



Decoding the concept of Abuse of Dominance- Current Trends in India

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Abstract: Healthy competition is the key to healthy economy. Indian Competition law has seen drastic change from the point of view of regulations. The old regime controls the formation of monopolies whereas the new one does not curtails or forbid a company to enjoy monopolistic/dominant status in the market rather it only fix the responsibility of those holding position of strength by prohibiting abuse of dominant position. This change of law was initiated after New Economic Policy 1991 can into existence. The New LPG reforms along with formation of WTO allowed foreign investor to dive in the vast Indian Market. This created a need to regularize the market and protect it from any kind of abuse by the big players around the globe. Therefore the new competition law on the line of English Competition Law was framed. The paper deals with the law regarding abuse of dominance in India after enactment of Competition Act, 2002 and its various interpretations in the relevant cases decided by Supreme Court and authorities like CCI and COMPAT.

Keywords: MRTP, Competition, Dominant position, product market, relevant market, geographical market, Abuse of Dominance

I. Introduction

Britishers left India in 1947 with bitter physical division and shattered economy. Therefore the Government of independent India have adopted an economic model where it can control the expansion of industries, price of goods and restrict the formation of private monopolies.¹ In 1951 Industries (Development and Regulation) Act was enacted by the Parliament to allow the government not only to regulate the setting up of new industries but also the expansion of the old one.² Further to aid this Monopolies Restrictive Trade Policies Act, 1969 was enacted which allowed the government to control growth of monopolies and unfair trade practices³ in the market. The genes of this legislation can be traced under article 38 and article 39 of Constitution of India. But as time passes by the economy changed and so does the economic policy. After two decade when India adopted the New Economic Policy. After LPG reforms Government attitude changed and so does its role from a controller of the market to a facilitator of the market. A pro-market, efficient, competitive and open economy was all set to take over the old licensed one. Raghavan Committee was set up to suggest a new competition policy as the old one didn't deal with abuse of dominance, predatory pricing, combinations, anti-competitive agreement etc. The committee submitted its report on 22nd May, 2002 and bill was passed by the Parliament taking suggestions from this report. This new Act was developed in the line of International standards. One of the major concept that is dealt by the new Act is Abuse of dominance. The new policy does not object the dominant position in the market but it penalized the abuse of powerful position.

II. Concept of Abuse of Dominance

“Dominance” means power or authority over other. Under new competition policy holding a position of dominance is not prohibited but its misuse is. Section 4 of Competition Act, 2002 defines dominant position⁴ as “*the position of strength, enjoyed by an enterprise in the relevant market in India which enable it:*

a) operate independently of the competitive forces prevailing in the relevant market;

or

b) affect its competitors or consumers or the relevant market in its favour”

¹ P.K Basu Majumdar, Penalising Anti-Competitive Agreements and Abuse of Dominance, 7 NUJSL Review, 226 (2014)

² Supra

³ MRTP Amendment Act, 1984, S. 36

⁴ Competition Act, 2002 (Act 12 of 2003) Explanation (a) to s. 4

The Act displayed a change in the shift from Monopolistic Restrictive trade Policies that rules India competition policies for four decade. From the above definition one can construed that a firm would be called a dominant firm if it has substantial power in the market such that it can work independently of its competitors in the relevant market. The second aspect of the definition is the ability of the firm to affect its competitor, consumer behaviour or the relevant market itself.

Relevant market is defined under competition Act is as relevant product market or relevant geographical market or both as decided by CCI. Relevant product market⁵ is defined as “a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use”. Whereas relevant geographic market⁶ has been defined as “ a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas”.

III. Factors determining the Dominant Position

There are three major stages in determining whether an enterprise has abused its dominant position:

1. First stage deals with defining the relevant market.
2. The second stage deals with finding whether the enterprise/ undertaking hold dominant position in the relevant market.

In cases of *Bharti Airtel v. Reliance Jio Infocom Limited*⁷ “the Informant, Bharti Airtel, alleged in its complaint that RJio’s act of offering free services since its inception under one offer or other, amounts to predatory pricing, which is thereby in contravention of Section 4(2)(a)(ii) of the Act. It further alleged that the company used its financial strength in other markets to enter into the telecom market through RJio, thereby contravening Section 4(2)(e) of the Act.”

Reliance was given a clean cheque and CCI state that “...in the absence of any dominant position enjoyed by RJio in the relevant market, the question of alleged abuse does not arise...” The Commission while dismissing the complaint against Reliance Jio stated it’s not only the free services that raises concerns for healthy competition unless the service provider enjoys the dominant position. It also need to show that the services were provided with an anti-competitive objective of excluding competition/ competitors.

⁵ Supra note no. 4 S. 2(t)

⁶ Supra note no. 4 S.2 (r)

⁷ Case No. 03 of 2017

Where as in case of Meru Travels Solutions Pvt. Ltd v. Uber India System Private Limited⁸, Meru alleged that Uber provided reduced tariffs, deep discounts to its customers. It was found that Uber had 50.1% of the market share in the relevant market namely Delhi NCR and at the same time it offered deep discounting and other monetary benefits to the passengers because of which it was losing on an average Rs. 204 per trip. Therefore, it was alleged that Uber has abused its dominant position and has indulged in predatory pricing violating Sections 4(2)(b)(i), 4(2)(c) and 4(2)(a)(ii) respectively. The matter went to Supreme Court and the court dismissed the appeal file by Uber. The Bench was of the opinion that “ *the fact of Uber was losing a considerable amount of Rs. 204 per trip and proving such deep discounting and monetary benefits to customers did not make any economic/ business sense. It pointed out that Uber intended to eliminate competition in the market. The Court further observed that if a loss is made for trips, as in the present case Explanation (a)(ii) would be attracted a such a loss would certainly affect the competitors already existing in the market and would also sway the relevant market in favour of the Appellant.*”

3. The third deals with determining whether the enterprise/ undertaking actually abused the dominant position.

Major factors that need to be taken into consideration while determine Dominant position of an enterprise is mentioned as under:⁹

- “(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 Commission may consider relevant for the inquiry.”

⁸Case No. 96 of 2015

⁹ Supra note no. 4 S. 19 (4)

The CCI succinctly describes the Dominant Position in case of *MCX Stock Exchange Ltd. V. NSE India Ltd*¹⁰ where it was held that

“The position of strength is not some objective attribute that can be measured along prescribed mathematical index or equation. Rather, it has to be a rational consideration of relevant facts, holistic interpretation of (at times) seemingly unconnected statistics or information and application of several aspect Indian economy. What has to be seen is whether a particular player in a relevant market has clear comparative advantages in terms of financial resources, technical capabilities, brand value, historical legacy etc. to be able to do things that would affect its competitors into taking a certain position in the market which would make market and consumer respond or react in certain manner which is beneficial to the dominant enterprise but detrimental to the competitors.”

Legal experts also suggests that this definition may appear ambiguous and different meaning may be infer from the same by judicial interpretations.¹¹ But actually this ambiguity is intentionally provided in the Act as a mixed mathematical figure might not be able to provide a real picture in all the cases. A same market share yard stick cannot be applied to determine the Dominant status in relevant market.¹² For example an enterprise holding 25% may held a dominant position in the relevant market where as at the same time other enterprise holding 30% may not satisfy the criteria of being dominant in the market.

Two major points mentioned in the Act¹³ while deciding Dominant position was further put to scrutiny in *Belaire Owner’s Association v. DLF Ltd.*¹⁴ by CCI. The CCI further explains both the phrases-

1. *“Operate independently of competitive forces prevailing in the relevant market”-*

“To promote productive and allocative efficiency is necessary to have healthy competition among the sellers. However there is cause of concern arises when sellers consciously creates entry barriers in the market, drive out the existing competitors, control the price or the output, impose unfair or discriminatory conditions etc. Such conduct is considered anti-competitive and come under scrutiny under competition laws. Therefore, for the purpose of the determining the dominant position it is important to examine the ability of an enterprise to operate independently of the competitive forces generated by its revival”.¹⁵

¹⁰ Case no. 13/2009, decided on 23.06.2011

¹¹ Dr. S. Chakravathy, *M RTP Metamorphoses into Competition Act, 2002*

¹² Page 150, *ibid.*

¹³ *Supra* note no. 4 Explanation to s. 4(2)(a)

¹⁴ Date of Order 12.8.2011

¹⁵ Para 12.46, *ibid.*

2. “Affects its competitors or consumers or the 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 consumers in relevant market. In a sense, this is a higher degree of strength where an enterprise may be freely able to adopt price or non-price strategy to overcome loss in the profit it is making due to its competitors, or to capture, bind consumers or to create a market environment that would deter newer competition, both in terms of competing enterprise or rivals.”¹⁶

Other than the above conditions there are some other characteristics of an enterprise that determine its dominant position under the Act like market share, size, resources of the enterprise, size of competitors also plays an important role.

IV. Indian Jurisprudence on ascertaining the Relevant Market

In the first part of the article we have discussed about the definition of relevant market under the Act, now let us throw some light on some interpretation given by CCI to lead down the vital jurisprudence of the term relevant market.

In *Kapoor Glass v. Schoot Glass*,¹⁷ the commission noted that the necessity to appreciate the ‘competitive interplay between the various colour and quality variants of the products involved in order to preclude any possibility of misestimating the market power of the enterprise under inquiry.’ In this regard, the apparent distinction between the sub-categories in terms of ‘colour/share’ and ‘expansion range’ becomes vital for appraisal of whether they can be reasonably viewed as substitutes and as constituents of the board relevant product market of neutral USP-1 borosilicate glass tubes.¹⁸

The Commission further observed that “distinction between the different quality variants of tube stem from the variation of expansion limits, albeit within the range permissible under USP Type 1 standards. The price of these variant too are different. In view of price sensibility of Indian market and in absence of anything substantive made available by the DG or the parties that conclusively rules out the competitive interaction between the different quality variant of tubes appear implausible.”¹⁹

In *Kansan News v. Fast Way Transmission*²⁰ DG suggested that Cable TV and DTH are two distinct product and thus distinct relevant markets.

¹⁶ Para 12.46, *ibid*

¹⁷ *Kapoor Glass Pvt. Ltd v. Schoot Glass India Pvt. Ltd.*, case no. 20 of 2010, decided on 29.03.2012

¹⁸ Para 9.16, *ibid*

¹⁹ Para 9.17, *ibid*

²⁰ MANU/CO/0063/2012

V. Abuse of Dominance

The Act itself provide for the situations where a person holding a dominant position can be said abusing the same. According to the Act an enterprise is said to have abused its position if:-²¹

- (a) “It directly or indirectly imposes unfair or discriminatory condition in purchase or sale of goods or service or unfair or discriminatory price in purchase or sale (including predatory price) of goods or service; or
- (b) It limits or restrict production of goods or provision of services or market therefor; or technical or scientific development relating to goods or services to the prejudice of consumers; or
- (c) Indulges in practice or practices resulting in denial of market access [in any manner]; or
- (d) Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
- (e) Uses its dominant position in one relevant market to enter into, or protect, other relevant market”

Whenever abuse of dominance is evaluated the main focus is paid on two aspects-

1. Whether the enterprise has used any measures which are considered as exploitative. For example overpricing or discriminatory pricing.²²

Pankaj Agarwal v. DLF²³, in this case the agreements with regard to distribution of apartment was drafted singularly by Delhi Land and Finance (DLF). This in-turn authorized them to be arbitrary about the designation of super-area, secretive about data pertinent to the buyer, such as total number of the apartment on each floor, and to drop portions and relinquish booking sums. The Commission held “*the agreements to be exploitative against purchasers, and consequently, it was one-sided and abusive.*”

2. Whether the enterprise has taken such measure that denied market access to its competitors. For example in the case of Re Shri Shamsher Kataria v Seil Honda²⁴, “where there already existed agreement between the dominant entities and the Overseas Suppliers of unique vehicle parts which kept the Overseas Suppliers from providing parts to free repairers, such understandings were held to be anti-competitive as they limited passage of new firms”²⁵.

²¹ Supra note no. 4 S. 4(2)

²² Predatory pricing as defined u/s. 4 (2)(b)

²³ Case No. 13 & 21 of 2010 and Case No. 55 of 2012

²⁴ Case No. 03/2011

²⁵ Deyasini Chakrabarti, *Abuse of dominant position*, Ipleader, available at <https://blog.ipleaders.in/abuse-dominant-position-competition-act-2002/> last visited on 06/01/2022

VI. Inquiry into abuse of Dominance and Penalizing Abuse of Dominance under Competition Act, 2002

Under Competition Act, 2002 if the commission suspect that there is any contravention or it has been alleged that an enterprise is behaving in a manner prohibited u/s. 4 of the Act either by any person, consumer or their association or trade association or any reference u/s. 19(1) (b) has been made by the central government, then it can place an inquiry into the matter. While conducting the inquiry on abuse of dominance factors lays down u/s. 19(4) of the Act need to be taken into consideration. The Act itself specifies the different factors that will help the commission to decide the relevant market in each case.²⁶

Once the inquiry is over the commission is provided with the power to decide the case.²⁷ The following order may be passed by the commission after the inquiry:

- i. Commission can order the enterprise to discontinue the abuse of its dominant position.
- ii. It has also been given the power to impose penalty, if it deems fit but the amount of penalty must not be more than 10% of the average of the turnover for the last three preceding FY.

M/s Excel Crop Care Limited v. Competition Commission of India²⁸, 2017, COMPAT held “*that punishments are to be determined based on the ‘significant turnover’.* So, for a situation of maltreatment against a multi-item organization, the turnover used to compute the punishment would be the turnover from the specific product(s) in conflict and not the general turnover.”²⁹

In case of Surinder Singh Barmi v. BCCI³⁰, it was claimed by the petitioner that there were irregularities in the way BCCI has granted ownership of the franchise, distribution of media rights, award of sponsorship right etc. while organizing IPL. An inquiry was initiated by the CCI and it was found that due to IPL the revenue of Set Max has gone up and at the same time it has also affected the TRP of otherwise popular shows. In its investigation CCI found that in the organization of private professional league BCCI does have a dominant position in the market. “CCI ruled that BCCI has actually violated the law and abused its dominant position and place a fine on BCCI worth Rs. 52 Cr (which was around 6% of average turnover of three FY).”

²⁶ Supra note no. 4 S. 19(6) and (7)

²⁷ Supra note no. 4 S. 27

²⁸ (2017) 8 SCC 47

²⁹ Deyasini Chakrabarti, *Abuse of dominant position*, Ipleader, available at <https://blog.ipleaders.in/abuse-dominant-position-competition-act-2002/> last visited on 06/01/2022

³⁰ Case No. 61/2010

- iii. It may pass any other order as it may deem fit.
- iv. The act allows the commission to pass an order in writing, by which it can direct the division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.³¹
- v. Commission has also been given the power to pass interim order (temporary order passed during the pendency of inquiry)³²

VII. Conclusion

Thus with the changing times and consolidation of industries one can see more and more incidences of abuse of dominant position, therefore it is very important to put a check on this phenomenon by stricter implementation of statue relation to Competition. Competition Law of a country helps us to ensure that market and business are functioning independently. It provides equal opportunity to all who want to do the business. The penal provision and adjudicatory power under the new law deter the industries from abusing their dominant position in the market as it not only cost them penalties but at the same time it cost them their Goodwill as well.

³¹ Competition Act, 2002 (Act 12 of 2003), S. 28

³² Competition Act, 2002 (Act 12 of 2003) S. 33