

THE CRITICAL ANALYSIS OF THE COMPETITION LAW IN INDIA: WITH SPECIAL REFERENCE TO THE ABUSE OF DOMINANT POSITION

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ABSTRACT

Dominance in law implies that a firm has a high degree of immunity from the normal disciplining forces of rival's competitive reactions and consumer behavior .on the other hand, dominance as an economic concept is associated with the notion of market power. The Indian Competition Law, the Competition Act of 2002, like other modern competition laws covers agreements, abuse of dominant position and mergers. Under the Competition Act of India, section 4 deals with Abuse of Dominance or dominant position by an enterprise or a group. The ultimate concern of the competition law is about market power and its abuse. The Law of Competition in India seeks to ensure fair competition by prohibiting trade practices which cause appreciable adverse effect on competition in markets within India. Market power is used to mean the ability of enterprises to raise price above the level that would prevail under the competitive conditions. The Competition law prohibits the use of market controlling position to prevent individual enterprises or a group from driving out competing businesses from the market as well as from dictating prices. The concept of abuse of dominant position of market power refers to anticompetitive business practices in which dominant firm may engage in order to maintain or increase its position in the market. Theoretical Research methodology has been used in this paper to conduct the study. This paper includes a study on what is dominance in market and how this dominant position is abused it also deals with collective dominance and the concept of predatory pricing.

Keywords: Dominance, Abuse of Dominant Position, Predatory pricing, etc

INTRODUCTION

There is nothing like “Pure” or “perfect” competition as expressed in a theoretical market structure. This is just a benchmark which is used to satisfy the actual working market structures. But in a situation where not the buyer or the seller has a direct implication over the price of the product or services it produces, the demand and supply are influenced by the price. The independent bargaining of buyers and suppliers is the way by which the price is established. None of the parties involved are not that financially big to have the market power to manipulate the price of a homogeneous product. Customers business which leads to competition forces the producers to battle for achieving the required needs for the same by innovating and developing new products. The Competition Act regulates to make a safe and fair environment which in turn prohibits or prevents the “abuse of dominance” by an „enterprise or undertaking“ for a smooth and healthy competition. The Competition Commission of India (CCI) in *Reliance Big Industries & Ors v Karnataka Film Chamber of Commerce & Ors*, held that only the actions of an „undertaking“ can be explained under the provisions of section 4 of the Competition Act. For the idea and the moral behind the Act, a person or a department of the government engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, would constitute an „enterprise“. To understand the existence of dominance we need to also understand the CCI’s definition of the relevant market as it differs from case to case, which is based on the kind of factual matrix. In the non presence of regulations for defining the relevant market, the CCI does not follow the general approach in delineating the relevant market. As such, the CCI has restricted the relevant geographic market to particular suburbs in some cases (such as *Belaire Owners’ Association v DLF Limited* and *Mr Om Datt Sharma v M/s Adidas AG & Ors*) and has, without any specific differentiation, defined the relevant market on an „all India basis“ in other cases. A narrow definition of the relevant market only facilitates establishing an entity’s dominance. Dominance on the other hand is dependent upon the position of economic superiority cherished by an undertaking, which gives it the power to prohibit any kind of efficient competition being followed in a relevant market by giving it the authority to act to an appropriate extent irrespective of its competitors. Dominance means acquiring the market power, which authorizes the undertaking to manipulate the price or its production independently of its competitors. Dominant position has to be determined in the relevant market and the factors for such determination are provided in the Act. On the face of it “Dominance” is not bad it is the

“Dominant position” which is prohibited by the law. The anti – competitive entrepreneur action encourages a dominant undertaking to involve it with practices, to increase its position in market. Competition rules and laws prohibit such kind of behavior, as it damages true spirit of competitions between the undertakings and exploits the relationship between them and consumers.

DOMINANT POSITION

“Overriding” or “influential” are the dictionary meanings to the term “Dominant.” Predatory in this sense on the other hand means dominating exploitation for acquiring financial purpose or gains. An undertaking holding a position which is “dominating” is only possible if it has the ability to behave independently or separately without the fear of its competitors, customers, suppliers and, the ultimate consumer. Market being held by such power of the dominating undertaking gives it the control of manipulating the price as per its wishes or needs. This will enable them to sell products or services of lower quality or lower cost of innovation below the level in which it actually exists in a competitive market.

Dominant position has two major aspects:

Firstly, dominant enterprise’s position such as it enables it to operate independent of competitive forces generated by its rivals. This is important because healthy competition among competitors promotes productive and allocate efficiencies and optimizes consumer surplus. So if an enterprise takes measures with intention to create entry barriers, drive out existing rivals, control output or price, it causes concerns.

Secondly, the aspect of dominance given in explanation (a)(ii) to section 4 of the Act relates to the ability of an enterprise to affect its competitors or consumers or the relevant market. In sense, this is higher degree of strength where an enterprise may be freely able to adopt price or nonprice strategy to overcome downward pressures on its profit from its competitor, or to capture or bind consumer or to create a market environment that would deter newer completion, both in terms of competing enterprises or rival products.

Determination of dominant position depends upon two main factors – market share and entry conditions. It is important to note that to achieve a dominant position by legitimate means, such

as through product innovation, superior production or distribution techniques or through greater entrepreneurial efforts. The Competition Commission of India has recognized certain conditions while determining the agreements dominant status as per section 19 of the Competition Act. The determination of the dominant position though market share, sales figures and active stock. But in most cases the market power is determined on the basis of the functional characteristics, of the products on the pattern of consumer behavior.

Section 19 basically highlights the duty on the Competition Commission to look at these aspects while dealing with the factors of dominant position by this we can conclude as to consider these crucial steps while establishing whether an enterprise holds a dominant position and whether it is abusing it

1. Defining the relevant market.
2. Assessing the market strength to ascertain whether the enterprise holds significant power.
3. Consider whether the conduct of the undertaking amounts to abuse.

ABUSE OF DOMINANCE

The idea of the concept of “abuse” is very objective as it relates to the behavior of the undertaking placing itself into the dominant position so as to influence the structure of a market. This results in the presence of the dominant entity in the market and the degree of competition is weakened by the recourse of methods undertaken by the entity which is different from those conditions which are generally normal in competition of products or services transactions of commercial operators. This has an effect which hinders the maintenance of a healthy degree of competition which is still existing in the market and the growth of that competition. The whole idea behind keeping a regulation or Act for the fair competition in the market is that a situation of monopoly on the face of it is not against public welfare policy but to use the same status in which it operates to the advantage of its full potential and in front of the actual competitors. The Act does not prohibit the undertakings to become the “dominant” player or having a “dominant” position. There is no physical control preventing the undertaking from becoming dominant or superior. The moral and goal of the Act is to prohibit the “Abuse” of the dominant position. The Act on the face of it prohibits “abuse of dominance” not “dominant position”.

This is the moral behind the Act which is fair and is a step towards an economy which is truly global and liberal. Therefore just because an undertaking withholds a position which is dominant does not mean it is breaking or not abiding by the law.

The “hugeness” of few undertakings is very natural and even essential, as because of this hugeness there is a need or requirement for industrial efficiency and innovation in marketing and production. The provisions of the Competition Act will interfere in market situations where the size of the undertaking affects the fair competition. An oligopolistic market needs these provisions under Section 4 to prevent these big undertakings from swiping out the independent and comparatively small businesses from the market and from dictating prices. An undertaking is said to have “abused its dominant position” when it directly or indirectly carries out unfair, bias and discriminatory market conditions, hence eliminating its competitors. It strengthens its position by abiding to unfair means which is outside the circle of a healthy competition driven market and equality. These are the few types of „abuse of dominant position’ situation analyzed as under

1. **Predatory Pricing-** As per section 4(b) of the Act it explains it as the practice by which the sale of goods or the provision of services, is at a rate of price which is lower the cost price with the view to reduce the competition or eliminate the competitors.
2. **Refusal to supply-** This practice involves purposefully withholding the supply of the product or service thus increasing the demand for the same and then forcing the customers to buy the product or service at a higher price thus manipulating the needs of the customer. This act of refusal has a major negative impact on the state of fair competition in the relevant market.
3. **Limiting Supply-** The practice of limited supply of products of luxurious and precious nature thus having the advantage of raising the price because of its scarcity. The appropriate example for this is the diamond market, though large quantities of them are in kept in storage, only a small quantity is only polished and made available to the customers, thus resulting in its high price.
4. **Barriers to entry or denial of the market assess -** Barriers to entry includes patent as well as strategic first mover advantages.
5. **A group of colluding multiple suppliers appreciably affecting the relevant market.**

INDIAN COMPETITION ACT

The Competition Act provides in section 4 for the prohibition of abuse of dominant position:

Section 4: Abuse of Dominant Position:

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,— (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or (b) limits or restricts— (i) production of goods or provision of services or market therefor; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market access; or (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation .—For the purposes of this section, the expression— (a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour;

(b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

The provision of the Competition Act in relation to abuse of dominant position clearly explains above that no undertaking or group shall abuse its dominant position. The dominant position is explained in the explanation to section 4 as a position of strength in the relevant market in India. The illustrations are inclusive and exhaustive. Section 4 explanation, raises many

possible ways by which such a strength could be used. These possibilities can be clearly examined separately or in a combined manner, depending upon the each of the facts of the case. The Explanation to section 4(2) (a) makes them immune from unfair or discriminatory trading situations or unfair or discriminatory prices rate or predatory pricing as referred in section 4(2) (a) (i) and (ii), preparing out those practices which are dominant in nature, from being referred as an “abuse of a dominant position” to meet competition. On the basis for this argument made by the undertakings who are involved in the competition and reformulating their trade practice strategies or plans to adhere to demand offer of competitors in a market as it grows, there is no abuse by any of the undertaking. They are only reciprocating to the changing market situations. for example, if rate of a product falls in the market, for reasons not none to the action of an undertaking, a decrease in the rate of the product by that undertaking to match its rate to the new rate cannot be tagged as unfair rating or predatory pricing. This explanation could be used as defense that may be used by one blamed for having abused a dominant position under section 4(2) (a). It should be noted that it is not available in the case of allegations of practices set out in section 4(2) (b) to (e).

INDIA’S POSITION AND CASES

There are many cases that have come up for consideration before the CCI regarding abuse of dominant position. Recently, a decision with far – reaching consequences was handed down by the CCI, involving all the major car manufacturers and suppliers in India. The issue was regarding restriction on completion by the car manufacturers on sale of spare parts in the downstream market.

Transportation sector Case: In Shri Shamsher Kataria two levels of market were identified. One is the primary market for sale of cars in India, and two aftermarkets, at secondary level, are market for sale of spare parts and market for „repair and maintenance services“. Original Equipment Manufacturers (OEM“s) argued that there is no such division as primary and secondary markets and there is only one “system market”. It was by the CCI observation the two aspects were determined so as to see the capability to affect competitors and consumers, market share and entry conditions. Regarding market share, it was noted by the CCI that OEM’s have 100 percent share in the aftermarket for their own brand of cars. This is because of the inter and intra-brand non substitutability of spare parts of one brand with other, due to high

degree of technical specificity. In the absence of substitutability, OEM's were shielded from any competitive constraints in the aftermarket from their competitors in the primary market. Moreover, through a network of contracts, OEM's became the sole supplier of their own brand of spare parts and diagnostic tools in the aftermarket and shielded themselves from any competition. This means that OEM's have 100% share in their own brand of cars.

Hospital Case: In Ramakant Kini, the DG suggested „provision of maternity services by super specialist hospitals“ to be the relevant product market and „area within a distance of 0-12km from OP hospital“ as the relevant geographical market. This was suggested by the DG on the basis of the inflow of patients from different wards to the hospital. The DG found that 63.70% of the maternity patients in the hospital were coming from certain areas. The opposite party, on the other hand, contended that relevant geographical market should not be bound to 12 km distance travelled, but should also include a catchment area where the patient has to travel 16-20km or roughly 12 crow flight(straight line), The CCI finally held relevant market to be of “provision of maternity services by super specialty /high end hospitals within a distance of 0-12km from the Hiranandani Hospital covering S, L, n, K/E, T and P/S wards of the Municipal Corporation of Greater Mumbai”. Thus CCI in this case concluded that the opposite party hospital is not dominant in the relevant market of „provision of maternity services by super specialty/high end hospitals within a distance of 0-12 km from the Hiranandani Hospital covering S, L, n, K/E, T and P/S wards of the Municipal Corporation of Greater Mumbai.

Power Sector: In In Re, Maharashtra State Power Generation Company Ltd., A number of complaints were filed against Coal India Ltd.(CIL) for abuse of dominant position. CIL along with its subsidiaries is clearly in a monopolistic position due to its statutory monopoly created under law. Complaints alleged that fuel supply agreements (FSA's) entered into by CIL with power-producing and other companies were one sided, without negotiations and were in favor of it. In this case CCI analyzed the market structure and legal and regulatory framework regarding the coal industry in India. The CCI noted that after the nationalization of coal mines in 1973, the coal industry was reorganized into two major public sector companies, viz. CIL and National Coal Development Corp.(NCDC), which have the main responsibility of supplying coal to all end users. CIL has eight subsidiaries. It concluded that CIL and its subsidiary companies have been vested with monopolistic power for production and distribution of coal in India. So coal companies have acquired dominant position and have no competitive pressure or horizontal challenge in the market.

The same was held in Ashoka Smokeless case too. Referring to various factors mentioned in section 19(4), the CCI found that the argument of CIL not being able to act independently regarding the supply and customers is misconceived. The CCI opined that CIL through its subsidiaries operates independently of market forces and enjoys undisputed dominance in the relevant market. This was reiterated in Madhya Pradesh Power Generating Co. Ltd.

Real- Estate Case: In Belaire Owners Association, the CCI determined the relevant market in the context of services of development or construction offered by the opposite party. While delineating relevant product market for service of construction, the underlying assets were analyzed from the point of view of the „residential“ and „high-end. Residential property, different from the non residential, may be of many kinds, such as standalone houses, builder-floors, apartments, row-houses, condominiums or studio apartments, etc. Despite some element of consumer preferences, these categories are interchangeable or substitutable to some extent, with reference to price range, geography, facilities and amenities. On the basis of these factors CCI held that DLF is fully capable of operating independently of competitive forces in the residential market and thus, the requirement of conditions laid down in explanation (a) (i) to section 4 is satisfied. DLF has the ability to influence the market itself in its favor. An announcement was made of several large projects by DLF Ltd. At one go can make its competitors react by holding some of their own projects to avoid market saturation. Similarly, prospective consumers may defer their demand in expectation of availability of projects to be offered by the market leader. Thus, DLF would be able to influence both supply and demand of projects in the relevant market. These possibilities indicate that DLF has a position of strength as envisaged in explanation section 4 (a) (ii) of the Act.

Sports case: In Surinder Singh Barmi there was a issue regarding the abuse of position by the BCCI, in the field cricket arose, wherein the informant, who claims to be a cricket fan, filed information under section 19(1)(a) alleging irregularities in the grant of franchise rights for team ownership, media rights for coverage of league and the award of sponsorship rights and other local contracts related to the organization of the Indian Premier League (IPL). To delineate the relevant market, the CCI looked at the characteristic features their relevance and substitutability of cricket. The CCI observed that their most significant source of dominance of the BCCI is its regulatory powers. Its monopoly in organization of cricket is axiomatic as it is the de facto regulator of the game. The CCI assessed the dominance of the BCCI in the market for organization of private professional leagues. BCCI's dominance also stems from its

role as an organizer of first class/international cricket events. Thus, owing to regulatory role, monopoly status, control over infrastructure, control over players, ability to control entry of other leagues (failure of ICL), the BCCI is concluded to be in a dominant position in the relevant market for organizing private professional league cricket events in India.

SOLVING THE PROBLEM OF ABUSE BY CCI

To an enterprise who is held to be abusing its dominant position, the Commission can do several things-

Firstly, it can direct the undertaking or enterprise to discontinue or stop such actions that may amount to abuse. (S.27(a)) of the Competition Act. For example the use of this power by the CCI can be found in cases like *In Re Shamsheer Kataria and Atos* in which the dominant parties were ordered to end and discourage the enterprises from involving in activities which had been found to be against section.4.

Secondly to Impose penalties of up to 10% of the average of the turnover for the last three preceding financial years. (S.27(b)) of the Competition Act. There has been a lot of concern about the provision as it provides no calculation but just the upper limit for the penalty, CCI is yet to formulate any guidelines on this issue.

Presently the CCI has overall discretion in calculation and assessment of penalties which needs to be imposed upon such persons or undertaking who are parties to such kind of abuse. The COMPAT (The Competition Appellate Tribunal) has put some prohibitions on the CCI in relation to awarding penalties which are related to it. COMPAT in the one instance has also admonished CCI for its action of awarding large penalty without explaining any reason for the same and recommended that it needs to be calculated on the basis of the 'relevant turnover'. So even in a case of where the abuse is done against a multi-product company, the turnover used to calculate the penalty against it would be the turnover from the kind of product or services which is in the contention, and not the overall turnover.

However, this irregularity is very rampant in this condition, when we talk about of the functioning of the CCI and the Appellate Authority, as for COMPAT has itself failed to adhere its own precedent of 'relevant turnover' in *M/s DLF Limited v Competition Commission of*

India &Ors. COMPAT did not restrain itself from assessing the penalty on the basis of DLF Limited's turnover which arose from the residential segment, regardless of the relevant market in the present case for 'high-end residential accommodation'. COMPAT withheld the penalty which the CCI collected on the basis of DLF's turnover pertaining to its entire business (i.e., the development of residential, office and commercial properties). Lastly, the Commission can pass any relevant order that it deems to cause the division of the dominant enterprise such that does not abuse its dominant position. (S.28)

CONCLUSION

The abuse of dominance is some way or the other is intruding with the competition in the changing demands of market place. In easy and clear terms it refers to the behavior of the undertaking which enjoys the dominant position, as per the Act. In actual sense dominant position means the authority or position of strength and superiority which is enjoyed by an undertaking enables it to perform independently of its competing forces which prevail in the relevant market. Such an undertaking or enterprise will be in a stature to ignore the market forces and unilaterally impose trading conditions, fix prices, etc. which is abusive and may result in the preventing any kind of competition, or the elimination of effective competition. Some of the various kinds of abuse are: price fixing, imposing discriminatory pricing, predatory pricing, limiting supply of goods or services, denial of market access, etc Abuse of dominant position is an important part of the constitution of modern competition authorities. For developing country like India, competition authorities who are regulating through the Competition Law rules, it is recommendable to deal with "abuse of dominance" on a priority basis. This question is very relevant in case of India as the Competition Commission of India has not yet started enforceable action yet on such an issue. Abuse of Dominant position cases should be taken up by authorities only if it has strong enforcement in. anti-competitive agreement and mergers. The new kind of competition issues faced by the authorities which invariably are faced by developing countries where infrastructure development is an ultimate priority. Abuse of dominance remains a main thrust area in view as there is a close link between essential facilities and infrastructure facilities. Infrastructure facilities tend to qualify as very essential facilities for the application of competition Law in view of the lumpy investment involved and the long gestation lag in creating infrastructure. Besides, Dominance is to be

determined by the Commission based on a number of factors which are either structural or behavioral in nature. The Act provides an exclusive list of abuses. It also takes cognizance of abuse by a group having dominant position in the relevant market. However, the relevant provision in the India law is distinct from the concept of collective dominance in EU law. The Indian law provides for effective and enforceable remedies against use of “abuse of dominant position”.

REFERENCES

1. T. Ramappa, *Competition Law In India: Policy, Issues, And Developments* (2nd Ed. 2009).
2. Avtar Singh & Harpreet Kaur, *Competition Law* (1st Ed. 2012).
3. Abuse Of Dominant Position, Legalservicesindia.Com (2002), [Http://Www.Legalservicesindia.Com/Article/Article/Abuse-O-Dominant-Position-729- 1.Html](http://www.legalservicesindia.com/article/article/abuse-o-dominant-position-729-1.html) (Last Visited Jun 22, 2002).
4. Abuse Of Dominant Position In Indian Competition Law: A Brief Guide, The Centre For Internet And Society (2017), [Http://Cis-India.Org/A2k/Blogs/Abuse-Of-dominant-Position-In-Indian-Competition-Law-A-Brief-Guide](http://cis-india.org/a2k/blogs/abuse-of-dominant-position-in-indian-competition-law-a-brief-guide) (Last Visited Feb 15, 2017).
5. Sneha Singh & Syed Ahmed, *Abuse Of Dominant Position Academike* (2015), [Http://Www.Lawctopus.Com/Academike/Perfect-Competition-And-Abuse-Of-Dominantposition/](http://www.lawctopus.com/academike/perfect-competition-and-abuse-of-dominant-position/) (Last Visited Feb 15, 2015).