition**. Consequently, the Court found that the **absence of a thorough harm assessment rendered the CCI's order invalid**.

[14] The Competition Act, 2002 (12 of 2003) s 4(2).

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The Supreme Court's ruling in Schott Glass firmly establishes effects-based analysis as a necessary component of inquiries under Section 4, emphasizing that competitive harm must be demonstrated through economic evidence rather than assumed from the nature of conduct alone. The judgment narrows the scope for automatic findings of abuse and reinforces that dominance is not unlawful per se. By insisting on measurable indicators such as price effects, output trends, and market foreclosure, the decision raises the evidentiary threshold for enforcement and encourages a more rigorous, economically informed approach by the CCI in future abuse of dominance cases.

***Alphabet Inc. & Ors. v Competition Commission of India & Anr.*[15]**

The NCLAT gave a broader and more practical perspective to effect-based analysis, by deciding on the core issue if the analysis includes both proof of conduct leading to actual restriction as well as conduct which is capable of restricting competition, or not. It came to the conclusion that in an **effects-based analysis**, the CCI must consider both:

(i) conduct by a dominant firm that has **already caused anti-competitive effects**, and

(ii) conduct that is **capable of causing such effects in the market**. Effect analysis should not be limited only to actions that have produced actual harm. If a dominant entity's conduct is likely to **restrict competition**, it can also be examined to determine abuse.

Accordingly, the effect analysis should encompass both actual harm and potentially harmful conduct. **However**, it is important to note that a forms-based approach was not taken, since the caveat was that the conduct under review must have **already occurred**. No violation can be established based solely on hypothetical or future actions. In essence, an effects-based assessment must examine whether conduct has **caused actual harm** or is **capable of producing anti-competitive effects**.

The judgement was reached by analysing balancing the principles of formalistic approach and effect-based approach in numerous other case laws.

[15] *Alphabet Inc.* Case (n 5).

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Firstly, when a dominant company imposes **unfair conditions** in a business-to-business (B2B) deal, it is treated as *exploitative conduct*. To assess this, a **fairness or reasonableness test** is applied. This means looking at two things:

1. How the condition impacts the other businesses dealing with the dominant firm, and
2. Whether the dominant firm had any **valid or necessary reason** to impose such a condition.[16]

The judgment also referred to the Report of the Competition Law Review Committee (July 2019), which had examined the scope of effect analysis under Section 4(2) of the Competition Act. The Committee observed that effect analysis by the CCI already falls within the framework of Section 4(2), and therefore, no amendment to the provision was necessary. It found it consistent with global standards and concluded that the current text of Section 4(2) does not hinder the CCI's ability to assess effects in abuse of dominance cases. At the same time, it cautioned that since effects analysis may not be necessary in every form of abuse, such as exploitative abuse, it should not be made a mandatory requirement. Accordingly, no legislative amendment was recommended.

The NCLAT, while considering the issue, referred to the Competition Law Review Committee Report (July 2019), which had examined the scope of effect analysis under Section 4(2) of the Competition Act. The Committee observed that effect analysis by the CCI already falls within the framework of Section 4(2), and therefore, no amendment to the provision was necessary. It found it consistent with global standards and concluded that the current text of Section 4(2) does not hinder the CCI's ability to assess effects in abuse of dominance cases. At the same time, it cautioned that since effects analysis may not be necessary in every form of abuse, such as exploitative abuse, it should not be made a mandatory requirement.

Drawing upon foreign antitrust jurisprudence, the Court reached this balance perspective of assessment of abuse of dominance and anti-competitive effects in cases. While acknowledging decisions wherein it is enough to establish that the conduct of a dominant undertaking has a tendency to restrict competition or is capable of producing such an effect, even if actual harm has not yet materialized,[17] the Court also contemplated the decision in another judgement where it was held that to determine the presence of anti-competitive effects in such circumstances, it

[16] *Indian National Shipowners' Association (INSA) v Oil and Natural Gas Corporation Limited (ONGC)* 2018 SCC OnLine CCI 47.
[17] *Tomra Systems ASA v Commission* (Case C-549/10 P) Commission Decision 549/10/ECLI [2012].

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is essential to examine whether the pricing policy without any objective justification results in an **actual or potential exclusionary** effect that ultimately harms competition and, consequently, consumer interests.[18] Lastly, In *Intel v. Commission*,[19] the Court clarified that where an undertaking, supported by evidence, argues that its conduct was incapable of restricting competition or producing the alleged foreclosure effects, the Commission must go beyond a superficial assessment. In such cases, the Commission is required not only to examine the scope of the undertaking's dominance, the market share affected by the impugned practice, and the terms, conditions, duration, and amount of the rebates, but also to evaluate whether the conduct reflects a strategy intended to exclude competitors who are at least as efficient as the dominant firm.

It also placed reliance on its own decision in ***Google LLC & Anr. v Competition Commission of India & Ors*** which affirmed the pertinency of carrying out an effect-based analysis and the statutory scheme of the Act which highlights its core objectives: to establish a Commission aimed at preventing practices that adversely affect competition, to promote and sustain healthy competition in the market, to safeguard consumer interests, and to ensure freedom of trade. The NCLAT held that "effect analysis" must encompass both conduct that has resulted in actual harm and conduct that is likely to have an adverse impact on competition.

The ruling refines the contours of effects-based analysis by recognising that anti-competitive effects may be actual or potential, provided that the conduct under review has already occurred and is capable of producing competitive harm. This strikes a balance between strict formalism and overly demanding proof requirements, allowing early intervention without relying on speculative or hypothetical conduct. The decision contributes to a developing hybrid standard under Section 4, where authorities must evaluate market impact while retaining flexibility to address exclusionary strategies before irreversible harm materialises.

European Union's Stance on Effect-Based Analysis

Forms-Based Approach

Initially, the European Commission (EC) and the Court of Justice of the European Union (CJEU) followed the formalistic approach to competition law, where greater emphasis was placed on the legal form or classification of conduct rather than on its actual effects. This

[18] *Post Danmark A/S v Konkurrenceradet* (Case C-209/10) Commission Decision 209/10 [2012].
[19] *Intel v Commission (Case C-413/14 P)* Commission Decision 413/14 [2016].

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approach was particularly evident in the enforcement of Article 102 of the Treaty on the Functioning of the European Union (TFEU), which deals with the prohibition of abuse of dominant position.

In the *Hoffman-La Roche*,[20] the CJEU held that exclusive dealing arrangements and rebates tied to customers sourcing all or most of their requirements from a dominant firm were per se unlawful. In effect, the Court considered it immaterial whether such practices generated actual or potential anti-competitive effects or whether any efficiency justifications could offset them. By the mid-1990s, the European Union's competition law framework began to evolve in response to mounting criticism, initially directed at the treatment of vertical restraints. Gradually, these concerns extended to the interpretation of Article 102 TFEU, prompting the emergence of what came to be known as the "more economic approach."

Step towards effect-based economic analysis

Subsequently, the EC revisited its enforcement policy under Article 102 TFEU, which culminated in the adoption of the 2009 *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*.[21] The Guidance Paper clarified that the Commission would generally intervene against exclusionary practices by dominant firms only where compelling evidence demonstrated that such conduct was likely to result in foreclosure, thereby causing consumer harm. This signalled a decisive move toward an effects-based analysis, wherein courts started paying more attention towards actual evidence of economic reasoning and impact on competition.

In relation to price-based exclusionary practices such as predatory pricing, margin squeeze, and loyalty rebates the Guidance Paper proposed applying the *as-efficient competitor (AEC) test*. This test seeks to determine whether the impugned conduct is capable of producing anti-competitive effects by assessing whether an equally efficient competitor could compete under the same conditions. The evaluation, it emphasized, must rest on reliable economic data concerning costs and sales prices.

[20] *Hoffmann-La Roche v Commission (Case C-85/76) Commission Decision 85/76 [1979] paras 89–90.*
[21] Official Journal of European Union, '*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings'* (*EUR-Lex*, 24 February 2009) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2009_045_R_0007_01> accessed 6 September 2025.

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In *Intel v Commission*,[22] the General Court upheld a strict stance on exclusivity rebates, treating them as unlawful unless the dominant firm could demonstrate an objective justification. This formalistic approach, however, drew significant criticism, as there was growing consensus against applying rigid *per se* rules to unilateral conduct. The Court of Justice, on appeal, **partially shifted this position**. The Court introduced an important **qualification**: where a dominant undertaking provides evidence during the proceedings that its conduct was not capable of restricting competition or producing foreclosure effects, the Commission must evaluate such claims.

This clarification effectively established that exclusionary practices are not automatically abusive under Article 102 TFEU. Instead, they can only be condemned if they are shown to be capable of harming competition, particularly by foreclosing as-efficient competitors. The Court emphasizing that conduct can be classified as abusive only when, based on all relevant circumstances, it is capable of restricting competition and producing exclusionary effects.

Where the intent of a dominant undertaking's conduct cannot be directly linked to harming competition, the Court of Justice has consistently held that such conduct can only be deemed abusively exclusionary under Article 102 if it is shown to have an actual or likely effect of restricting or distorting competition. For instance, in *TeliaSonera*,[23] the Court clarified that to determine whether a margin squeeze amounts to abuse, it must be demonstrated that the practice has an anti-competitive impact on the market.[24] Similarly, in *Post Danmark I*,[25] the Court stressed that an assessment of potentially abusive pricing practices must consider "all the circumstances," including their likely effects, a principle reaffirmed in *Post Danmark II*.

This approach has also shaped the European Commission's decisional practice, which, for many years, has consistently sought to establish evidence of anti-competitive effects in its major cases.[26]

[22] *Intel* Case (n 21).
[23] *Konkurrensverket v TeliaSonera Sverige AB, (Case C-52/09) Commission Decision 52/09 [2011]*.
[24] Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021).
[25] *Post Danmark A/S v Konkurrenceradet*, (Case C-209/10) Commission 209/10 [2012].
[26] Damien Geradin and Stijn Huijts, 'Abuse of dominance: has the effects-based analysis gone too far?' (2024) 40(4) *Oxford Review of Economic Policy* 776–786.

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Shift in Position

By 2023, the European Commission (EC) appeared to be shifting its stance once again. It revised the Guidance Paper and released a Policy Brief entitled *"A Dynamic and Workable Effects-based Approach to Abuse of Dominance"* and announced that it will publish new guidelines on exclusionary abuses of dominance by 2025.[27] It said that cases such as *Post Danmark I and II*, *Intel* had reaffirmed the central features of an effects-based framework for assessing exclusionary practices by dominant firms.[28] Importantly, the EC clarified that this framework is grounded in the notion of "potential effects" requiring more than hypothetical concerns but not insisting on proof of actual harm in order to establish abuse under Article 102 TFEU.

The Policy Brief also highlighted the rationale for amending the Guidance Paper, noting that "anti-competitive foreclosure" should not be understood solely as conduct leading to the total exclusion or marginalisation of rivals. Instead, it also covers behaviour that weakens the overall competitive fabric of the market, even if it falls short of full exclusion. While the "as-efficient competitor" (AEC) standard remains significant, the EC recognised that in some situations the role of less efficient competitors may also deserve protection under Article 102 particularly where the structure of the market or high entry barriers make the development of AECs unlikely.

The European Commission has cautioned that an excessively rigid application of the effects-based framework may raise the threshold for intervention to such an extent that effective enforcement against anti-competitive practices becomes disproportionately difficult, if not unattainable. In light of its 2023 policy announcements, it can be suggested that the Commission is shifting away from the strict "more economic approach" at the very moment when the EU Courts appear increasingly receptive to it.

The European Union's experience offers important lessons for the Indian competition law framework. First, the gradual transition from rigid form-based presumptions toward a

[27] European Commission, press release, 'Commission announces guidelines on exclusionary abuses and amends guidance on enforcement priorities', 27 March 2023, retrieved from https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1911.
[28] Competition Policy Brief, 'A dynamic and workable effects-based approach to abuse of dominance' (European *Commission*, March 2023) < https://competition-policy.ec.europa.eu/system/files/2023-03/kdak23001enn_competition_policy_brief_1_2023_Article102_0.pdf > accessed 06 September 2025.

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structured effects-based assessment demonstrates the value of integrating economic analysis without abandoning legal certainty. India can draw from this approach by developing clearer analytical standards that allow early intervention where conduct is capable of producing anti-competitive effects.

At the same time, the EU experience also highlights what should not be imported uncritically. Excessive reliance on complex economic tests, such as a rigid application of the as-efficient competitor standard, may raise enforcement thresholds and create uncertainty for regulators and businesses alike. For India, where markets are still evolving and enforcement capacity continues to develop, a balanced model that combines doctrinal clarity with proportionate economic assessment may prove more suitable than a purely economics-driven framework.

This approach was further solidified in *Post Danmark A/S v Konkurrenceradet*[29] in which in light of these considerations, it was clarified that Article 82 EC cannot be interpreted to mean that a dominant undertaking engages in exclusionary abuse merely because it charges certain key customers of a competitor prices that fall below average total costs but remain above average incremental costs. To determine whether such conduct constitutes abuse, it is necessary to examine whether the pricing policy, absent any objective justification, produces actual or likely exclusionary effects that harm competition and, consequently, consumer welfare.

Analytical Framework: Towards a Hybrid Effects-Based Standard

The discussion above reveals that neither a purely form-based nor a purely effects-based approach provides a complete solution for abuse of dominance analysis. A strictly form-based model risks over-enforcement by condemning conduct without examining its market impact, while an excessively economics-driven approach may delay intervention until competitive harm becomes difficult to reverse. The emerging trajectory in Indian jurisprudence suggests the development of a hybrid framework that combines structured legal presumptions with evidence-based economic assessment.

Under such a framework, certain categories of conduct by dominant firms may justifiably trigger closer scrutiny, but liability should ultimately depend on whether the conduct causes or is capable of causing anti-competitive effects. This approach allows enforcement agencies to

[29] *Post Danmark* case (n 27).

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intervene at an appropriate stage without relying on speculative or purely hypothetical harm. At the same time, it preserves legal certainty by ensuring that economic analysis is guided by clear doctrinal principles.

The hybrid model also aligns with comparative experience, particularly the European Union's gradual movement away from rigid formalism while avoiding an overly technical economic threshold that may undermine effective enforcement. For India, adopting such a framework would reconcile the objectives of protecting competition, promoting innovation, and maintaining predictability for market participants.

Suggestions – The Way Forward

Despite the increasing emphasis on economic analysis, certain gaps remain in the application of the effects-based approach under Section 4. At present, market inquiries often begin with an assessment of market share, which plays a decisive role in determining dominance. However, modern economic theory indicates that greater attention should be given to entry barriers in the market. The "market leaders theory" highlights that enterprises are more likely to adopt aggressive strategies when barriers to entry are high, as such barriers allow them to protect their position with less competitive pressure. This theory suggests that regulatory intervention should be prioritised in markets with high entry barriers, and only then should effects analysis be applied, since aggressive conduct in such contexts is more likely to harm consumers.

To strengthen the framework, a number of measures can be considered. First, clear and uniform guidelines should be developed to bring consistency and certainty in evaluating anti-competitive effects. Competition authorities should also build institutional capacity by enhancing their expertise in economic assessment, including the involvement of economists in complex cases. Greater collaboration among competition authorities at national and international levels would help promote harmonisation and reduce uncertainty for businesses. Further, comprehensive market studies to assess entry barriers and overall market dynamics would be valuable in shaping appropriate interventions in abuse of dominance cases. By doing so, authorities can identify structural risks and tailor enforcement strategies accordingly.

Finally, revisiting the **Competition Amendment Act, 2023** to expressly incorporate an effects-based standard in Section 4 would provide a clear legal foundation for a more nuanced, economically informed approach to enforcement.

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Conclusion

The shift toward an effects-based analysis under Section 4 of the Competition Act marks a significant doctrinal transition in Indian competition law. However, the central challenge is no longer whether effects-based analysis should apply, but how it should be structured to ensure both effective enforcement and legal certainty.

Recent judicial decisions indicate that Indian courts are moving toward a hybrid standard that rejects automatic presumptions of abuse while allowing intervention where conduct is capable of distorting competition. The future development of abuse of dominance jurisprudence will therefore depend on whether regulators and courts can articulate consistent analytical standards that balance economic reasoning with predictable legal rules.

Ultimately, the convergence of Indian competition law with global practices underscores the Act's twin goals of preventing anti-competitive practices while fostering economic growth and consumer welfare. The recognition that exclusionary and exploitative abuses should be evaluated through the lens of their effects, whether actual or potential, ensures a balanced enforcement regime that protects both the integrity of markets and the interests of consumers, without stifling legitimate competitive behaviour.

While the European Commission's Guidelines on abuse of dominance recognise the importance of an effects-based approach, they fall short of addressing the deeper concerns highlighted by modern economic theories.

In practice, the adoption of an effects-based approach has been inconsistent. For India, which aspires to be a global leader in business and enhance ease of doing business, comprehensive reforms are essential. By embedding an effects-based framework and implementing the suggested measures, Indian competition law could more effectively tackle the challenges posed by unfair practices of dominant enterprises. Such a model would help maintain the right balance between promoting competition, protecting consumer welfare, and acknowledging the potential efficiencies that pro-competitive behaviour can generate.

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