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DOMINANT POSITION –MARKET - SECTIONS 2 (R), 2 (S) AND 2(T) OF THE COMPETITION ACT, 2002

The object of this Knowledge Bank Article is to discuss the concept of Market under the Competition Act, 2002

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Dominant Position – Relevant Market

A dominant position is always with reference to a relevant market, both the relevant product and relevant geographic markets. The CCI will have to make inquiries if the enterprise is dominant in the relevant product and relevant geographic markets.

'Relevant Market' under Section 2 (r) means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

'Relevant Market' refers to the line of commerce in which competition has been restrained and to the geographic area involved, defined to include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the near term if the restraint or abuse raised prices by a not insignificant amount. In simple terms, relevant market identifies the particular product/ service or class of products produced or services rendered by an enterprise(s) in a given geographic area. Identification also includes identification of enterprises that compete to supply those products or services.

A relevant market has therefore two fundamental dimensions, product and geographic. The product market describes the good or service. The geographic market describes the locations of the producers or sellers of the product or service. Relevant market is defined by consumer or purchaser preferences and actions. For instance, if purchasers consider two goods to be close substitutes or readily interchangeable, those two goods are considered to be in the same relevant market. As an illustration, butter and margarine can be considered to be in the same relevant market. In contrast, even if producers/ sellers consider two goods to be very similar on the ground that they are manufactured on the same machines, the goods may not be in the same relevant market. As an illustration, even if 13–inch automobile tyres and 14–inch automobile tyres are made on the same machine, purchasers do not substitute between 13-inch and 14-inch tyres and thus the two sizes are in two different relevant markets.

As such, the breadth of the relevant market definition is an important factor in establishing whether an enterprise is dominant or not. A classic example is the case of real-estate major, Belaire Owner's Association vs. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana[1] (**the DLF case**).

Belaire Owners' Association ("**Informant**") filed this complaint against three Respondents namely, DLF Limited, HUDA and the Department of Town and Country Planning, Haryana. The Informants alleged that DLF Ltd. had abused its dominant position by imposing highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the Housing Complex 'the Belaire', which has serious adverse effects and ramifications on the rights of the allottees.

The CCI while defining the relevant market in this case first established that DLF was providing services of a developer/builder as defined under the definition of "service" provided under section 2(u) of the Act. Once the nature of service was determined, the CCI next moved to define the relevant product and geographic market. The CCI noted from the investigation report submitted by the DG Investigation that the nature of service being provided by DLF was described as services of developer/builder in respect of "high-end" residential building in Gurgaon. The relevant market definition had two important components "high-end" and "residential". "Gurgaon" was defined as the relevant "geographic market".

Terms like "high-end" or "affordable" are relatively and therefore it was felt necessary to establish a clear and logical interpretation of the term "high-end". The CCI in its order noted "that "high end" is a complex mix of factors such as size, reputation of the location, characteristics of neighborhood, quality of construction etc. However, the most significant characteristic of a "high-end" has to be the capacity of the buyer to pay the price for buying the "high-end" residential apartment".

The CCI after it defined the relevant product market examined the relevant geographic market and defined Gurgaon as relevant geographic market. The CCI was of the view that, "a decision to purchase a high-end apartment in Gurgaon is not substitutable by a decision to purchase any apartment in any other geographical location because Gurgaon possess certain unique geographical characteristics such as its proximity to Delhi, proximity to Airports and a distinct brand image". The CCI was of the view that a decision to fix a residence depends on several factors ranging from occupation to children's education, family, friends, surroundings, amenities, quality of life etc. The CCI also observed that, "a residential property is by nature immovable, and the preference of residential property is generally not interchangeable or substitutable, therefore a small, 5 % increase in the price of an apartment in Gurgaon would not make the person shift his preference to other location".

The CCI concluded that the act of DLF Ltd. was in contravention of Section 4 (2) (a) (i) of the Act in particular on account of the size and resources that DLF Ltd. had and the duration for which the abuse had continued leading to great advantages for DLF Ltd. and immense disadvantages to consumers.

The CCI imposed a penalty at the rate of 7% of the average of the turnover for the last three preceding financial years on DLF Ltd.

In contrast, in the **Consumers Guidance Society vs. Hindustan Coca Cola Beverages Pvt. Ltd.**[2] (which dealt with the alleged abuse of dominance in relation to the sale of its aerated drinks and bottled water at high prices by Coca-Cola in multiplex theatres), the CCI held that Coca-Cola was not dominant, by defining the market to be all multiplex theatres in India, as opposed to any single multiplex theatre, which would no doubt have led to the obvious conclusion that Coca-Cola was dominant. The Complaint in this case was filed before the Monopolies and Restrictive Trade Practices Commission ("**MRTPC**") on 01.10.2008 by the Consumer Guidance Society, Vijayawada (hereinafter referred to as "**Informant**") against Hindustan Coca Cola Beverages Pvt. Ltd (hereinafter referred to as "**HCCBPL**") and INOX Leisure Private Limited (hereinafter referred to as "**ILPL**") for their alleged restrictive and unfair trade practices.

It was alleged that the Opposite Parties, HCCBPL and the ILPL have entered into an agreement and in pursuance of that agreement HCCBPL has been supplying its products which, inter- alia, include the package drinking water and soft drinks at an inflated and exorbitant price which is in sharp variance with normal price of same products in open market. Thus, the HCCBPL and ILPL are indulging into discriminatory pricing policy by selling products with same quality, quantity, standard and package at different prices to different buyers' i.e. higher prices from the buyers at ILPL complex and lower prices from the buyers in open market.

CCI noted that, "HCCBPL in its reply has submitted that there is intense competition between suppliers of non-alcoholic beverages to compete for obtaining such contract with multiplexes and to buttress this argument they have pointed out that many multiplex owners like Adlabs/Big Cinemas, Cinemax and Waves Cinema have been switching over their suppliers periodically. HCCBPL has also submitted that it has been able to enter into such agreements with multiplexes having only 214 screens in India whereas its competitor PEPSICO has entered into similar agreements with a large number of multiplexes having about 600 screens".

CCI observed that, "there are about 900 multi-screen theatres out of which HCCBPL is having exclusive supply agreement with multiplexes having 214 screens and PEPSICO with multiplexes having 600 screens, the relevant geographical market cannot be confined to the closed market inside the premises of multiplexes owned by ILPL who is only operating 38 multiplexes in India. If the relevant geographical market is taken as defined by the DG it would certainly lead to illogical conclusion and in that case every retail outlet, restaurant or store having exclusive supply agreement with a supplier will be deemed dominant within the boundaries of its premises and at the same time because of such agreements supplier will also be deemed dominant within the closed premises of that retailer. All this leads to the irresistible conclusion that there is not sufficient material on record to establish that either HCCBPL or ILPL is enjoying dominant position in the relevant market, properly so defined".

'Relevant Geographic Market' under Section 2 (s) means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.

A 'Relevant Geographic Market' is not merely the physical territory in which the competing enterprises operate but only that part of the territory where the 'conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas'. The dictionary meaning of 'homogeneous' is: formed of parts that all are of the same type. This refers to uniformity of composition that can be distinguished from the conditions of competition such as terms of supply, or the mix of the services offered or demanded in the neighbouring areas. Only that part of the geographic territory where uniformity of composition is present should be considered the geographic market. Conversely, when conditions prevailing in the neighbouring areas are different, the markets are different. The objective is that the exact sphere of competition, both in terms of a physical market and a specific product or service is to be identified towards ascertaining a dominant position.

For example, markets for sand, gravel, cardboard boxes, refuse hauling and other heavy but low value products are often quite small because the cost of transportation is a large fraction of the cost of the product. Transportation cost therefore can indirectly affect the limits of the geographical markets. Limits of geographic markets are often determined by transportation costs, tariffs, trade barriers etc. As an illustration, if foreign producers of a product must pay a tariff (domestic producers do not) then the resulting increase in the price of the foreign product may be so large that the consumers would not switch from the domestic product for the foreign product. Similarly, regulations such as for health and safety can serve as barriers to the sale of some goods and services. The relevant geographic market could be determined by the Competition Authority having regard to all or any of the following factors:

[1] CCI Case No. 19 of 2010 Decided On: August 12, 2011

[2] CCI Case No. UTPE 99 of 2009 decided on 23rd may 2011

- REGULATORY TRADE BARRIERS;
- LOCAL SPECIFICATION REQUIREMENTS;
- NATIONAL PROCUREMENT POLICIES;
- ADEQUATE DISTRIBUTION FACILITIES;
- TRANSPORT COSTS;
- LANGUAGE;
- CONSUMER PREFERENCES;

need for secure or regular supplies or rapid after-sales services.

'Relevant Product Market' under Section 2(t) means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

In 'Relevant Product Market' all products or services are considered interchangeable or are substituted by the consumer by reason of characteristics of the products or services, their prices and intended use, constitute the relevant product market. All those products or services compete among themselves, in the perception of the consumer and, therefore, all such interchangeable products and services form the product market in a given case. The issue of a dominant position is to be determined in relation to such group of products.

Competition Authorities in various countries use or adopt different definitions of the product market. Despite the lack of uniformity, the veneer that runs through the definitions is that the product market has the characteristic of interchangeability or substitutability of goods/services by the consumers/purchasers. Put differently, goods/services that purchasers consider to be substitutes are generally regarded to be in the same product market and those that the purchasers do not consider to be substitutes are regarded to be in separate product markets.

On the demand side, the relevant product market includes all such substitutes that the consumer would switch to, if the price of the product relevant to the investigation were to increase. From the supply side, this would include all producers who could, with their existing facilities, switch to the production of such substitute goods. There are 3 elements that pin a product market. They are:

- PRICE INCREASE
- REACTION OF PURCHASERS
- SMALLEST SIZE REQUIREMENT

Relevant product market could be determined by the Competition Authority having regard to all or any of the following factors:

- PHYSICAL CHARACTERISTICS OR END-USE OF GOODS;
- PRICE OF GOODS OR SERVICE;
- CONSUMER PREFERENCES;
- EXCLUSION OF IN-HOUSE PRODUCTION;
- EXISTENCE OF SPECIALIZED PRODUCERS;
- CLASSIFICATION OF INDUSTRIAL PRODUCTS.

The purpose of ascertaining the market is to be able to examine whether an enterprise is dominant in a specific market, made up of the product, or the service, the competing suppliers and the buyers of the product or service, all operating in a particular geographic area. If an enterprise is found to be enjoying a dominant position in a specific market, comprising a geographic and a product market, the next step would be to investigate if the prohibited abuse of a dominant position has taken place.

Unhesitatingly, protecting consumers and ensuring freedom of businesses and to engage in economic conduct free from abuse by dominant firms will contribute to economic development but determining dominance of a firm or group is highly subjective and complex. It is more challenging for a new agency of an emerging economy of India. There are no hard and fast rules to determine dominance. Erroneous determination of dominance will discourage firms from pursuing pro-competitive conducts. Erroneous non-determination of dominance will allow them to perpetuate with exploitative and exclusionary conducts. Thus, CCI needs to strike a balance to avoid both types of error.