ABUSE OF DOMINANT POSITION UNDER COMPETIION LAW: AN ANALYSIS

**ANTRA PANDIT[1] & PRITHIVI RAJ[2]

INTRODUCTION

The elements that constitute a dominant position are: (i) position of strength; (ii) that position being enjoyed in a relevant market in India (both product and geographical markets) (iii) and such a position that gives the enterprise the power to 'operate independently of competitive forces in the relevant market', meaning thereby that it can at will, disregard market forces and conditions and impose its own trading conditions, which it is prepared to supply goods or services.[3] Section 4 deals with abuse of a dominant position. As stated earlier, section 4(1) prohibits abuse of its dominant position by an enterprise. Section 4(2) (a) – (e) set out what conduct would be an abuse of a dominant position under the Act.[4]

FACTORS TO BE DETERMINE DOMINANT POSITION

Dominance has been traditionally defined in terms of market share of the enterprise or group of enterprises concerned. However, a number of other factors play a role in determining the influence of an enterprise or a group of enterprises in the market. These include:

i. Market share of the enterprise;

ii. Size and resources of the enterprise;

iii. Economic power of the enterprise including commercial advantages over competitors;

iv. Vertical integration of the enterprises or sale or service network of such enterprises;

v. Dependence of consumers of the enterprise;

vi. Entry barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, etc.;

vii. Countervailing buying power; and

viii. Any other factor which the Commission may consider relevant for the inquiry.[5]

---

[1] LL.M, Rajiv Gandhi National University of Law, Punjab
[2] LL.M, Rajiv Gandhi National University of Law, Punjab
[3] S.M. Dugar, MRTP Law Competition Law & Consumer Protection Law, Vol. 1, LexisNexis Butterworths Wadhwa, Gurgaon, 2009, at p.61
[4] Section 4 of the Competition Commission Act, 2002
[5] Abir Roy and Jayant Kumar, Competition Law in India, Eastern Book House, New Delhi, 2008, at p. 20

INSTRUMENTS OF ABUSE

The most common instruments of abuse of dominant position by a firm are:

Predatory Pricing

Predatory pricing is defined as the situation wherein the firm with the market power prices below cost so as to [6] drive the competitors out of the market and acquire or maintain a position of dominance. On the event that the strategy works out, the monopolist can then, in the absence of competition charge higher prices and more than recouping losses.[7] Predatory pricing exists if there is the intention of eliminating a competitor.[8] However, when there is a risk that competitors will be eliminated, there is no need to prove the possibility of recoupment.[9]

Price Discrimination

The anti-trust laws prohibit the practice of charging different practices of the same product to different customers with the intent of injuring the competitors. The prohibition of the price discrimination tends to protect small firms against the discounting policies of their larger and more efficient rivals. An undertaking is said to be discriminatory when it applies dissimilar conditions to equivalent transactions with other trading parties. An abuse is sufficient even if anti-competitive effects are likely to occur.[10]

Tying and Bundling agreements

A "tying arrangement' is an arrangement by party to sell one product but on condition that buyer also purchases a different product, or at least agrees that he will not purchase the product from any other supplier. Bundling refers to situations where a package of two or more products is offered. If only the bundle is offered and not its individual component then bundling is called 'pure' otherwise it is 'mixed'.[11]

REMEDIES IN CASE OF ABUSE OF DOMINANT POSITION

Section 19(1) of Competition Act 2002 provides that the commission may either on its own motion or on the receipt of the complaint, accompanies by such fee as may be determined by

[6] Newmann v. Reinforced Earth Co. 786 F2d 424(1986)
[7] Cargill Inc v. Monfort of Colorado 479 US 104 (1986)
[8] Newmann v. Reinforced Earth Co. 786 F2d 424(1986); Wnadoo v. Commission (2003) CAT 5, 1007/2/3/02
[9] Tetra Pak International SA v. E.C. Commission[1997]4 CMLR 662
[10] United States v. E.I.du Pont de Nemours & Co. 351 US 377(1956)
[11] Ibid at p.24

regulations, from any person, consumer or their association or trade association or a reference made to it by the central government or a statutory authority, inquire into any alleged contravention of the provisions contained in section 3(1) or 4(1). Under section 27of the Act, Commission may direct any enterprise or person or association of persons, to discontinue such abuse of the dominant position; impose such penalty as it may deem fit which shall be not more than 10 percent of the average of the turnover for the last three preceding financial years; award compensation to parties in accordance with the directions; recommend to the Central Government for the division of an enterprise enjoying dominant position; and pass any such order as may deem fit.

Discontinuation of Abuse/Penalties

An injunction to enjoin defendant from further continuing the alleged activities coupled with a penalty may prove an effective method of eliminating further from the market. However, this relief may not be sufficient either to deter similar abuses by other firms or to restore competition in the market affected by the anti-competitive conduct.

Damages

In India, Competition Commission is empowered, under section 34, to award, after an inquiry, compensation to any person, loss or damage suffered by him as a result of any contravention of the provisions of Chapter II by any enterprise. This includes breach of section 4 i.e. abuse of dominance. However, compensation is claimable only for loss or damage suffered as a result dominant position by the firm. The advantage of compensation is deterrence-firms in similar circumstances in other markets will be deterred from engaging in the same conduct, lest they also be forced to pay compensation.[12]

CONTENT ANALYSIS

Content Analysis as defined by Bernard Berelson[13] means a research technique for the objective, systematic and quantitative description of the manifest content of communication. Another well known and apparently similar definition by Holsti[14] is "Content analysis is any technique for making inferences by objectively and systematically identifying specified

[12] D.P. Mittal, Competition Law and Practice, Taxmann Publications (p) ltd, New Delhi, 2011 at p.46,at p.86
[13] Bernard Berelson, Content Analysis in Communication Research, Free Press, New York, United States, 1952, at p. 1.
[14] Ole R. Holsti, Content Analysis for the Social Sciences and Humanities, Addision-Wesley, Masachusetts, 1969, at p. 1

characteristics of messages". Both the definitions contain a reference to two qualities: objectivity and being systematic. The technique is objective in the sense that different people agree on the categories developed and get similar results. The term "systematic" in the definition means that the content analysis is not used haphazardly.[15] In other words, content analysis can be defined as "an approach to the analysis of the documents and texts that seeks to quantify content in terms of pre-determined categories and in a systematic and replicable manner".[16] This technique has been used for various purposes. Berlson has classified its uses into three categories namely (1) Characteristics of communication content (2) Causes of content and (3) consequences of content.

The major advantages of using content analysis are:

a) "Can be used with any type of communication and applicable in many situations.
b) Usually free from response bias because analysis of communications are usually done without subject's awareness.
c) Can usually be carried out at researcher's convenience as the communication is usually recorded.
d) Can be easily checked for accuracy, if recorded.
e) Useful for prediction when direct observation is not feasible.
f) Appropriate for analysing open ended items.
g) Can be used with existing data or data generated for the purpose".[17]

JUDICIARY ON ABUSE OF DOMINANT POSITION

I. In MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd & others[18], Issues Involved are :

1. *What is the relevant market in the context of Section 2(r), (s) and (t) read with Section 19(5) /(6)/(7)) of the Competition Act, 2002?*

[15] Surendra Kumar Gupta, "Application of Content Analysis in Legal Research", S K Verma and M Afzal Wani (eds.), Legal Research and Methodology, Indian Law Institute, New Delhi, 2006.
[16] Alan Bryman and Emma Bell, "Content Analysis", Business Research Methods, Oxford University Press, New Delhi.
[17] G L Ray and Sagar Mondal, "Data Collection including PRA Technique", "Research Methodology in Social Sciences", Kalyani Publishers, Ludhiana.
[18] MANU/co/0032/2011

The Commission decided that in the present case the stock exchanges services in respect of the CD segment in India clearly constituted an independent and distinct relevant market as the technological support and facilities offered by exchanges like easy access, easy execution, lower cost of transaction, efficient risk management, fail-proof settlement mechanism were very vital. A robust infrastructure mechanism with enhanced technological support definitely adds volumes necessary for the development of the market.

2. *Whether NSE is dominant in the relevant market and whether it has directly or indirectly imposed unfair or discriminatory price (including predatory price) in sale of services, thereby violating Section 4(2)(a)(ii) of the Act?*

   The Commission examined the respective market shares of NSE, MCX & USE and concluded that NSE is not dominant in the relevant market and the zero price set by it for transactions does not directly or indirectly impose unfair/predatory price. As such, since NSE is neither dominant in the relevant market nor has it imposed an unfair or predatory price in sale of services, it has not violated Section 4(2) (a) (ii) of the Act.

3. *Whether NSE is dominant in one relevant market and has abused this dominance to enter or protect the other relevant market in terms of Section 4(2) (e) of the Act?*

   The commission via the previous NSE circulars found that the informant has been facing the restraint of zero fees since the beginning. However, the Commission concluded that zero price policy of NSE in the relevant market is unfair and can be termed as destructive pricing.

Order / Judgment

NSE was directed to modify its zero price policy in the relevant market and to cease and desist from unfair pricing, exclusionary conduct and unfairly using its dominant position in other market/s to protect the relevant CD market with immediate effect. The Commission levied a penalty on NSE equivalent to 5% of their average turnover amounting to a total of INR 55.5 crores.

II. In Belaire Owners Association v. DLF Limited, Huda & Ors.[19]

Issues Involved are:-

1. *Do the provisions of Competition Act, 2002 apply to the facts and circumstances of the instant case?*

[19] MANU/Co/0044/2011

The CCI observed that a plain reading of Section 2(u) of the Act makes it abundantly clear that the activities of DLF in context of the present matter squarely fall within the ambit of term 'service'.

2. *What is the relevant market, in the context of Section 4 read with Section 2 (r), Section 19(5), Section 19(6) and Section 19(7) of the Competition Act, 2002?*

   Based on the facts of the case, Gurgaon is seen to be the relevant geographic market. A decision to purchase a high-end apartment in Gurgaon is not easily substitutable by a decision to purchase a similar apartment in any other geographical location. Gurgaon is known to posses certain unique geographical characteristics such as its proximity to Delhi, proximity to Airports and a distinct brand image as a destination for upwardly mobile families.

3. *Is DLF Ltd. dominant in the above relevant market, in the context of Section 4 read with Section 19(4) of the Competition Act?*

   The Commission was of the view that DLF enjoys the position of market leader as it held 45% of the market share in the real estate *vis-a vis* the market share of its nearest competitor which was a mere 19%(half of DLF's) and this is a relevant factor under Section 19 (4) (m) for holding that it has a dominant position in the relevant market.

4. *In case DLF Ltd. is found to be dominant, is there any abuse of its dominant position in the relevant market by the above party?*

   The CCI held that DLF has resorted to malpractice in the agreement. The abuse was found to be committed by imposing conditions on the buyer through the provisional booking agreement which is signed by the buyer only after paying substantial costs

Order / Judgment

CCI held that DLF had contravened the section 4 (2) (a)(i) and (ii) directly and indirectly, imposing unfair or discriminatory practices in the sale of services. CCI found DLF guilty of abusing its dominant position and imposed a penalty of Rs. 630 crores.[20]

III. In *Competition Commission of India v. Steel Authority of India Ltd. and Anr*[21]

The Commission may issue directions, pass orders or take decisions, as required, under the various provisions of the Act. The object of the Act is demonstrated by the prohibitions contained in Sections 3 and 4 of the Act. Where prohibition under

[20] In an appeal before the COMPAT a stay was granted against the imposition of penalty @ Rs. 630 Crores, under section 27 of the Act.
[21] 2010(9)SCALE291

Section 3 relates to anti-competition agreements there Section 4 relates to the abuse of dominant position. The regulations and control in relation to combinations is dealt with in Section 6 of the Act. The power of the Commission to make inquiry into such agreements and the dominant position of an entrepreneur, is set into motion by providing information to the Commission in accordance with the provisions of Section 19 of the Act and such inquiry is to be conducted by the Commission as per the procedure evolved by the legislature under Section 26 of the Act.

IV. *Sh. Sonam Sharma v. Apple Inc. USA, Apple India Pvt Ltd, Vodafone Essar ltd & Bharti Airtel Ltd*[22]

Issues involved are:

1. *What was the relevant market for the purpose of the present case and whether it had been properly identified?*

   Apple views Samsung, Nokia, Blackberry etc as its competitor in the smartphone market in India and similarly other smartphone manufacturers also offer their products in direct competition with iPhones. Therefore, in the absence of any specific finding that Apple iPhone constituted a distinct market, the Commission had reasons to believe that the true relevant market was the market of smartphones in India

2. *Whether the OP had abused their dominant position by imposing unfair conditions on the purchasers of the Apple iPhones?*

   Apple's share in smartphone market in India was around 3 per cent during 2008-11. Further at the time of launch of iPhones in India, Apple did not have its own retail stores. None of the OPs had a position of strength to affect the market outcome in terms of market foreclosure or deterring entry, creating entry barriers or driving any existing competitor out of the market and within the theoretical framework of tying arrangement, the anti-competitive concerns in terms of Section 3(4) violations does not hold.

V. *Sai Wardha Power Company Ltd.* v *Western Coalfields Ltd.*[23]

Issues involved are:

1. *What is the relevant market in the present case?*

[22] MANU/CO/0019/2013
[23] MANU/CO/0085/2014

Since there does not exist any substitute for non-coking coal which is made available to the thermal power producers the Commission held that the relevant product market in the present case was 'production and supply of non-coking coal to the thermal power producers.

2. *Whether the opposite parties are dominant in the said relevant market?*

   The commission in this regard observed, CIL and its subsidiaries face no competitive pressure in the market and there is no challenge at the horizontal level against the market power of the opposite parties. Further the market share of CIL and its subsidiaries in the relevant market clearly establishes the dominance of OPs in the relevant market.

3. *If finding on the issue No. (ii) is in the affirmative, whether the opposite parties have abused their dominant position in the relevant market?*

   The Commission concluded that conduct of the opposite parties was in contravention of the provisions of section 4(2)(a)(i) of the Act. It clearly imposed unfair terms and conditions in supply of non-coking coal Conditions in LoA, thereby abusing its dominant position in contravention of the provisions of section 4(2)(a)(i) of the Act.

Order / Judgement:

1) The opposite parties are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act, as detailed in this order; and
2) The opposite parties are further ordered to make necessary modifications in its agreements in light of the observations and findings recorded in the present order within a period of 60 days from the receipt of this order and furnish an undertaking to this effect.

VI. *Grasim Industries Ltd.* v *Competition Commission of India*[24]

Issues involved are:

1. *Whether the Opposite Party i.e. GIL (manufacturer of VSF) is directly or indirectly determining the sale prices thereby violating the provisions of section 3(3)(a) of the Competition Act, 2002?*

[24] [2014]119CLA169(Delhi)

The GIL has kept dual basic price and differential discounts for the sale of VSF, by imposing unfair conditions relating to subsequent production and sale of yarn (either domestic or export) by virtue of its dominance.

2. *Whether the Opposite Party is limiting or controlling production or carrying on any practice to impose restrictions on supply of MMF thereby violating the provisions of section 3(3)(b) of the Competition Act, 2002?*

   The GIL provides segmental discounts for export or domestic consumption on the conditions that a minimum of 25% content of VSF is necessary in yarn. In case the content of VSF is less than that, no discounts are offered. GIL obtains proof of production/export before providing discounts. Customers have no choice but to manufacture the yarn in the given manner to obtain such discount. Otherwise they have to pay higher prices for the same VSF. GIL being dominant in the relevant market have imposed such unfair condition and violated the provisions of the Act

3. *Whether the Opposite Party share the market/source of production by way of allocation of geographical area of market, or type of goods or customers thereby violating the provisions of Section 3(3)(c) of the Competition Act, 2002?*

   A discount/rebate is given by GIL with a condition that the yarn manufacturer shall not purchase VSF from anybody (including imports) other than GIL. The policy of GIL in this regard is not transparent and through such conditions, the GIL prevents its customer from importing VSF. Putting such unfair conditions and limiting or restricting the market for yarn manufacturers for imports of VSF is violative of the provisions of the Act.

4. *Whether the OP i.e. GIL has abused its dominant position?*

   The GIL was found to be maximizing its profits through imposing unfair conditions and abusing its dominant position. By taking the advantage of import landed price and imposing unfair conditions in pricing and sales, the high profit margins are earned, which is not passed onto the customers and thereby violating the provisions of section 4(2)(a) of the Act.

VII. *Builders Association of India v. Cement Manufacturers' Association and Ors*[25]

Issues involved are:

[25] MANU/CO/0106/2012

1. *Whether the parties in the present case have contravened the provisions of section 4 of the Act?*

   The market share of cement manufacturing companies is such where no single firm is dominant in India. In fact, the two major groups-Birla and Holcim have more or less comparable market share. No single firm or a group is in position to operate independent of competitive forces or affect its competitors or consumers in its favour to make it dominant within the meaning of explanation (a) to section 4 of the Act.

2. *Whether the parties in the present case have contravened the provisions of section 3 of the Act?*

   The Commission observed that the act on the part of the cement companies had neither caused any improvement in production or distribution of goods or provision of services nor any promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

VIII. *Mr. Karan Sehgal* v. *M/s. Lakme Lever Private limited*[26]

Issues Involved are:-

1. *What is the relevant market for the purposes of the relevant c\case and whether it had been properly defined?*

   It was held that the market of beauty and wellness services exclusively for women through saloon in the territory of Gurgaon as well as NCR was the relevant market for the instant case and had been properly defined and identified.

2. *Whether OP was in dominant position in the relevant market and had abused its dominant position?*

   It was held that the market of beauty and wellness services exclusively for women is highly fragmented and unorganized. There are very few corporations in this segment and these corporations catered to the needs of only small category of customers and their presence is only by way of saloons. One can find beauty parlours in every street/ mohalla of Delhi. Thus, the question of dominance of Lakme did not arise. Accordingly, there did not exist a *prima facie case* against the OP.

IX. *UPSE Securities Ltd.* v. *National Stock Exchange of India Ltd*[27]

[26] MANU/CO/0015/2013
[27] MANU/CO/0016/2013

The Commission observed that though OP enjoyed a dominant position in the relevant market, the conditions imposed by the OP upon RSE members including the informant did not amount to abuse but were rather necessary for investors' protection. The Commission observed that *prima facie* there existed no case of contravention of provisions of Sec 4 of the case and case needed to be closed.

X. *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*[28], it was observed that, "Abuse may occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition. The behaviour of an undertaking may be considered as an abuse of a dominant position where the company through recourse to methods different from those used in normal circumstances, hinders the maintenance or development of competition and may affect trade conditions in a market[29].

XI. In *United States v. International Harvester Co*[30]., the Court citing the case of *United States v. United States Steel Corp*[31] observed that the law does not make mere size of a corporation, however impressive, or the existence of unfettered power on its part, an offence, there needs to be a misuse of such power for there to be any liability imposed on such firms. Different conducts have been expressly declared to amount to abuse of dominance under the competition laws of different jurisdictions. Legislators have merely included such acts as illustrations and not as an exhaustive list.[32]

CONCLUSION & SUGGESTION

There is a need for a National Competition Policy which shall incorporate competition impact assessment, competition neutrality, essential facility doctrine, separation of policy, regulation operation incentives for reform at state level, etc. The anti-trust authorities to make sure that the market structure supports the prospects of abuse of dominant position.

[28] Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities [1973] EUECJ C-6/72
[29] NV L'Oréal and SA L'Oréal v PVBA Judgment of the Court of 11 December 1980
[30] United States v. International Harvester Co. 274 US 693, (1927)
[31] United States v. United States Steel Corp. 251 US 417
[32] Tetrapak Interational SA v. Commission of European Communities [1996 ECR I-5951]; See Also, Compagnie Maritime Belge Transports SA v. Commission of European Communities [2000]EUECJ C 365/96