

Contextualizing Abusive Behaviour of Dominant Entity- Challenges Before Fair Competitive Market

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Abstract

Unfair practices and abuse of dominant positions are prohibited in India as they together attempt to disrupt healthy market competition. In India, sections 3 and 4 of the Competition Act 2002, deal with these unpreferred practices and abuse of dominant position, respectively. It's crucial to grasp the differences between the aforementioned clauses since, despite their superficial overlap, they each has a separate scope of action. Only when an agreement pertaining to the production/ supply of products or rendering of services creates or is likely to cause significant detrimental effect on competition inside India makes a company or association of companies liable under Section 3 of Competition Act, 2002. Dominance concerned with the dominating enterprise's or group's unilateral behavior is called abuse of dominance. While the assent of two or more independent entities is required to establish a case of abuse of dominance. It is one-sided act, does not arise from an agreement requiring the permission of more than one party. Finding out if there has been a real abuse of dominating position takes three stages. First, the target market must be identified. Second, it is weighed if the firm has a dominating position in the relevant market. Finally, dominance per se is not deemed anti-competitive. Section 4 requires an abuse of dominating position. So, to restate, mere domination is not illegal. Also, identifying dominance serves as a strainer while imposing penalty. Finally, there are several laws dealing with the idea of "dominant" position and its misuse in various countries. As a result, there is a dispute over a standard definition in the case of cross-border transactions. As a result, this article will take a realistic approach to a comprehensive examination of India's competition laws and the misuse of its dominating position. Many variables influence an organization's dominance, including market portion, economic influence, and entrance and exit obstacles. Thus, this article aims to examine dominance and its misuse using supporting case laws and experiences. Also, this research will cover the threat of Dominance Abuse and its limitation aspects.

Keywords: Abuse of Dominance, Market, Competition, Monopoly.

INTRODUCTION

The espousal of fair competition is with an aim to protect consumer welfare and freedom of trade. Competition is thought to lead to efficiency, lower pricing, and new product development. and innovation. Because monopoly in whatever form is a major foe of the free market, it's impossible to ignore the link between efficient implementation of competition rules and economic development. As a result, understanding the aspect of "abuse of dominant position" is critical, as most competition rules prohibit it across the jurisdictions. As India's economy has opened up to the world, economic regulations have been

relaxed. With the implementation of a new competitive legislation system, India has taken a significant stride toward facing out against domestic and foreign competition. This legislature's overarching goal is to encourage businesses to compete on the basis of their efficiency rather than anti-competitive behavior. Though companies can use the competition regime to assure fair play in the relevant market, the new regime's goal isn't to make it easier for weaker enterprises to thrive or force the more lucrative players into ceding market share. These ideas differ from previous legislation in India dealing with restrictive trade practices, i.e. the Monopolies and Restrictive Trade Practices

Act, 1969 (MRTP Act), which was known as the MRTP Act until it was renamed. The primary goal of the MRTP Act was to keep the market free of monopolies. However, as time has passed and as globalization has taken hold, the focus has switched from combating monopolies to supporting competition in India. The purpose of the Competition Act is not to limit market competition. On the contrary, in order to monitor activities and actions that have a negative impact on market competition, the Competition Act seeks and intends to regulate them. The Competition Act, 2002 also aims to foster and support healthy market competition, safeguard consumer interests, and guarantee free commerce.

The abuse of dominating positions by companies is a major source of worry for competition regulations all around the world. The situation where an organization is able to operate autonomously due to specific variables (market share, economic power, etc.) and goes about abusing such a position can be explained as an abuse of a dominant position in the market. Such conduct is not only adverse to the competition, but it also works against the interests of customers. Under any competition rule, dominance is not necessarily a bad thing. Abuse of a dominant position, on the other hand, is inherently anti-competitive. Abuse occurs when a dominating party abuses its position by excluding or exploiting others under its control. In India, the Competition Act, 2002 contains a comprehensive list of practices that are illegal because they represent abuse of a dominant position. The only time such techniques amount to abuse is when they are used by a company with a monopoly position in the relevant Indian market. The specific types of conduct undertaken by a dominating company are measured when determining whether or not there has been abuse of dominance. Such behavior is against the law. Abuse by a dominant firm of the sort mentioned in the Act is banned. Besides India, many countries have their alternative approaches through their legislation to find finding of a dominant position. For example, the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position but does not define it. The European institutions considered the dominance as a position for “economic strength” for their market as it is able to prevent effective competition from being maintained in a relevant

market where the significant amount of leeway in its behavior is independent of competitors, customers, and, ultimately, consumers.

On the other hand, the enforcement priorities of EUs outlined Article 82 of the Treaty Establishing the European Community (now the Treaty of Rome) and 102 of the Treaty on the Functioning of the European Union) are effective for abusive conduct of dominant position. The criteria to be followed are set out by dominant undertakings' exclusionary behavior. The European Commission takes into account when assessing dominance, in particular the constraints imposed by existing suppliers as well as the position in the market of, actual competitors (the dominant market position undertaking and its rivals), credible threat of future growth by actual competitors or potential competitors' entry (expansion and entry and by the undertaking's bargaining power purchasers (countervailing buyer power). In USA, the concept of dominant position is undefined but United States Supreme Court, have attempted to define it as being “the power to control market prices or exclude competition” in *United States v. E.I. du Pont de Nemours and Company*.

Dominance/Dominant Position- “Abuse”

‘Dominant position’ means position of strength, paramount position enjoyed by an enterprise, in the relevant market, in India, which facilitates it to

“(i) operate independently of competitive forces prevailing in relevant market;

(ii) affect its competitors or consumers or the relevant market in its favour.”

There is no way to measure dominance as it's not based on any formula and mathematical calculation rather it can be measured in a comparative environment. It has significance for competition only when there is a relevant market. Competition Act defines Relevant market. It is the market that may be determined by the Commission on the basis of three aspects. Firstly, in reference to relevant product market. Secondly, in reference to relevant geographic market and thirdly in reference to both. Thus, as per the above definition, the product and geographic dimensions are related to the concept of relevant market. Essentially, the product market demonstrates the portrait of goods or services vis-a vis geographical market deals

with where the producers or sellers of their product or service. This means that the market and the market share of the company or group concerned are important when deciding whether or not there is dominance. A number of additional elements also play a significant part in defining a company's or a group of companies' market influence. The Competition Act 2002, Section 19(4), gives the Commission broad authority to examine all or any of these factors when determining whether a company has a dominant position or not, including the market share of the company or its size factor or resources compared to competitors, or economic power of the company, as well as the sale or service networks of such companies, as well as how dependent consumers are on the company. Dominance also has to do with a company's ability to act in an interdependent manner rather than a dependent manner. Having a dominant position means that a company may reap the rewards of the market without being reliant on any external factors. In India, there are many case studies where CCI discussed the area of dominant position for example; in 2013 the BCCI had abused its market dominance and was levied a penalty of Rs.53 crores as a result. As per the facts, on November 2, 2010, the Informant, a cricket fan, filed a complaint with the CCI under Section 19 (1) (a) of the Act against the OP in the BCCI. His charges were concerning the irregularities occurred in the IPL, a Twenty 20 and professional league tournament organized under BCCI supervision. He hinted toward many issues including franchise rights, media rights, sponsorship rights and other local contracts relating to the IPL's organization in relation to league and team organization. Pursuant to the above information, CCI harangued as there is a prima facie case so the DG must conduct a special inquiry as per Section 26(1) to investigate the matter. This case study shows that the power should be reasonably restricted.

Dominant Position in the market- abuse & kinds

The company is unaffected by its competitors. Now the issue is not whether a firm esteems its dominant position in the market, rather, the tilting point occurs when dominance is prefaced by the phrase "abuse." Abuse is the wrong use of something and in the context of competition laws, it's an abuse of dominating position as

some firm enjoy market supremacy and exploit it. Abuses can be categorized into two as:

- Exploitative Abuse;
- Exclusionary Abuse.

The Indian Competition Act, 2002, defines a "predatory price" as "the sale of goods or the provision of services at a price less than the cost, as determined by regulations of manufacturing goods or providing services, with the intent of reducing competition or eradicating competitors". Though as per the scheme of Indian competition Act, the reasonable requirements are not prohibited for the protection of intangible rights i.e., IPR. It neither touples 'anti- competitive agreements nor provide specific reference of IPRs in the Act form is use of dominant position laws. But if these activities affect the unfair condition or unreasonable price, makes impossible to access to market, hamper the productivity through its manufacturing or by other means or keep discrimination of price, or inclusive of anything relating to above, may amount to misuse of dominant position.

Whether discrimination of price carries abuse?

According to Competition Act, there is a clear prohibition of discrimination of non-price and price. In Schott Glass Appeal Case, the COMPAT ruled that discrimination of price was abused when two components were met: (1) different handling of identical transactions; and (2) injury/likely harm to competition, in which purchasers were at a disadvantage to one another. The COMPAT went on to say that "the pricing and conditions might be regarded to be discriminatory if, and only if, they were different for the same quantities of the same product."

In addition, for the same subject matter, the CCI and COMPAT held that the different prices given by Microsoft for various types of licenses granted to different classes of customers (OEM licenses, volume licenses and retail licenses) does not refer to price discrimination. In the same lines another important decision came in Travel Agents Federation of India v. Lufthansa Airlines. This was a case with reference to the sale of tickets of airline via travel agents and official website of Lufthansa. They had constituted two separate markets taking different modes and mediums with unlike fares. It was decided by CCI that it also does not

amount to price discrimination because the Lufthansa tickets prices on the official website are not identical to those made available to travel agents.

Further in *Telefonaktiebolaget LM Ericsson v. Competition Commission of India* Ericsson's licencing charges were determined by the CCI prima facie to be discriminatory, as well as a violation of Ericsson's agreements to grant licences on fair, reasonable, and nondiscriminatory conditions. Ericsson's royalty rate was not dependent on the patented product's functioning, but on the ultimate selling price of the prepared good for which the patent was being used. Ericsson was forced to conduct an internal inquiry after the CCI deemed charging two separate licence prices for per phone for the usage of the equitable know-how to be discriminatory.

Recently, CCI imposed an additional penalty of \$500,000 on GIL for engaging in price discrimination by giving lower pricing for exporting producers and higher pricing for companies selling VSF in the GIL case. There is a monopolistic effect in the market where rejection was delivered.

For abuse of Dominance position, the Predatory pricing (Pp) is interpreted as an exclusivist behavior factor that can be exclusive to enterprise(s) with a monopolistic position in the pertinent market. Also, the other important influences that contribute to the fixation of Predatory behavior includes consolidation of enterprise's dominant aquarians operating in a related market where fixation of price below the product's actual marketing cost and the intention to reduce or eliminate competition. Besides above, another important factor is Essential Facility Doctrine (EFD) that plays a pivotal role in the determination of Dominance. This doctrine demonstrates the inability of new firms to enter a given market and that is a key impediment to a fair competition. It happens where a dominant company in a market that controls infrastructure or a facility has to be in the market. And the product is unable to be reproducible at a reasonable cost nor it is substitutable with other products/services. Further EFD application must meet the following requirements such presence of dominant unit in the relevant market must dominate the facility, competing businesses/individuals should be unable to

replicate the facility in a practical manner. Also, in order to participate in the relevant market, access to the facility must be there.

- Refusal to Deal and EFD

Refusal to deal, a kind of threat against the fair competition defined as per the vertical arrangement in Indian Competition Act. It says that "any agreement that restricts, or is likely to restrict, the individuals or classes of persons to whom commodities are sold or from whom goods are bought, by whatever manner." In a landmark case namely *The Auto Parts case*, where 14 car manufacturers had been imposed penalty of Rs. 25.44 billion. Eventually, an unfair limit on the sale of replacement parts of car was placed in the free market. Non-Market Access and Refusal of Trade by unfair limitations, both are the abuses and was considered as a prohibition. According to CCI, under section 3(4)(d) and section 4(2)(c) of the Competition Act, 2002.

To make a fair and perfect market, an access to essential facilities is always considered significant. Therefore, the practices that result in a denial of market access and carrying unauthorized limitation would definitely be an issue under section 4(2)(c). Along with the same, the machinery of the competition law, as per section 4(2)(b), forbids restrictions on the making of goods or services including technical or scientific know-how that is detrimental to consumers.

In *Arshiya Rail Infrastructure Ltd. Case* the complainants had submitted that rail and railway infrastructure are indispensable facility. The reluctance to grant access to this rail infrastructure constitutes an abuse of power. The EFD principle is indeed invoked based on an assessment of the required technical possibility of providing access to the market. Also, other contributing factors made this abuse wider such as "the impossibility of replicating the facility in a reasonable time, the distinct possibility of a lack of effective competition and the possibility of providing access on reasonable terms is broken."

Therefore, if these legal requirements are not met, there could be a refusal to deal under section 4. Circumstantially, in the present case, the CCI analyzed and did not find any reason to succumb that why container train operators could not build their own terminals or equivalent

facilities within a rational time. Thus, the CCI rejected their accusations of mistreatment. Afterwards, the CCI, in the case of Air Works India (Engineering) Private Limited case, while examining (EFD) doctrine, declared the Rajiv Gandhi International Airport (RGIA) to be an essential facility. To accommodate it, GMR to be in prima facie violation of Section 4 of the Act. Thus, CCI directed the DG to conduct an investigation. The CCI ruled as follows:

“GMR controlled access to the RGIA; the RGIA was not a facility that a competitor could duplicate; GMR had denied a competitor access to the RGIA; there was no other way to enter the relevant market (of line maintenance services at the RGIA) at a reasonable cost without having access to the RGIA; and there was spare capacity in the RGIA for providing line maintenance service.”

- Rebate schemes

Discounts and rebates are not expressly described in Indian competition laws. It's possible, however, that rebate programmes may be viewed as activities that limit or regulate making of products or related services and methods, denying their access to the market, and as a consequence, could be included under the Act. In relation to it, the Intel case is a significant study where the incentives and target programmes did not exclude competitors, the distributors and original equipment manufacturers (OEM) who distributed competing microprocessors, the Competition Commission of India (CCI) concluded that they were not foreclosed. Distributors were not prohibited from dealing in rival items, as claimed by the complaint. The CCI also concluded that Intel's incentive programmes aimed to increase sales of low-demand items. Simultaneously providing non-predatory discounts to compete so both activities were deemed to be fair business practices.

As per above considerations, it is clear the main role of CCI is to control the abuse of dominance in the market not only through its penalty provisions but also by granting conditional approval. In February 2020, CCI had granted approval for ZF Friedrichshafen's ("ZF") purchase of 100% of WABCO Holdings Inc. ("Wabco") shares. In relation to foundation brakes, clutches, and other brake and clutch components for commercial vehicles, both ZF

(through its joint venture with TVS group viz. Brakes India) and Wabco were active in the Indian automotive goods market and acquiring substantive position. They proved their ability to combine and depart, the CCI had argued that this merger could have negative impact on Indian market. Thereafter, ZF voluntarily modified its plans, selling off 49 percent of its Brakes India stock and agreeing not to re-purchase Brakes India stock or create another joint venture with the TVS group in the same product categories.

Procedural Requirement

Dominance isn't necessarily a bad thing but its misuse is apparent. According to reports, abuse occurs when an individual, a single company or a group of related businesses being in a market-dominating position in a way that is either discriminatory or exploitative. As per the process requirement, section 4 (2) (c) of the Act (which deals with a dominant company's denial of market access) gives the Competition Commission the authority to issue a curative order requiring the dominant company to share an essential facility with its competitors in the downstream markets. It is also provided conditions as above mentioned are to be fulfilled and those principles are applicable to the specific case. Afterwards, the Commission has to conduct an inquiry into the alleged contravention of section 4 (1) of the Act dealing with abuse of dominance. If the Commission believes there is a prima facie case of abuse of dominance, it will instruct the Director General to conduct an inquiry and submit a report on its abuse of dominance, pursuant to section 12 of the Competition Act 2002. In order to accommodate the Code of Civil Procedure, the Commission has the authority to summon or compel attendance of any person and examine him under oath, to require discovery and production of documents and receive testimony on an affidavit. After an investigation, the Commission may issue directions, including but not limited to :-

- 1) Instructing the parties to discontinue and not re-enter the agreement;
- 2) Inform the company in question to change the disputed agreement.
- 3) Instruct the companies in question to follow any other orders the Commission may issue. Also the company will comply with the

directions, including payment of any costs that may be incurred; and;

4) Pass appropriate orders in the interest of justice.

5) the commission can levy penalty on the parties. The penalty can be calculated up to 10% of the average turnover for the last three preceding financial years. The above penalty shall be upon each of such persons or enterprises which are parties to bid-rigging or collusive bidding.

6) in order to ensure that enterprise does not abuse its dominant position, the commission can order for division of an enterprise enjoying dominant position.

A special type of power is given to commission in case there is pendency of an investigation into abuse of dominant position. The Commission may, without giving notice to the party, provisionally restrict any party from continuing with the alleged offending act until the investigation is completed or until further orders are issued. The Competition Appellate Tribunal (COMPAT) was established under section 53A of the Act to hear and decide appeals against any direction, decision, or order issued by the Commission under certain parts of the Act. The Commission's order, instruction, or determination must be appealed within 60 days. A person may file an application with COMPAT to have a claim for compensation adjudicated based on the Commission's conclusions.

There is no doubt that the diverse criteria of relevant product market and relevant geographical market plays a significant role in determining the existence of dominance apart from market power and customer strength. In one of the leading cases decided by the European Court of Justice in the case of *Hoffmann-La Roche & Co. v. Commission*, it was highlighted that there are some factors to determine the nature of dominance like technological advantage, presence of integrated sale-based networking base, absence of prospective competitors. Interestingly, the observation was also made on the objective nature of abuse of dominant entity and its behavior towards influencing the market in such a way so that the existing competition gets deteriorated and becomes unhealthy. It is possible that different ways could be adopted through which hindrance can be created against

growth of other rival & vulnerable competitors in the market. An important deliberation usually comes as to whether abusive practice/behavior of a dominant player adversely affects the rights of consumers as well apart from rival competitors in the market. In this regard, it is important to understand the possible context of privacy and competition law especially in the recent case of *suo moto* order of CCI, where it ordered for advanced investigation into affairs of WhatsApp in the alleged matter of abuse of dominance and development in the form of WhatsApp updated policy. The alleged matter is also regarding diversion of private data of consumer to other companies of Facebook, which is also subject-matter of investigation. Interestingly, in another case of *Harshita Chawla v. WhatsApp Inc & Anr*, where CCI considered WhatsApp as dominant player in the specific market of OTT where messaging apps are existed in different smartphones. It was found that users are not actually provided with voluntary choice of objecting or opting out from the data sharing which is a result of updated policy of WhatsApp. The CCI considered this term and condition as unreasonable and unfair in nature and calls it abusive behavior of WhatsApp.

Conclusion

For every economy, free trade and fair competition are absolutely essential. Trade transactions are considered lifeblood of every economy. Therefore, no limitations on trading should be measured. This view of free commerce encompasses all possibilities. Fair competition in the marketplaces is a result of free trade only. As per India's laws on trading, The Monopolistic and Restrictive Trade Practices Act of 1969 was replaced by the Competition Act of 2002. As a result, India's current competition law doctrine is just 19 years old, and it may not be as comprehensive as the US jurisprudence, which has been evolving since 1901. Despite this, it is a progressive piece of law that, unlike the MRTP Act, which had minimal tolerance for any form of market supremacy, acknowledges changing market conditions and does not have issues with dominance per se, but does not stray from its goal of maintaining market competition. The laws on Abuse of dominance does not penalize that has gained a dominating share of the market

as a result of its superior performance. After such a thorough examination of a plethora of laws relating to the same concept, it is discovered that, while each law pertaining to abuse of dominant position differs in its application and operation in some way, the basic goal of each law relating to it, is to ensure fair competition and maximize consumer welfare.

As the primary goal of this legislation, is to prohibit any company or organization from abusing its superior position in the market. The criteria used by CCI to determine fines have recently been a source of concern; a change is needed to add openness to the penalty-imposition procedure. The penalty as per law, shall not exceed 3 times to the profit or 10 percent of the turnover for each year of infringement, whichever is larger. CCI had assessed a penalty of 0.5 times earnings for 2009-10 in the Cement Cartel case. Apart from it, there is a high need of pass "National Competition Policy" to combat these types of restrictions.

In the competitive world, when every enterprise is looking forward to expand the horizon of their business in the interest of sustainable profit as a long-term plan, it is highly misunderstood fact that substantial increase of price of any product/process/service is always antithesis to competition and fair-play in any market. It does not always reflect the behavior and intent of a dominant enterprise in a bad shape and possible involvement of exploitative abuse or unfair trade practice. If the case of excessive price of product/service doesn't offer any reasonable explanation/justification or doesn't have any relation with existing economic value, then excess of such cost price is definitely considered as abusive practice of a dominant enterprise in any market. The similar nature of reasonability also applies in the case of predatory behavior as well. It is important to note that sale of product/service below standard price rate is not per se predatory in nature. But, if such nature of practice could be executed by dominant entity with a specific intent so as to increase the monopolization in the relevant market and drive out existing competitors from the business market, then, charge of predatory behavior could be proved. Thus, it is important to have deep understanding of corporate strategy and close analysis of variation of related costs adopted by dominant entity to determine the presence of

excessive pricing or predatory pricing in any particular case where such charged are raised.

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