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DOMINANT POSITION - THE COMPETITION ACT, 2002

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

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The Competition Act, 2002 (hereinafter referred to as the "**Act**") is the principal legislation dealing with competition law in India. Despite having been enacted in 2002, the substantive provisions of the Act were only partly brought into force on 20 May 2009. Section 4 of the Act is the substantive provision dealing with abuse of dominance. The Competition Commission of India (for short "**CCI**"), which despite its relatively short tenure has proven to be a proactive regulator, has imposed several headline fines for abusive conduct by enterprises. Dominant position is created when one or more undertakings in a particular market use their position in that market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers. A firm is in a dominant position if it has the ability to behave independently of its competitors, customers, suppliers and, ultimately, the final consumer. A dominant firm holding such market power would have the ability to set prices above the competitive level to sell products of an inferior quality or to reduce the rate of innovation below the level that would exist in a competitive market. Under European Union Competition law, it is not illegal to hold a dominant position, since a dominant position can be obtained by legitimate means of competition, for example by inventing and selling a better product.

Meaning of Dominant Position under Explanation 2 (a) to section 4 the Act

The Act defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to:

- Operate independently of the competitive forces prevailing in the relevant market; or
- affect its competitors or consumers or the relevant market in its favour.

It is the ability of the enterprise to behave/act independently of the market forces that determines dominant position. In a perfectly competitive market no enterprise has control over the market, especially in the determination of price of the product. Each enterprise is a price taker. However, perfect market conditions do not obtain in reality. Keeping this in view the Act specifies a number of factors that should be taken into account while determining whether an enterprise is dominant[1].

"Dominant Position" has a specific meaning under section 4 of the Act, and in the European Community Law, in Article 82, on which both the Indian Act and the Competition Act, 1998, UK, are based. It does not contain the commonly understood connotations of dominant position, as constituted by size or market share of an enterprise, though they are relevant in ascertaining dominant position. The substance of the definition is that a dominant enterprise is one that has the power to disregard market forces, that is, competitors, customers and others and to take unilateral decisions that would benefit it and also, in the process, cause harm to the process of free competition, injuring the consumers by saddling them with higher prices, limited supplies, etc.

The capacity to engage in the market in this manner is what is called 'market power', which is quite different from 'market share', though, the structure of a particular market, may aid an enterprise with a significant market share in acquiring market power. A dominant position is acquired over a period of time and the many factors which may further the acquiring of a dominant position by an enterprise are: technological superiority, access to certain intellectual property rights in the supply of the products, early entry, weak competition, the nature of the industry, government regulations, etc.[2] .

[1] Article published by CCI on "Abuse of Dominance" available at " http://cci.gov.in/images/media/Advocacy/AOD2012.pdf"

Abuse of Dominance

There are primarily three stages in determining whether an enterprise has abused its dominant position.

- The first stage is defining the relevant market.
- The second is determining whether the concerned undertaking/enterprise/firm is in a dominant position/ has a substantial degree of market power/ has monopoly power in that relevant market.
- The third stage is the determination of whether the undertaking in a dominant position/ having substantial market power/monopoly power has engaged in conducts specifically prohibited by the statute or amounting to abuse of dominant position/monopoly or attempt to monopolize under the applicable law.

However, the Explanation to section 4 (2) (a) exempts such unfair or discriminatory trading conditions or unfair or discriminatory prices, or predatory pricing referred to in section 4(2) (a) (i) and (ii), setting out those practices as an abuse of a dominant position, from being considered as an abuse of a dominant position, when they are adopted to meet competition. The basis for this contention is that when enterprises are engaged in bona fide competition and readjusting their trading strategies to meet the terms of offers of competitors in a market as it evolves, there is no 'abuse' by any of the enterprises. They are only responding to the market situation. For example, if prices fall in the market, for reasons not the action of an enterprise, a reduction in the price by that enterprise to match its prices to the new prices cannot be termed unfair pricing or predatory pricing.

FACTORS TO DETERMINE DOMINANT POSITION

While assessing the dominance of an undertaking it is important to consider all the constraints present in the market, which hinders its ability to act independently and affect the relevant market in its favour. A finding of abuse of dominance-be it of an individual enterprise or that of a group-involves a three-stage process. Firstly, it is the determination of the relevant market which is assessed on the basis of relevant product/geographical market. Secondly, it is the determination of "dominance" in that relevant market and thirdly, is the determination of an "abuse" of that dominant position. Therefore, mere dominance is not a violation of the law. Further, determining dominance, a pre-requisite for intervention under the Act, serves as a filter and it is presumed that the same conduct either cannot be carried on by a non-dominant enterprise or would not harm the competition. The Act lists some factors, all or any of which can be considered by the Commission while inquiring whether an enterprise enjoys a dominant position or not. These factors help the Commission to precisely and accurately assess the dominance of alleged undertaking under the relevant market by providing an objective point of view.

Factors determining dominant position under section 19(4), (5), (6) & (7) of the Act [3]

Under section 19(4) of the Act, the CCI is required to assess dominance on the basis of the following factors:

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the CCI may consider relevant for the inquiry.

(a) Market Share of the Enterprise:

After determining the relevant market, the next step in determining "dominance" is to assess market share of enterprise or group. Different parameters are employed to measure market share depending upon the nature of sector and the issue under investigation. For example, the market share of an airline could be measured on the basis of number of flights, number of aircrafts, number of passenger's carrying capacity, the city pairs etc. and each parameter may give different results. In the mining industry, the market share can be based on reserves held by different operators. In case, the products are heterogeneous, it is advisable to calculate market share in terms of value expressed in turnover and in case products are homogenous, the production capacities and reserves are believed to be better indicators of market share.

Primarily, the CCI is required to look at current market share as provisions are applicable only to pre-existing dominance. However, historic data may be relevant in markets which are characterized by relatively infrequent large lumpy Orders. The competition literature also suggests that if market share has fluctuated significantly over time, this is indicative of effective competition and erosion of market share over time, is indicative of absence, of dominance and in case the market leader has been able to maintain or increase its market share, it demonstrates dominant position. A high market share also indicates limited ability of customer to shift to other undertakings.

(b) Size and Resources of the Enterprise

Large size and superior financial position or resources may be a contributing factor to a dominant market position. In India, the cash rich BCCI with virtual strangle-hold over cricket has not accorded recognition to the ICL as a league, and has denied access to cricket grounds and prevented ICL players and coaches from participating in BCCI sponsored activities. The financial clout and other resources at the command of BCCI enabled it to promote its own sponsored IPL by excluding the ICL formed by Essel Group in May, 2007. The presence of two cricket leagues namely the IPL and ICL would have led to increased competition to the benefit of cricket fans, cricketers and market as a whole.

(c) Size and Importance of Competitors

When looking at market share it is also relevant to look at the largest firm's market share relative to its competitors; the smaller the shares of the competitors, it would be advisable to hold that the largest firm as dominant. Market share of one competitor in the market also determine the competition constraint on another player. For example, both Pepsi and Coke enjoy over 40 per cent

[2] Book on Competition law in India – Policy, Issues and Developments, Third Edition 2014, Pg. 160-161, authored by T. Ramappa

[3] Article on "Dominance and its Abuse" authored by Dr. S Chakravarthy available on "http://circ.in/pdf/CPS-06-Abuse-Dominance-Ethiopia-Workshop_May08.pdf"

market share in soft drink market in India and again in the truck chassis market, there are only two players namely Ashok Leyland and Telco and both have almost equal market shares. This reflects that one has ability to exercise competitive pressure on another and therefore, neither of them ought to be determined as "dominant in the relevant market".

(d) Economic Power of the Enterprise Including Commercial Advantage Over Competitors

Superior market position or resources may be a contributing factor to a dominant market position. In India, Life Insurance Corporation of India is having the benefit of prior entry and that of sovereign guarantee in the personal insurance market and thereby has commercial advantage over new entrants. Access to capital which incumbent has to the exclusion of others may be regarded as relevant for the purpose.

(e) Vertical Integration of the Enterprises or Sales or Service Network of Such Enterprises

The vertical integration and the benefit of well-established distribution system may act as barrier to entry as it can discourage or impede access for a potential entrant to the market. In India, the railways own the rail tracks and also operate trains, the generators of electricity also own distribution grids, telecommunication companies possess network and offer communication services. The vertical integration in these public utilities favour labelling them as "dominant". Bajaj Auto Limited has the advantage of cohesive dealership network to market its two wheelers over latter entrants, namely Kinetic Honda Ltd. and Lohia Machines Ltd.

(f) Dependence of Consumers on the Enterprise

In public utilities, the dependence of consumers is invariably high. Unlike in other developed jurisdictions, a consumer of electricity in India, at present, does not have a choice of supplier. Likewise, in the absence of portability of number, a mobile user in India is being restrained to switch to another and the resultant effect is conferring dominance on the existing provider of service. Again, in after sale market or in case of products where the demand is inelastic, enable the provider of goods or services to exercise market power with convenience. Non-standardization of spare parts facilitates the maker to dominate. For example, in India, standardization of LPG cylinder and regulator will exert inter se competition pressure on public sector gas companies as well as on their distributors. Charging exorbitant price for spare parts or after sale service is not uncommon in many markets. In India, the real estate developers invariably in the flat buyer agreement makes mandatory that subsequent maintenance services will be provided by it or its affiliate. These are suggestive of "dominance".

(g) Monopoly or Dominant Position Whether Acquired as a Result of Any Statue or Virtue of being a Government Company or a Public-Sector Undertaking or Otherwise

A former state monopoly later on facing competition from new entrants, may have inherited advantages like a strong financial position, control of certain network facilities, connections and political support or established relations with suppliers and customers and such dominant firm may make life of new entrants difficult and may oust them out of market. The imbalances between a former state monopolist and the new entrants have been noticed globally. In India, all segments of electricity sector are currently dominated by the public sector (87 per cent in generation, 100 per cent in transmission, 86 per cent in distribution and retail supply and 93 per cent in trading activity). Likewise, in oil and gas sector, the National Oil companies hold about 86 per cent market share of India's oil Exploration and Production, 77 per cent of natural gas, 74 per cent of oil refining capacity and 86 per cent of marketing infrastructure. These public-sector undertakings do have edge over new private sector entrants. Shell and Reliance ventured into marketing of oil in a big way but had to close their oil dispensing outlets due to absence of competitive neutrality between public sector and private sector by confining the subsidy (state aid) only to public sector oil companies.

(h) Entry Barriers Including Barriers Such as Regulatory Barriers etc.

Barriers to entry, exit or expansion and durability to market power have been identified as very important factors in the assessment of dominance. If entry barriers faced by the rivals are low, the undertaking which has high market share may not be able to continue with significant market power for long. For example, during 1989 to 2004 in all, 19 firms entered and 22 exited in the pesticide industry in India and this shows that barriers to entry and exit have not been substantial. This demonstrates that the entry and exit barrier have not been substantial. The substantial entry barriers shield existing competitors from competition and foster market power. The barriers could be structural, regulatory or strategic one. The structural barriers could be on account of peculiar nature of industry e.g. cost advantages for the incumbent, supplier-customer relationship, switching cost, sunk cost, economies of scale and scope, technological knowhow etc. An idle capacity of a player in industry could discourage a prospective entrant to enter the market. The regulatory barriers are those which are created by the State in the form of laws, regulations and administrative practice e.g. tariff and non-tariff barriers. The strategic barriers are those which are created by the incumbent in a market which have the effect of deterring entry e.g. long-term supply contracts, exclusivity contracts, over investment in capacity or advertising, exclusive dealing or tying etc. If barriers substantially delay entry, the incumbent would not be currently constrained by entry. Frequent and successful examples of entry reflect lack of barrier to entry. The likelihood of entry and profitability are important components of entry analysis. The need to enter at significantly large scale or with large sunk costs reduces the incentives for new entrants.

(i) Countervailing Buying Power

An enterprise may be constrained not only by actual and potential competitors but also by its customers. A buyer enjoying monopoly can take a dominant supplier to exercise market power. If there are competitors with adequate capacities to meet demand, a buyer's threat to switch to another supplier may have a considerable disciplinary effect on a supplier that sells a major part of its production to a single buyer. A strong buyer may pave the way for new entry or lead existing suppliers in the market to expand their output so as to defeat the exercise of market power not only to its own benefit but also to the benefit of other buyers and consumers.

(j) Market Structure and Size of Market

Market structure which is characterized by a sole supplier of goods/services either on standalone basis or by virtue of common ownership, makes conditions conducive to exercise market power affecting competition, consumers or market. The UK Competition Authority has recently noted that common ownership of seven airports of British Airport Authority (BAA) is preventing the development of competition and also obstructs the scope for inter se competition and has therefore, directed the BAA to sell off London Gatwick, London Stansted and either Edinburgh or Glasgow airports to a buyer approved by it within a period of two years. International Airport in Delhi is the sole supplier of airport services to the airlines and the passengers and rising airport charges is reportedly alleged to be one of the reason necessitating foreign airlines (Virgin Atlantic, Delta, Lufthansa, Singapore Airlines etc.) to withdraw over 100 flights

during the last 6 months. Further, smaller the size of the market, the greater is the likelihood of prevalence of dominance. It would also be wrong to suppose that only a large sized firm is likely to be dominant. Given that the relevant market is narrow, a small firm may be found to be dominant.

(k) Social Obligations and Social Costs

This factor gives flexibility to Commission to take into account social obligations performed by an entity. There is greater realization more than ever before that business house is trustee of society. The profit for profit's sake is becoming a dirty word and focus of future business is on ethics, governance beside quest for sustainability, conservation of energy etc. For example, Lucifer Lights Private Ltd. has developed LEDs (light emitting diode) which operate on low current and is thereby, a major source of energy saving and have 5 to 10 times longer life than the conventional lighting products. Being the first and only one in the market, at present it may be dominant player in the relevant market but conservation of energy and overall saving to the users ought to be construed as a mitigating factor while assessing its dominance. Likewise, while looking at the dominance of the Indian Railways, its important role in ensuring connectivity between the various places in the country inter se at affordable fare need to be taken favorably by the Commission.

(l) Relative Advantage by Way of Contribution to Economic Development, by the Enterprise Enjoying a Dominant Position having or Likely to Have Appreciable Adverse Effect on Competition

Section 38 of the MRTP Act, 1969, provides certain circumstances where there shall be presumption of public interest even if there is a case of deemed restrictive trade agreement under Section 33(1) thereof. Two such situations are when an adverse sanction by MRTPC would have serious and persistent adverse effect on the general level of employment or reduction in the volume or earnings of export business. Such situation may also be considered by the Commission as mitigating factors. In the banking sector in India, the State Bank India is the largest bank (in terms of deposits/loans and number of branches) and is known for its pro-development approach and has toed the Government's line in determination of rate of interest, extending credit facilities to the small and medium scale industries and underprivileged communities. It is also known for its extensive rural network branch and all these could weigh the scales in favour of the SBI while determining its dominance.

(m) Any other Factor which Commission may Consider Relevant for the Inquiry

This residuary clause gives ample scope to the Commission to take into account any other factor which it may deem fit for the inquiry. Price and profit level are also used in some jurisdictions as a relevant factor while assessing dominance but some jurisdiction caution about potential error in using them as determining competitive price or profit is extremely difficult and further exorbitant price or profit is viewed as inducement to others to enter into the market. Access to essential inputs on long-term basis may be in favour of assessing dominance. For example, on an average the iron ore cost to steel companies with total captive mining, partial captive mining and dependence exclusively on open market ranged from Rs. 322 per tonne to Rs. 2,800 per tonne during the year 2005-2006 and thus, unequal access to raw material may yield some firms an artificial commercial advantage.[4]

The above factors can be classified into three broad categories:

- Ability to influence the relevant market, and
- Features and structure of market, and
- Discretionary factor

The first category includes the factors from clause (a) to (h). This category objectively analyses, inter alia, the market power of an undertaking, its ability to influence the market and restrain the competition.

On the other hand, the factors under clause (i) to (l) fall in the second category. In order to completely understand the effects of an alleged dominant undertaking on the relevant market, it is necessary to understand the conditions and structure of the relevant market in which the dominant undertaking operates, the second category seeks to do the same.

The last but certainly not least, third category which consists of only clause (m) seeks to provide certain extent of discretionary power to the commission, to include certain factors relevant for assessing dominance of an undertaking but not included in the preceding Clauses.

It is pertinent to note that dominance of an undertaking in relevant market is a question of fact and selection of above mentioned factors for assessing dominance will depends solely upon facts and circumstances of each case. Some factors quite relevant in a case can be futile in other.

Dominant Position and Relevant Market

That a dominant position should be established with reference to a relevant geographic market and a relevant product market. Section 2 (r), 2 (s), and 2 (t) of the Act deals with “Relevant Market”, “Relevant Geographic Market” and “Relevant Product Market” respectively. The factors to be taken in regard while determining the relevant geographical market and the relevant product market are on a consideration of all or any of the factors set out in sub-sections (6) to (7) of section 19 of the Act[5].

Relevant Geographic Market under section 19(6) of the Act:

“(6) The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:

(a) regulatory trade barriers;

(b) local specification requirements;

(c) national procurement policies;

(d) adequate distribution facilities;

(e) transport costs;

(f) language;

(g) consumer preferences;

(h) need for secure or regular supplies or rapid after-sales services”.

The CCI may consider all or any of the following factors set out in section 19(6) in determining the relevant geographic market like regulatory trade barriers, local specification requirements, national procurement policies, etc. It may be noted that all these factors excepting the last one will negate uniformity of composition and would help in narrowing down the geographic territory to the actual geographic market that is to be considered.

Relevant Product Market under section 19(7) of the Act:

“(7) The Commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:

(a) physical characteristics or end-use of goods;

(b) price of goods or service;

(c) consumer preferences;

(d) exclusion of in-house production;

[4] http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=8de19f8a-5bbd-42b6-a96a-692a0f376625&txtsearch=Subject:%20Commercial

[5] Book on Competition law in India – Policy, Issues and Developments, Third Edition 2014, Pg. 167 authored by T. Ramappa

(e) existence of specialized producers;

(f) classification of industrial products".

The factors that may be considered in determining the relevant product market are as set out in section 19 [7] like physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in- house production, etc.

The first three would aid in assessing the interchangeability of products or services. In-house production does not enter the market and is therefore to be excluded. Specialized producers are a group by themselves. The classification of industrial products may be only of limited use as classification is done for various purposes and may not be directly relevant for determining a product market as a commercial unit.

Thus, there is no bright line market share test, unlike as with other jurisdictions, for the determination of dominance under the Act, even though market share is treated as an important indicator. The CCI has considered market share in most cases of abuse of dominance it has reviewed, but has also considered subjective factors such as vertical integration, countervailing buyer power, economic power of the enterprise, entry barriers, statements in the public domain, etc.