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ABUSE OF DOMINANT POSITION - COMPETITION ACT, 2002

The object of the present Knowledge Bank Article is to look into the concept of Abuse of Dominant Position under the provisions of the Competition Act, 2002

After the dominance has been established, the next question which needs to be answered is whether the conducts of the alleged enterprise or group can be considered as abusive? Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/and an exploitative manner. The Act places a special responsibility on any enterprise which enjoys dominant position not to conduct its business in a manner prohibited under the Section 4(2). The Act gives an exhaustive list of practices that shall constitute abuse of dominance position and, therefore, stand prohibited. Such practices shall constitute abuse only when engaged in by an enterprise enjoying dominant position in the relevant market in India. In a layman's language, abusive conducts include all the acts of dominant undertaking which are a deviation from normal practice and result in hindering the maintenance or development of the level of competition still existing in the market. It must be noted that the acts prohibited under the section are not punishable per se, as the same acts will not amount to contravention of section 4 if committed by a firm not dominant in the relevant market. It also pertinent to point that list of acts under section 4(2) is exhaustive in nature and no action can be taken if the conduct of an undertaking does not fall within the subsection. It is not necessary to show that the abuse was committed in the market which the undertaking dominates. In certain circumstances, prohibition under section 4 may apply where an undertaking that is dominant in one market commits an abuse in a different but closely associated market.

Meaning of Abuse of Dominant Position under section 4 of the Act

Abuse of dominance is judged in terms of the specified types of acts engaged in by a dominant enterprise alone or in concert, and shall remain

prohibited. There is no need for any reference by the Commission to the adverse effect on competition (in Indian markets). Rather, any abuse of the type specified in the Act^[1] by a dominant firm shall stand prohibited.

The usual abuses of a dominant position are imposing discriminatory prices or trading conditions, predatory pricing, limiting supplies, exclusive dealing, denial of market access and such other anti-competitive practices. However, section 4 (a) to (e) has listed certain specific abuses of dominant position:

“There shall be an abuse of dominant position ^[2] [under sub-section (1), if an enterprise or a group],

(a) directly or indirectly, imposes unfair or discriminatory—condition in purchase or sale of goods or service; or

- condition in purchase or sale of goods or services; or
- price in purchase or sale (including predatory price) of goods or service.

Explanation-

For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service 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 condition or price which may be adopted to meet the competition.

(b) limits or restricts

- production of goods or provision of services or market therefor; or



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[1] Clauses (a) to (e) of sub section [2] Substituted by Competition (Amendment) Act, 2007 for “under sub-section (1), if an enterprise” (w.e.f. 20.05.2009)

- 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^[3] access [in any manner]; 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.

Thus, in brief, the Act specifies the following practices by a dominant enterprises or group of enterprises as abuses:

- Directly or indirectly imposing unfair or discriminatory condition or price in the purchase or sale of goods or services;
- limiting or restricting production of goods or provision of services or market;
- limiting or restricting technical or scientific development to the prejudice of consumers;
- denying market access in any manner;
- making 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;
- Using its dominant position in one relevant market to enter into, or protect, other relevant market

(a) Imposing unfair or discriminatory conditions or price (including predatory pricing) as an abuse of dominant position:

A dominant enterprise has been prohibited from imposing directly or indirectly any unfair or discriminatory conditions in purchase or sale of goods or services. The Act requires a dominant enterprise to act fairly and to treat like cases alike.

(b) Limiting or restricting production or technical or scientific development relating to goods or services as abuse of dominant position:

Limiting or restricting production of goods or provision of services or market thereof, technical or scientific development relating to goods or services to the prejudice of customers, shall be treated as abusive.

(c) Practice(s) resulting in denial of market access as abuse of dominant position:

A dominant enterprise shall not indulge in any practice or practices resulting in denial of market access in any manner. Any practice by the dominant enterprise which forecloses the market access to other market players or deter entry to new players shall be considered as abuse of dominant position by the Commission.

(d) Conditional contracts as abuse of dominant position:

Conditional contract by a dominant enterprise shall be abuse of dominance if conclusion of that contract is 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.

(e) Using dominant position in one relevant market to enter other relevant market as abuse of dominant position:

An enterprise using its dominant position in one relevant market to enter into, or to protect, other relevant market(s) shall be treated as having abused its dominant position.

Exploitative and Exclusionary Behavior

Abuses as specified in the Act fall into two broad categories:

EXPLOITATIVE-

These include the imposition of exploitative conditions to sale of goods or provision of services, such as excessive or predatory pricing, tying and bundling, leveraging, etc. and

EXCLUSIONARY-

These include actions or conduct that could result in the exclusion of competitors or new entrants from the relevant market, such as refusal or limitation of supply, denial of market access, etc.

Even though the wording of section 4(2) of the Act indicates that abuse of dominance is to be treated as a per se violation of competition law, exclusionary abuses by definition require the demonstration of the effect of exclusion or foreclosure from the market in order to establish the offence. The CCI has effectively brought in an effects-based test through case law by considering the effects on competition, the relevant market and consumers on account of the alleged abusive conduct.

In terms of standard of proof, the CCI stated in **Shri Sanwar Mal Agarwal vs. Punjab National Bank**^[4] that the informant is not only required to show or establish through reliable material or data that the opposite party has a dominant position in the relevant market but also that it has abused its dominance by indulging in the conduct enumerated under section 4(a) to (e) of the Act.

That in this case the information was filed by Shri Sanwar Mal Agarwal (“**Informant**”) who owns a small scale industrial undertaking which is engaged in the business of manufacturing and sale of steel utensils. It has been banking with the Opposite Party, Punjab National Bank (hereinafter referred to as PNB) for quite some years and PNB has granted various types of credit facilities to it. Informant had to cancel various export orders on account of sudden levy of export duty by the Government of India and consequently informant required the premature cancellation of the derivative transaction. In premature cancellation, the informant incurred some losses due to the adverse (upward) movement of US Dollar prices from July, 2008 onwards on account of the difference between USD price at the time of booking and at the time of such premature cancellation of forward contract. Therefore, the Informant formally approached the Banker with the restructuring proposal to fund/finance the loss of Rs.1.40 crores arising out of such premature cancellation as per the prevailing banking guidelines during August, 2008. It was alleged by the Informant that PNB by abusing its dominant position not only rejected the Informant's claim for compensation but also debited the losses to his account and declared his business unit as Non-Performing Asset (NPA) and has declared informant's unit as sick.

CCI after considering the material placed on record noted that, “no concrete material has been placed by the Informant before the CCI in order to enable it to infer that PNB is in a dominant position and any delay on its part to carry out the instructions of the Informant amounted to abuse of dominance. The delay on the part of PNB in providing banking cover is alleged to have affected the Informant with adverse financial consequences as the PNB failed to take decisions either regarding extending the credit limit or in cancelling the derivative future transactions entered into by the informant within a reasonable time frame. The unconscionable delay on the part of the PNB to the detriment of the Informant by itself cannot, however, lead to the conclusion that it has violated section 4 of the Act relating to the abuse of dominance. Such actions on the part of PNB may amount to deficiency in services but that is not equal to abuse of

[3] Inserted by Act 39 of 2007, sec. 3(ii) (w.e.f. 20.05.2009)

[4] CCI Case No. 8 of 2010 decided on 18 th March 2010.

dominant position. Element of abuse of dominant position definitely stands at a higher and onerous position than the deficiency in services”.

Therefore, it was held by CCI that, “for establishing the contravention of section 4 of the Act, the Informant is not only required to show or establish by reliable material or data that PNB was enjoying the dominant position in the relevant market but also that it has abused that position by indulging into acts or practices enumerated under section 4(a) to (e). In absence of any cogent material, only assertion of such abuse will not bring the action of the PNB within the purview of the infringement of said section. Thus, the information filed by the Informant was held to be not maintainable under the Act”.

In terms of standard of evidence required to prove dominance, the CCI has relied on publicly available data or industry reports which indicate that the impugned enterprise has a dominant position in the relevant market, as has been held in **Rupesh Sarabhai Patel vs The Oriental Insurance Company**.^[5]

In this case information was filed by Mr. Rupesh Sureshbhai Patel (“**Informant**”) who is the holder of certain insurance/mediclaim policies from The Oriental Insurance Company Ltd. (“**Opposite Party**”). The information alleges abuse of dominant position by the Opposite Party by influencing the market conditions and restricting the competition between the Third-Party Administrators (“**TPA’s**”). The Informant is skeptical of the procedure/standard adopted by the Opposite Party in selecting and appointing TPA’s.

It has been alleged by the Informant that the Opposite Party had shortlisted 8 TPA’s out of 15 existing TPA’s for empanelment without following any reasonable selection criteria. It has randomly empaneled these TPA’s without considering other TPA’s in the market or inviting bids. Basis and criteria of short listing and selection has not been disclosed. The TPA’s which are not capable of handling the job have been selected, resulting in various complaints being filed against the Opposite Party. That the Opposite Party shares a dominant position in the health and general insurance market and is abusing such dominant position to favour a few TPA’s without realizing the ramifications of its actions on the consumers and the market at large.

CCI after considering the material placed on record held that, “as there is no material available on record or on the public domain that the Opposite Party is enjoying a position of strength in the relevant market which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. Thus, the Opposite Party cannot be said to be in a dominant position in terms of explanation (a) to section 4 of the Act”.

The dominant position of an enterprise is a question of fact to be determined in each case, taking into consideration a number of relevant factors. Section 19(4) of the Act sets out the factors that ought to be taken into consideration by the Commission while inquiring into the question whether an enterprise enjoys a dominant position, within the meaning of section 4. An enterprise may acquire a dominant position over a period of time by its own efficiency in running the enterprise and also by the way the market evolves. Acquiring a dominant position is not prohibited, only its abuse is prohibited. As is evident from the precedents, the CCI’s evidentiary standards for proving the dominance and the abusive conduct require some fine-tuning and clarification, particularly in its delineation of the relevant market and application of predatory pricing. As competition jurisprudence in India evolves, it is expected that the CCI will rely on internationally accepted principles of competition law and focus on reasoned orders, as well as establish penalty guidelines, to ensure that its decisions are premised both, on the law and tenets of natural justice.

INTELLECTUAL PROPERTY RIGHTS AND ABUSE OF DOMINANT POSITION

Competition laws are framed with the intention of curbing abuse of market power by a dominant company. Further, competition law aims at eliminating monopolization of the production process thereby encouraging new firms to enter into the market. The maximization of consumer welfare and an increase in production value are some of the main objectives of competition law. On the other hand, Intellectual Property Rights Laws are monopolistic legal rights granted to the creators and owners of work which are a result of human intellectual creativity. These can be in varied fields such as industrial, scientific, literary and art. Intellectual Property Rights gives the owners the right to exclude others from using their invented subjected-matter for a limited period of time. Further, Intellectual Property Rights laws pertaining to copyrights, patents, trademarks, industrial designs and trade secrets prevent commercial exploitation of the innovation by others. Intellectual Property Rights grant the owner an advantage over the rest of the industry or sector. When this advantage or dominant position is abused it creates a conflict between Intellectual Property Rights and competition law.^[6]

Intellectual Property

Intellectual Property can be regarded as a single generic term that protects applications of novel ideas and information that are of commercial value. As per the Competition Act, Intellectual Property includes:

1. Copyright Act, 1957;
2. Patents Act, 1970;
3. Trade and Merchandise Marks Act, 1958 or the Trade Mark Act, 1999;
4. Geographical Indications of Goods Act, 1999;
5. The Designs Act, 2000;
6. Semiconductor Integrated Circuits Layout-designs Act, 2000.

Intellectual Property Rights and Market Power/Dominant Position

Intellectual Property Rights provide exclusive rights to the holders to perform a productive or commercial activity. But this does not automatically include the right to exert restrictive or monopoly power in a market. An Intellectual Property Right generates market power. The potential pejorative character of the power may be unjustifiably great because of public policies like the encouragement of inventions. On the other hand, if investment of resources to produce ideas or to convey information is left unprotected, the competitors may take advantage and benefit by not being obliged to pay anything for what they utilize. This may result in lack of incentives to invest in ideas or information and the consumer may be correspondingly poorer. What is called for is a balance between abuse of market power and protection of the property holders’ rights.

Intellectual Property Right lessens competition while competition law engenders competition. A workable solution can be predicated on the distinction between the existence of a right and its exercise. In other words, during the exercise of a right, if a prohibited trade practice is visible to the detriment of competition in the market or consumer interest, it ought to be assailed under the competition law.^[7]

Section 4 of the Act has a wide scope and application as a lot of anti-competitive activities come to its fold. An enterprise, which enjoys dominant position by virtue of the Intellectual Property Rights, if it engages in conduct considered abuse in terms of section 4, shall not enjoy any immunity. Any Intellectual Property Rights holder could be indicted under this section for

[5] CCI Case No. 53 of 2010 decided on 3 rd December 2010

[6] <http://www.legalserviceindia.com/article/I307-Competition- Law-and- Intellectual-Property- Laws.html>

charging excessive prices, unfair and discriminating conditions. An extension of exclusivity to a product that is unsupported by Intellectual Property Rights and non-use of an Intellectual Property Rights to the consumers can be grounds for proceeding against an enterprise under Section 4.

Intellectual Property Rights, by their very nature, create a form of monopoly or, in other words, a degree of economic exclusivity. The creation of that legitimate exclusivity, however, does not necessarily establish the ability to exercise market power. Even in case it does confer market power, that dominant position in the market does not by itself constitute an infringement of competition law nor does it impose on the Intellectual Property Rights holders the obligation to license that property to others. Besides, competition authorities are normally concerned with the abuse of the dominant position, whatever the source of such dominance, rather than with any abuse of Intellectual Property Rights. Much, however, also depends on the facts of each case involved.

An issue was raised in the Hon'ble Delhi High Court in the case of **Hawkins Cookers Limited vs. M/s. Murugan Enterprises**.^[8] Hawkins Cookers Limited (“**Appellant**”) is the owner of the trademark “Hawkins” and uses it on several products including pressure cooker gaskets. Murugan Enterprises (“**Respondent**”), manufacturers, among other things gaskets for pressure cookers and uses the Hawkins trademark in respect of parts of pressure cookers to establish compatibility.

The Appellant alleged that by so writing on the packaging material, the Respondent is infringing upon its registered trademark. It is the case of the Appellant that the gaskets pertaining to pressure cookers are not manufactured by the Respondent for any particular brand of pressure cooker, much less Hawkins Pressure Cookers and that the gaskets of pressure cookers can fit any pressure cooker manufactured by any manufacturer, for the reason all pressure cookers have the same dimensions of the mouth and hence the lid size, the only correlation is to the capacity of a pressure cooker i.e. 1 liter, 2 liter etc. Thus, the Appellant contended that the Respondent cannot use the word “Hawkins”, which is the trademark of the Appellant, in relation to the goods gaskets, forming part of Hawkins pressure cookers for the reason it is not reasonably necessary for the Respondent to indicate that the gasket manufactured by it is adaptable to the pressure cookers manufactured by the Appellant.

The Respondent in its arguments before the court stated that it had its own well-established trademark “Mayur” with a prominent peacock displayed on its product packaging.

The Delhi High Court in this case held that, “no reasonable person or purchaser could assume a trade connection between the “Mayur” brand of gaskets and the “Hawkins” brand of pressure cookers. Further, the court opined that in this case the Respondent neither sought to benefit from Hawkins’ trademark nor did it try to show a connection between the two. Additionally, the court opined that the Respondents’ use of the “Hawkins” mark was only to show the suitability of the product to be used as an ancillary product in a Hawkins pressure cooker and that such use would evidently fall within the exception carved out under Section 30 of the Trademarks Act, 1999. Further, the use of the trademark in relation to the product is reasonably necessary to indicate the fitness of the gaskets for the “Hawkins” brand of pressure cookers”.

In the Hawkins case, Justice Kaul also pointed out that “the object of filing of the suit thus appears to be to create a monopoly over such (gaskets) ancillary items so that no third party is able to sell the same in the market.” The judge also went on to point out that the use of the “Hawkins” trademark on the gaskets packaging would have been infringing if it had been used as a trademark. Since Respondent’s use of the “Hawkins” mark

was only indicative and is not being used as a trademark there would be no question of infringement.

The Delhi High Court Judgment in the Hawkins case reflects on the fact that dominant firms cannot be encouraged by courts if they are found to abuse their dominance by creating a monopoly in the market thereby affecting the market share of smaller and/or firms who are in direct competition with such dominant firms.

Penalty Provisions

The Commission is empowered to inquire into any unreasonable conditions attached to the IPR agreements and can impose penalty upon each of such right holder or enterprises which are parties to such agreements or abuse of dominant position (Section 27):

(a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be;

(b) impose such penalty, as it may deem fit which shall be not more than ten percent. of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:

Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher.

(c) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;

(d) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;

(e) pass such other order or issue such directions as it may deem fit.

Provided that while passing orders under this section, if the Commission comes to a finding, that an enterprise in contravention to section 3 or section 4 of the Act is a member of a group as defined in clause (b) of the Explanation to section 5 of the Act, and other members of such a group are also responsible for, or have contributed to, such a contravention, then it may pass orders, under this section, against such members of the group.

In case of abuse of dominant position under section 4 by virtue of an IPR by an enterprise, in addition to the above penalties, the Commission has the power to order division of enterprise under section 28.

Innovation has always been a catalyst in a growing economy resulting in more innovation. The advent of fresh innovations gives rise to healthy competition at macro as well as micro economic levels. Intellectual Property Rights laws help protect these innovations from being exploited unlawfully. In view of this Intellectual Property Rights and Competition laws have to be applied in tandem to ensure that the rights of all stake holders including the innovator and the consumer or public in general are protected. The common objective of both policies is to promote innovation which would eventually lead to the economic development of a country however this should not be to the detriment of the common public. For this the competition authorities need to ensure the co-existence of competition policy and Intellectual Property Rights laws since a balance between both laws would result in an economic as well as consumer welfare.

[7] http://competitioncommission.gov.in/advocacy/PP-CCI_IPR_7_12.pdf

[8] (2012) 189 DLT 545