

Abuse of Dominant Position

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Abstract

The present papers proceed by studying the case and instances of abuse of dominant position the relevant market. The researcher has observed drawback in the implementation of the law of competition act due to which many enterprises and firms obtain this position on the force of money power and monopolization.

However in the study the researcher has pointed out that the dominant per se is not bad but abuse of such position is not favorable for other enterprises of the firm. Further, the abuse not only affects the market producers but also the consumers who are a part of it. The present paper deals with instances where the CCI has dealt with penalty for the abuse of dominant position.

Introduction

Fairness and equal playing field in all the levels of market and all the participants of the market is absolutely necessary for sustainability and development.

When there is a perfect competition in the market, the consumer is sovereign as his welfare is maximized. However, in reality the markets are imperfect and the invisible hands in the Adam Smith theory not always favors the consumer interest. Consequently we require maintaining consistency and fairness in the market.

Thus, all modern competition law contains specific provision of anti-competitive and monopolistic behavior. The Sherman Act, 1819 to which the origin of competition law can be traced contains specific provisions against monopolistic. Again ARTICLE 82 OF EU treaty prohibits the use of dominance. One of the most important objectives of Competition Act 2002 like other competition regime in the world is to detect and to prevent abusive conducts by dominant enterprises.

Dominant position as being 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. The competition laws of the countries focuses on all activities be it multilateral activity or unilateral activity i.e. abuse of dominant position in the market.

The extent of dominance can be defined as the position of strength enjoyed by an undertaking that enables it to operate independently of the competitive pressure in the

relevant market and also affects the relevant market, competitors and consumers by its action.

The impact on the market including barriers to new entrants is to be taken into account. The Competition law prohibits the use of market controlling position to prevent individual enterprises or a group from driving out competing businesses from the market as well as from dictating prices. The concept of abuse of dominant position of market power refers to anticompetitive business practices in which dominant firm may engage in order to maintain or increase its position in the market.

Objective of Study

- To know the meaning of dominant position in competition market.
- Overview of legal provision for prohibition of abuse of dominant position.
- To find out decisions given by CCI on various cases of abuse under competition law.

Hypothesis

It may be hypothesized that the Indian framework for Competition Law prohibits the abuse of dominant position to maintain competitiveness in the market for every kind of market players.

Research Problem

1. Has Competition act is succeeded by in preventing abuse of Dominant Position?
2. The lack of awareness and efficiency the dispute resolve mechanism are functioning and ruling of CCI?

Methodology

The methodological approach used in the research paper is doctrinal and case study method. The data used in the research is collected from both primary, secondary and tertiary sources to make analysis and to approve or disapprove the hypothesis.

Literature Review

In “**Assessment Of Dominance : Issues And Challenges Under The Indian Competition Act, 2002**” by “**Mr. G.r. Bhatia**” The article mostly deals with the legal frame work for Dominant Position and law provided in the Competition act, 2002 and MRTP act, 1969.

In “**Abuse Of Dominant Position**” by “**Shilpi**” explained that Dominance relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.

Power Sector: In In Re, Maharashtra State Power Generation Company Ltd., A number of complaints were filed against Coal India Ltd. (CIL) for abuse of dominant position. CIL along with its subsidiaries is clearly in a monopolistic position due to its statutory monopoly created under law.

Concept of Dominant Position

As per section 4(2)(a):

The term dominant position or dominance defined in terms of position of strength, enjoyed by an enterprise, in the relevant market in India, which enables it to:

- A) Operate Independently of the competitive forces prevailing in the relevant market.
- B) Affects its competitors or consumers or the relevant market in its favour.

In simple words, it is the ability of enterprise to act or behave independently of the market forces to determine its dominant position.

Such dominant position can be achieved due to:

- i) Deep pockets,
- ii) Large market share,
- iii) Technology etc.

Elements of the Above Definition

A) Operate Independently

Characteristics of a market is defined by the forces of demand and supply, which are affected by several forces such as government policy, regulations, demographic factors, natural condition of land availability etc.

At this point it would be relevant to refer to **Porter's 5 Force Analysis** which attempts to analyze the level of competition within an industry.

3 forces from horizontal competition:

- threat of substitutes to products/services
- threat of established rivals
- threat of new entrants

2 forces from vertical competition:

- bargaining power of suppliers
- bargaining power of customers

When an enterprise in such a position that is unaffected by these forces it is considered dominant.

For example, Maruti Suzuki due to their strong brand loyalty, service network and higher resale value in the used car market are relatively unaffected by competitive forces prevalent in the car market.

B) Affects Its Competitors Or Consumers Or The Relevant Market In Its Favour

Now the second element of the definition which is the ability of an enterprise to affect its competitors/consumers/relevant market in its favour. An enterprise may have the capability to not only operate independently of competitive forces but may actually be in

a position to influence its competitors or consumer or the relevant market itself in its favour.

In a sense it is higher degree of strength, where an enterprise may be freely adopt price or non-price strategy to overcome downward pressure on its profit from its competitors or to capture or buying customers or to create a market environment that would deter new competitors both in terms of competing enterprise or rival products.

Is Dominance Per Se Bad?

Before proceeding further it is important to understand dominant, being in a dominant position is not illegal per se and such enterprises are entitled to receive the same benefits as other enterprises in the market. There are various natural monopolies which exist in the market even today.

For example: Google in the market of internet searches. However according to many cases decide by courts across various jurisdiction it is clearly established that the undertaking enjoying a dominant position has a special responsibility of not allowing its conduct to impair genuine undistorted competition in the relevant market.

Abuse of Dominant Position

Section 4:

No enterprise should abuse its dominant position, if it gained a dominant position its good but it will not be allowed to abuse it.

How Do You Abuse A Dominant Position?

Basically there are 5 situations when an enterprise when an enterprise said to be abusing its dominant position:

1. Impose Unfair or Discriminatory-Condition

-Price

For example, a tie-in agreement where if you are purchasing one product you have to purchase the other product too or any other discriminatory condition.

That means if an enterprise is monopoly, it may allocate discriminatory conditions and that is adversely affecting the market or to set a quoted price and bound to accept that product at that price. This is because of the dominance the enterprise enjoys in the market. This is considered abusing of dominant position.

In the same regard there is a term called, Predatory Pricing that is all predatory prices are unfair price. At any point of time the producer fill the good in the market below the cost either producer/distributor. If it takes product at Rs.50 and supplies at Rs 40. Now why does a producer do that to suffer loss. The basic objective of the loss is to occupy the market.

For example: Ola and Uber went below their cost provided cab in Delhi and other region below the cost that they had to incur, just to sweep away the competitors in the market. This is the example of predatory pricing.

2. Limit Of Restricts-Production Of Goods

-Technical Or Scientific Development

If the enterprise who is enjoying the dominant position in the market is somehow or the other limiting the production of goods or the provision of services in the market, now what will be the impact of limiting production? It will reduce the supply and demand remaining constant, what will happen is that the price of that product would increase and that would effect the market ultimately.

So any enterprise who is enjoying the dominant position should not be indulging in such activity that will be an abusive action leading to dominant position and otherwise if you are not restricting the production still you are restricting the technical or scientific development like the development which is actually needed for the consumers in the market.

So if an enterprise is restricting the development what is happening is basically is the consumers are adversely affected because they need a change, need a scientific advancement in the good.

For example, a mobile phone, we had the barphone initially then slide and flip phone and now smartphone. If there was a monopoly in the market in the market and they restrict the technical development in the mobile phone. What would the customer be doing till date they would be using the barcode phone, the technical development was restricted. The end result would be we would be living in the same era of the bar code phone.

So if an enterprise has a dominant position in the market, they are not supposed to restrict either the production or the technical and scientific development and advancement.

3. Denies Market Access

For example: an enterprise ABC ltd who has dominant position in the market. Like the cell phone market, just to create artificial shortage in the market, they would take step ahead which would lead to denial of market in any manner. It would be abuse of the dominant position, the market should be free to operate. For there is a competitive market, it comes to equilibrium at one point, demand, supply, competitors are balanced.

4. Makes Conclusion Of Contract Subject To Acceptance Of Supplementary Obligation

Since an enterprise is holding a dominant position, its entering into a contract with any distributor or any supplier or any one dealing with the enterprise in the market, the enterprise come out to impose any supplementary obligation. The obligation does not relates to anywhere in the contract.

For example, if an enterprise is getting into contract of construction of building, the obligation is to supply rice to the district/family. There is no relation in such contract. If the other person accepts such contract, it has to abide by other obligation which is not related to the contract. Now, its just because the enterprise has a dominant position and the other party has no option. This is abuse of dominant position.

5. Enters Other Market By Using Dominant Position

If the enterprise uses its dominant position in one relevant market to enter into another relevant market, then it is abuse of dominant position. If the enterprise is entering into another sector is well and good but if its entering by misusing i.e. by the abuse of dominant position, it is not permitted.

Important Cases Regarding Abuse Of Dominant Position

Belaire Owners' Association Vs. DLF Limited, HUDA & Ors.15

On this case, CCI held that DLF has contravened the section 4 (2) (a) (i) and (ii), directly and indirectly, imposing unfair or discriminatory conditions in the sale of services. CCI found DLF guilty of abusing its dominant position in the market and imposed a penalty of Rs. 630 crores on

DLF. The CCI further directed DLF to cease and desist from formulating and imposing such unfair conditions in its Agreement with buyers in Gurgaon and to suitably modify unfair conditions imposed on its buyers as referred to above, within 3 months of the date of receipt of the order on DLF.

Adani Gas Case: Similar to Coal India case (supra), CCI found that Adani has imposed unfair conditions on the buyers by way of Gas Supply Agreement (GSA), for example “likely termination of contract by the opposite party on account of failure to off-take 50% or more of the cumulative DCQ by the buyer during a period of 45 consecutive days as against the longer period available to the opposite party from GAIL.” CCI imposed a penalty of 4% of the average turnover, i.e. Rs. 2567 lakhs on Adani in this case¹⁵ along with the orders to cease and desist and modification of the unfair and discriminatory clauses of the GSA.

In Re:M/S Maharashtra State Power Generation Company Ltd.And Ors.Vs Coal India Lts And Others

The CCI held that since CIL through its subsidiaries operates independently of market forces and enjoys undisputed dominance in the relevant market of production and supply of non coking coal in India they are in contravention of section 4(2)(a)(i) of the competition act,2002 for imposing unfair/discriminatory conditions in fuel supply agreement(FSAs) with the power producers for supply of non-coking coal.

Shri Surinder Singh Barmi V. Board Of Control Of Cricket In India(Bcci)

CCI concluded that BCCI was abusing its dominant position in violation of section 4(2)(c) of the act and imposed a penalty @six percent of the average turnover of the BCCI in 2007-08,2008-09 and 2009-10 amounting to Rs.52.24 crores.

Remedies/Penalty

After an abuse of dominance is established under Section 4 of the Act, CCI may pass the following orders under section 27 of the Act:

- Order discontinuance of such abuse of dominant position by way of a cease and desist order.
- Impose a penalty which shall not be more than ten percent of the average turnover for the last three preceding financial years.
- Pass such other orders or issue such directions as it may deem fit.

Further, under section 28 of the Act, CCI may also direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position. Such an order by CCI, which has to be in writing, may provide for the following:

- (a) The transfer or vesting of property, rights, liabilities or obligations;
- (b) The adjustment of contracts either by discharge or reduction of any liability or obligation or otherwise;

- (c) The creation, allotment, surrender or cancellation of any shares, stocks or securities;
- (d) The formation or winding up of an enterprise or the amendment of the memorandum of association or articles of association or any other instruments regulating the business of any enterprise;
- (e) The extent to which, and the circumstances in which, provisions of the order affecting an enterprise may be altered by the enterprise and the registration thereof;
- (f) Any other matter which may be necessary to give effect to the division of the enterprise.

The Commission may, during the pendency of an inquiry into abuse of dominant position, if the conditions of Section 33 of the Competition Act, 2002 are met, temporarily restrain any party from carrying on the offending act until conclusion of the inquiry or until further orders.

Other than the above, the Central Government or a State Government or a local authority or any enterprise or any person may make an application under section 53-N of the Act to COMPAT requesting to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II (which includes section 4), having been committed by enterprise.

Conclusion

Where the implementation of the competition law lacks the enterprise are seen to abuse the dominant position. CCI has a pivotal role in curbing the abuse and ensuring fairness in the relevant market. The above situations where the dominance is not limited has widen the area of interest. Thus, more effective mechanism is needed to have control on enterprises exercising their dominance power. Lastly, competition should ensure benefit for both producers as well as consumers in the market.

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