Corporate Laws: Abuse of Dominance

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Abstract

The atop verbalization aptly applies to a position of strength enjoyed by an enterprise, in the market and thereby bringing the element of monopoly. A perfect competition is a boon for the consumer as it can maximize its welfare. Unfortunately the position is not the same for seller, as for him blessing would come in the shape of enjoying the monopoly. The monopolists control the market and can increase the prices or reduce the volume of goods to be infused in the market. Well in proper terms this position is definitely called a “dominant” position, as to how one or few people can actually bring a standstill in the market and affect the customers at large along with detrimental effect on its competitors in the market. Looking into the dictionary meaning of “dominance” one would find having control or influence over other as the meaning which can definitely not be termed as adverse. It is only when the word is prefixed by “Abuse” that makes it a matter of concern. We have the Competition Act, 2002 which aims at encouraging competition and shielding Indian markets against anti-competitive practises like “abuse of dominance” forming vital part of. The mere fact of dominance is inconsequential in so far as attracting the Act is concerned. Abuse of dominance is what is required to be proved. There are numerous factors determining dominance of an enterprise, like market share, economic power, entry and exit barriers to name a few. The paper will address the economic concept of dominance before attempting a narrative which can do justice to the title. This paper attempts to look at dominance and its abuse with supporting case laws and experiences along with coming of the Competition Act, 2002 to chain the menace of Abuse of Dominance. In addition the paper will have comparisons with the international scenario in this respect.

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

I. Introduction

The concept of market needs addressal before attempting a narrative which can do justice to the more vital part of the title. After the Market concept is well conceptualised then the question would pop up as to what constitutes dominance? Is enjoying a dominating position will attract the provisions of law or it needs something more to attract the penalties given under the law? This paper is an attempt to look at dominance and its meaning & constituting elements and its abuse with supporting case laws along with advent of the Competition Act, 2002 to chain the menace of Abuse of Dominance.

II. Market Vis-a-Vis Relevant Market

A market is a medium that allows buyers and sellers of a specific good or service to interact in order to facilitate an exchange. The concept of market has grown to cover in its definition physical marketplace and virtual marketplace. Markets are diversified for a number of reasons, including the kinds of products sold, location, duration, size and constituency of the customer base, size, legality and many other factors.

Be the concept of market being as per physical existence or virtual existence one element that is common to both of them is “Fair play”. It means that there needs to be respect for the rules of
the market. One of the vital rules of the market being “perfect competition”. Perfect competition is a market structure in which one of the salient features is no control on the market price of the product. As the current topic of the paper is concerned, there is a need to look into more precise definition of the term market in relevance to the Competition Act of India, 2002. By the phrase more precise definition, we would like to focus on “relevant market”.

The definition of the relevant market as enshrined in Section 2(r) of the Competition Act cannot be whole hog as the term owes its origin to the concept of Economics and thus is bound to be progressive depending on the different set of facts for each case. Section 2(r) of Competition Act 2002 reads as:

“relevant market” means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets”.

A relevant market has therefore two paramount dimensions, product and geographic. The product market depicts the good or service. The geographic market depicts the locations where the producers or sellers of the product or service would be.

In economics, the product market is the marketplace where one can find final goods or services being offered for purchase by consumers, businesses, and the public sector. Focal point being the sale of finished goods, it does not include commercialism in raw or other intermediate materials. Along with the product market, there exist the geographical boundaries of the relevant market too. Geographic dimension involves identification of the geographical area within which competition takes place. Relevant geographic markets could be local, national, international or at times even global, depending upon the facts in each case. Some factors pertinent to geographic dimension are:-

- consumption and shipment patterns,
- Perish ability characteristic
- existence of entry barriers,
- shipment of products,
- Existence of regulatory trade barriers,
- local specification requirements,
- national procurement policies,
- adequate distribution facilities,
- transport costs,
- linguistic barriers,
- preference of Consumer.

For example, in relation of the high transportation costs that are involved in cement industry, the relevant geographical market may be definitely the region close to the manufacturing facility.

III. Product Market

To import the meaning of the product market, we would say that it is the smallest set of substitutes. The product market has the characteristic of interchange ability or exchangeability of goods or services by the consumers or purchasers. The goods or services that purchasers see
as good substitutes are generally regarded to be in the same product market and those that the
purchasers do not see as substitutes are regarded to be in separate product markets. Depending
upon the personal preference of the purchaser along with other factors like:-

- physical characteristics of goods;
- price characteristic of goods or service;
- exclusion of in-house production;
- existence of any specialised producers;
- classification of industrial products, the relevant product market comes into being.

IV. Geographical Market

Construing the concept of relevant geographic market we can say that it is the area in which
products are available at approximately the same price given transport costs and any increase
in demand can be met from neighbouring areas profitably. There are various factors in the
determination of geographical market:-

- Regulatory trade impediments
- Local specification requirements
- National procumbent policies
- Adequate Distribution Facilities
- Transport Costs
- Linguistic factor
- Consumer preferences

If purchasers of a product that is sold in one location would, in response to a small but
significant increase in its price, switch to buying the product sold at another location, then those
two locations are regarded to the in the same geographic market, with respect to that product.
Limits of geographic markets are often determined by transportation costs, tariffs, trade barriers and
many more.

V. Dominance/Dominant Position- “Abuse”

Dominance in one line would mean power and influence over others. ‘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; or
(ii) affect its competitors or consumers or the relevant market in its favour.

Dominance is not based on any straightjacket formula or some mathematical calculations,
rather it can be measured in a comparative environment. One can enjoy the dominant position
by way of having considerable market share to its credit, or by the resources under operation of
a particular enterprises, or by the size of any enterprise, or the size of its competitors, or if the
enterprise enjoys some commercial importance over its other players in the market i.e. its
competitors.
As per Section 19(4) of the Competition Act, 2002 the Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section, have due regard to all or any of the factors, namely which may include the market share of the enterprise, or size factor and resources of the enterprise and of the competitors, or economic power of the enterprise, sale or service networks of such enterprises, how much dependence of consumers is there on the enterprise, or whether the monopolistic feature or dominant position is acquired by virtue of any statute or by virtue of being a Government company or a public sector undertaking or otherwise, or entry barriers, or relevance could be placed upon the market structure and size of market, or 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 and to sum up in last any other factor which the Commission may consider relevant for the inquiry. The nature of dominance can also be attributed to the ability of an enterprise to behave interdependently rather being dependently. If one enterprise is in a position to reap the benefits in the market without being dependent on any external factor, then yes it does enjoy a dominant position. The enterprise is independent of its competitors & customers.

The matter of concern is not that an enterprise is enjoying the dominant position in the markets but the trigger point is achieved when dominance is prefixed by the word “abuse”. The dictionary meaning of abuse is the improper use of something and in the market scenario a little liberty can be taken to construe the meaning of word abuse affixed with dominant position as some enterprise enjoying dominance in the market and exploiting the same.

In the year 2013, the Competition Commission of India ordered that Board of cricket council of India had abused its dominant position in the market and thereby imposed penalty amounting to Rs.53 crores. In the BCCI-CCI case, the instant complaint was filed by the Informant who is a cricket fan, against the OP to the CCI under Section 19 (1) (a) of the Act on November 2, 2010. His allegations were pertaining to the irregularities in the organization of Indian Premier League (IPL), Twenty 20 and professional league tournament conducted by BCCI. He alleged irregularities in the following:

a. grant of franchise rights for team ownership;
b. grant of media rights for coverage of the league;
c. award of sponsorship rights and other local contracts related to organisation of IPL

Upon the above mentioned issues and after findings CCI opined that BCCI has no statutory status but their actions in terms of laying down rules of the game and selection fall under the purview of a regulatory role. Given the implicit recognition by GOI as the national association for cricket, BCCI is a de facto regulator of cricket in India. It is conclusive that all Sports Associations are to be regarded as an enterprise in so far as their entrepreneurial conduct is concerned. It went on to state that the situation where the regulator is also the economic beneficiary is definitely a competition concern. CCI observed that BCCI’s dominance was a definite factor in ICL’s failure hence leading to abuse of its dominant position. The order also directed BCCI to stop denying market access to potential competitors or make such anticompetitive agreements in future. CCI concluded that BCCI was abusing its dominant position in violation of section 4(2) (c) of the Act and imposed a penalty @ six per cent of the average turnover of the BCCI in 2007-08, 2008-09 and 2009-10 amounting to Rs. 52.24 crores.

Such orders serve as a welcome step and are eye openers as they will help in tightening the noose of such enterprises that enjoy their dominance in an abusing way. As the saying goes, ‘Power corrupts; absolute power corrupts absolutely’ needs to be looked upon in a more
The enterprise in the market can improperly use its dominant position by any of the below mentioned ways:

- Imposing unfair or discriminatory price or condition in purchase or sale
- Limiting production to the prejudice of consumers
- Denial of market access in any manner
- Use of position in one relevant market to enter into or protect other relevant market

In reference to a defined market the dominant position is defined. It is only with respect to a market that you can define whether an enterprise which enjoys dominance is actually abusing its position or not. It is pertinent to note that only when dominance is beyond doubt established, can abuse of it be alleged.

Competition in the market is adversely affected if an enterprise abuses its dominant position by indulging in various actions. These actions could be in the shape of an enterprise imposing directly or indirectly unfair or inequitable conditions in either purchase or sale of the goods or services. They could even indulge in price factor of purchase or sale of goods or services which can include very well in its ambit predatory pricing. Predatory pricing is understood when the pricing of goods or services are determined at such a low level that other firms cannot compete because it is not feasible for them to carry out their operations at such a low level and thereby are at the end forced to leave the market.

The enterprise could be smart enough to limit or restrict its production of goods or provision of services in market, which would again be abuse of its dominance. They could even restrict their technical development relating to the goods or services. When one enterprise enjoys dominance in one market it could use that dominance as a tool to enter other relevant markets too.

There was another case of CCI – Google wherein the informants have filed cases alleging that Google enjoyed a dominant position and conducted its business in a manner that was discriminatory, biased and detrimental to others by manipulating algorithms and caused harm to advertisers and indirectly the ultimate consumers. It was further alleged that by using a number of vertical services such as Youtube, Google News, Google Maps etc., it mixed many vertical results into generic search results. Informants contended manipulation in search results and that there was also denial of access and creation of entry barriers for competing search engines etc. CCI concluded that prima facie Google’s had abused its dominant position and that a case had been made within the meaning of Section 26 (1) of the Competition Act. Consequently, DG was directed to carry out investigation in respect of Case No. 7 of 2012 and Case No. 30 of 2012.

Recently the Delhi High court has ruled that in Patent licensing the CCI can look into cases if allegations of abuse of dominance are involved. Micromax India and Intex, which manufacture telecom equipment in India, had alleged that Ericsson was imposing unfair conditions for granting license to use its Standard Essential Patents (SEP).

The CCI had directed investigation into the allegations. The firm had claimed that the CCI did not enjoy the jurisdiction to issue such orders as the dispute in the case was on issues of grant of patent licenses, which would come under the jurisdiction of the Controller General of Patents, Designs and Trade Marks or a Civil Court. The single bench of the high court has, however, held that there was “no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act. And, in absence of any irreconcilable conflict between the two legislation, the jurisdiction of CCI to entertain complaints for abuse of dominance in respect of Patent rights can’t
be ousted.” The bench also noted that while the dispute under the Patent Act would be specific to the parties involved, the “the orders passed by CCI are in rem.”

VI. Predatory Pricing

Predatory pricing in plain vanilla means that a firm enjoying dominance in the relevant market slashes the prices of its products to an unprofitable level i.e. below the cost of the product and by this eliminating its existing rivals in the market. This also has detrimental effect upon the new entrants as entry barriers are created for them. It is a market strategy by which a dominant firm at the first go lower down its prices to a level which is no more feasible for the counterparts and as a result will force them out of the market. When the latter class of established counterparts have been successfully expelled, the former can now raise its prices again and reap the rewards of its solitary existence by expelling its rivals. The act of dominant undertaking may deter new entrants because not only of the predatory pricing factor but also because the predation becomes a barrier to entry.

The indispensable characteristic of competition is that the firms should compete by reducing their prices in the market but care must be borne in mind that a situation must not occur where a dominant firm starts abusing its dominant position in the relevant market. The Competition Act, 2002 defines predatory pricing as “the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors”.

Although customers may perceive the situation beneficial for a short span of time from such lower prices, but if long term effects are taken into account customers will be impaired due to weakened competition which leads to soaring prices, reduced quality and limited choice. There are number of problems which are relevant for assessment of whether predation is taking place or has taken place. The major issues to tackle under predatory pricing are :-

- Pricing below the cost;
- Intention to eliminate a competitor; and
- The feasibility of recouping the losses.

There are differences of opinions about occurrence of predatory pricing. This was famously adopted by Bork and said that ‘it seems unwise to construct rules about phenomenon that probably does not exists or which, should it exists in very rare cases, the courts would have grave difficulty in distinguishing from competitive price behaviour’. Predatory pricing is often considered to be feasible where the firms operate multi-market because it may be able to set off losses in one market from the profits earned in another. An enterprise may witness two prominent phases in predatory pricing :-

Sacrifice phase: As the name says it, in this phase the enterprise suffers from heavy losses due to the predatory pricing which it has resorted to in order to brush off its competitors from the market.

Recoulement phase: After suffering losses now it is required by an enterprise to make up for the same so generally in this phase the enterprise make up for the losses which was caused to her in the sacrifice phase. Not every enterprise operating in the market can practise the predatory pricing. There has to be certain fulfilment of pre requisites for the predatory pricing to follow :-
**Dominant Position:** The substance of the definition is that a dominant enterprise is the one that has the power to disregard market forces, that is, competitors, customers and others and to take unilateral decisions that would benefit itself and also, in the process, cause harm to the process of free competition, injuring the consumers by saddling them with higher prices, limited supplies, etc. The capacity to engage in the market in this manner is what is called ‘market power’, which is quite different from ‘market share’, though, the structure of a particular market, may aid an enterprise with a significant market share in acquiring market power. The elements that constitute a dominant position are:

- A position of strength;
- Position being enjoyed in a relevant market in;
- Such a position that gives the enterprise the power to ‘operate independently of its competitive forces in the relevant market’, meaning that it can at will, disregard the market forces and conditions and impose its own trading conditions, which will include the prices at which it is prepared to supply goods or service.

**Barriers to entry and re-entry:** Successful predatory pricing requires certain level of entry barriers to the market. Otherwise other potential rival enterprises would immediately re enter the market once the predator raises its prices and by adding their output to that of the predator drive the prices back to competitive level. The entrant must incur such costs and hence faces the risk of under-pricing by an incumbent with sunk costs, the latter acting as a barrier to entry, giving the incumbent the power to raise prices above the competition level. Re entry barriers can be said to exist when a firm that has left a market bears considerable costs in seeking to reopen its business.

**Excess Capacity:** One of the important factor to bear in mind for predatory pricing is the production capacity of the enterprise. When the dominant enterprise indulges in predatory pricing then the prices of its products reduces and therefore the demand for their products increases automatically. In UnitedBrands Co. V Commission, the ECJ considered economies of scale a significant power leading to dominance. Even the customers of the competitor shift its preference to the product of the dominant enterprise. If the enterprise fails to cope up with the increasing demand in the market, then the price of product will increase which will eventually help the rivals and the strategy of the enterprise will not work.

**Deep Pocket Requirement:** The enterprises which have strong financial reserves & back up can indulge in predatory pricing. Although it is not termed as of the main pre-requisites of predatory pricing but it is vital for the simple reason that if the enterprise will not have more than sound financial position than its rival then it will not be able to eliminate him from the market and in that process they themselves will get destroyed. As already discussed, predatory pricing has two phases. In the first phase the enterprise has to suffer from heavy losses, therefore, it must have sufficient financial resources in order to complete this phase. After this, in the second phase, that is, recoupment the enterprise will be able to be able to recoup its losses which it has suffered during the sacrifice phase.

In the case of MCX v. NSE, the question of predatory pricing came up for the Competition Commission of India in the case. MCX alleged that NSE had abused its dominant position in the form of waiver of transcription fees, data feed fees and admission fees. The commission found out that the Currency Derivative (CD) and Over the Counter Exchange (OTEC) market are the relevant market and NSE has dominant position in it and has abused its dominant position.
Thus, NSE’s zero pricing policy was declared anti-competitive, due to its unfairness, as the two firms were not competitors placed on equal footing. The NSE was asked by the CCI to immediately cease and desist from unfair pricing, exclusionary conduct and unfairly using its dominant position in other markets to protect the relevant CD market. The Commission imposed a penalty of Rs 55.50 crore on NSE for contravention of the provisions of the Competition Act in its order dated June 23, 2011. NSE was also asked to maintain separate accounts for each segment from next financial year and modify its zero price policy in the CD market and levy appropriate transaction costs.24

VII. Competition Act, 2002 – Remedies for Abuse of Dominance

The Competition Act, 2002 by virtue of section 27 of the act finds mention regarding the orders of the Commission after inquiry into agreements or abuse of dominant position referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass orders directing any enterprise which is involved in such abuse of dominant position to discontinue such practise and not to return with the same in future, which is generally called as cease & desist order.

The commission is also conferred with power to impose penalties as it deems fit to be not more than 10 % of the average of the turnover for the last three preceding financial years on each of such person or enterprises that are found to be parties to such agreements or abuse procedure, which is generally called as power of imposition of penalty.

Section 28 also contains relevant provisions in relation to AOD and mentions that Commission may, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position in the market.

There exists also the Competition Appellate Tribunal (COMPAT) established under section 53A of the Act, in regard to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified section of the Act.

In the matter of Canada (Director of Investigation and Research) v. Nutrasweet Co 26 ruled abuse of dominance by Nutrasweet. They had 95% share in artificial sweetener market, imposed exclusivity by allowing discounts only to those who will use logo & name thus compelling customers to make all their purchases.

The Japan fair Trade Practise Commission recently warned Microsoft to scrap a provision in its licensing contracts with PC makers that prevents them from filing patent infringement suits if they find Microsoft Software features similar to their own technology.27

VIII. Conclusion

The economic development of any nation is possible through protecting consumers & ensuring freedom of businesses from abuse of dominant position by firms. the process of determining dominant nature of a firm is a cumbersome procedure because there exists no straight jacket formula to put into to determine the characteristic of dominance. Erroneously determining the dominance will have detrimental effect upon the competitiveness of the firms. Most modern competition laws do not concern upon dominance but gloom over abuse of dominance. Thus, CCI need to strike a chord in the concerned matter.
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