

ABUSE OF DOMINANT POSITION IN INDIA*Shreya Srivastava**

The Competition Act, 2002 defines dominant position (dominance) in terms of a 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; or a affect its competitors or consumers or the relevant market in its favour. It is the ability of the enterprise to behave/act independently of the market forces that determines its dominant position. In a perfectly competitive market no enterprise has control over the market, especially in the determination of price of the product. However, perfect market conditions are more of an economic “ideal” than reality. Keeping this in view, the Act specifies a number of factors that should be taken into account while determining whether an enterprise is dominant or not.

Dominance has significance for competition only when the relevant market has been defined. The relevant market means “the market that 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”. The Act lays down several factors of which any one or all shall be taken into account by the Commission while defining the relevant market. Relevant product market under Section 2(r) and 2(t) is defined in terms of substitutability. It is the smallest set of products (both goods and services) which are substitutable among themselves, given a small but significant non-transitory increase in price (SSNIP). The market for cars, for example, may consist of separate ‘relevant product markets’ for small cars, midsize cars, luxury cars etc. as these are not substitutable for each other on a small change in price. Relevant geographic market, under Section 2(s) is defined in terms of “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”.

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. As defined under Section 19(4), these include:

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market share, the size and resources of the enterprise; a size and importance of competitors; economic power of the enterprise; vertical integration; dependence of consumers on the enterprise; extent of entry and exit barriers in the market; countervailing buying power; market structure and size of the market; source of dominant position.; social costs and obligations and contribution of enterprise enjoying dominant position to economic development. The Commission is also authorized to take into account any other factor which it may consider relevant for the determination of dominance.

Dominance is not considered bad per se but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/ and an exploitative manner. The Act gives an exhaustive list of practices that shall constitute abuse of dominant position and, therefore, are prohibited. Such practices shall constitute abuse only when adopted by an enterprise enjoying dominant position in the relevant market in India. Abuse of dominance is judged in terms of the specified types of acts committed by a dominant enterprise.

The Act prescribes a three-step test for the determination of abuse of dominance: (a) defining the relevant market; (b) assessing dominance in the defined relevant market; and (c) establishing the abuse of dominance. The dominance of an enterprise is always determined in the context of a particular relevant market. For CCI, such delineation of 'relevant market' clarifies the economic space within which it needs to adjudicate on the alleged abuse of dominance case. As per the provisions of the Act, relevant market is determined on the basis of relevant product or service and relevant geographic market.

The substantive test and benchmark for analysis under the Act is to prohibit practices that have an appreciable adverse effect on competition in India. Section 4 of the Act deals with the regulation of abuse of dominance (i.e. the regulation of unilateral conduct). The Act prohibits the abuse of a dominant position by any 'enterprise' or 'group', and defines dominant position as a position of strength enjoyed by an enterprise in the relevant market in India that enables it to operate independently of the competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. In India, the determination of 'dominance' is based on a qualitative assessment of the prevalent market dynamics and the relative position of strength enjoyed by the market participants. Section 4 stipulates that practices such as imposition of unfair or discriminatory conditions on price in purchase or sale (including predatory pricing), limiting or restricting the production of goods, denial of market access, and leveraging market position in one relevant market to enter into another relevant market, shall amount to abuse of dominance. Evidently,

section 4 of the Act is a welcome departure from the earlier competition law regime under the aegis of the Monopolies and Restrictive Trade Practices Act 1969, wherein emphasis was placed on the size of the concerned player, rather than the actual abusive practice or conduct of such a player.

An issue at hand while discussing what amounts to abuse is whether commission of any act falling within S. 4(2) is *per se* violative of competition law. To elaborate, if an act by a dominant power, say, unjustly exploits the consumer, but is in pursuance of some policy or rule, would the dominant entity be held to be abusing its position? No such distinction or characterization appears in the Act, but was introduced by the Commission in its decision in *Dhanraj Pillay v Hockey India*¹. In that case, Hockey India, a dominant entity in the market for organisation of private professional hockey activities in India and for services of hockey players, decided against adding World Hockey Series in the list of sanctioned events, thus, disincentivising players from participating in the same. The Commission noted that sanctioning of events was a regulatory function of Hockey India, and could not be found, *per se*, of violation of competition laws. Creating a further distinction between means and ends, the Commission noted that it had to be proved that the clause in contention was applied by Hockey India in a discriminatory/unjust manner². So, what is left somewhat in the grey is whether the activity is in contravention of the Act if it results in abuse, or if it is done in a discriminatory manner.

To an enterprise held to be abusing its dominant position, the Commission can do several things-

- Direct the enterprise to discontinue such acts that amounted to abuse. (S.27 (a)). Examples of use of this power by the Commission can be found in cases like *In Re Shamsheer Kataria*³ and *Atos*⁴, where the dominant parties were ordered to cease and desist from indulging in activities that had been found to be in contravention of S.4.
- Impose penalties of up to ten percent of the average of the turnover for the last three preceding financial years. (S.27 (b)).

¹ Case 73 of 2011.

² *Ibid.*

³ Case No. 03 of 2011

⁴ *Atos Worldline v Verifoneindia*, Case No. 56 of 2012