

Abuse of Dominance Under Competition Act 2002

The Competition Act, 2002 as amended by the Competition (Amendment) Act, 2007, (the Act) follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti-competitive practices by enterprises. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises, and regulates entering into combinations (consisting of mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India. This competition advocacy and awareness booklet addresses the applicability of Section 4 of the Competition Act, 2002 relating to abuse of dominant position (dominance) by enterprises. Competition laws all over the world are primarily concerned with the acquisition and/or exercise of market power and its abuse. The term “market power” is variously known as “dominant position”, “monopoly power” and “substantial market power”.

WHAT IS DOMINANCE?

The Act 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:

- Operate independently of the competitive forces prevailing in the relevant market; or
- 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.

RELEVANT MARKET

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.

The **relevant product market** 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 nontransitory increase in price (SSNIP). The market for cars, for example, may consist of separate ‘relevant product markets’ for small cars, mid size cars, luxury cars etc. as these are not substitutable for each other on a small change in price. A relevant product in a relevant geographic market is what matters.

Relevant geographic market 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”.

FACTORS TO 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:

- Market share,
- The size and resources of the enterprise;
- 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 viz. whether obtained due to statute etc.;
- 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.

ABUSE 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 alone or in concert. Such acts are prohibited under the law. There is no need for any reference by the Commission to the adverse effect on competition (in Indian markets). Rather, any abuse of the type specified in the Act⁵ by a dominant firm shall stand prohibited.

Section 4 (2) of the Act specifies the following practices by a dominant enterprises or group of enterprises as abuses:

1. directly or indirectly imposing unfair or discriminatory condition in purchase or sale of goods or service;
2. directly or indirectly imposing unfair or discriminatory price in purchase or sale (including predatory price) of goods or service;
3. limiting or restricting production of goods or provision of services or market;
4. limiting or restricting technical or scientific development to the prejudice of consumers;
5. denying market access in any manner;

6. making 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;
7. Using its dominant position in one relevant market to enter into, or protect, other relevant market.

EXPLOITATIVE AND EXCLUSIONARY BEHAVIOUR

Abuses as specified in the Act fall into two broad categories: exploitative (excessive or discriminatory pricing, including predatory pricing) and exclusionary (for example, denial of market access).

PREDATORY PRICING

The “predatory price” under the Act means “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 goods or provision of services, with a view to reduce competition or eliminate the competitors” **[Explanation (b) of Section 4]**

Predation is exploitative behaviour and can be indulged in only by enterprises(s) having dominant position in the concerned relevant market. The major elements involved in the determination of predatory behaviour are:

- Establishment of dominant position of the enterprise in the relevant market
- Pricing below cost for the relevant product in the relevant market by the dominant enterprise [‘Cost’, for this purpose, has been defined in the Competition Commission of India (Determination of Cost of Production) Regulations, 2009 as notified by the Commission.]
- Intention to reduce competition or eliminate competitors. This is traditionally known as the predatory intent test

ESSENTIAL FACILITIES DOCTRINE (EFD)

Barrier to entry of new enterprises into the relevant market is a major restraint on the dynamics of competition. When an dominant enterprise in the relevant market controls an infrastructure or a facility that is necessary for accessing the market and which is neither easily reproducible at a reasonable cost in the short term nor interchangeable with other products/services, the enterprise may not without sound justification refuse to share it with its competitors at reasonable cost. This has come to be known as the essential facility doctrine (EFD). It has been recognized that any application of the EFD should satisfy the following:

- The facility must be controlled by a dominant firm in the relevant market
- Competing enterprises/persons should lack a realistic ability to reproduce the facility
- Access to the facility is necessary in order to compete in the relevant market; and
- It must be feasible to provide access to the facility.

Subject to such conditions being satisfied, the Commission may under the provisions of Section 4 (2) (c) of the Act (related to denial of market access by a dominant enterprise) pass a remedial order under which the dominant enterprise must share an essential facility with its competitors in the downstream markets.

INTELLECTUAL PROPERTY RIGHTS (IPRs) AND ABUSE OF DOMINANCE

While reasonable use of IPRs stand exempted from the rigours of Section 3 related to anti-competitive agreements, no such derogation is available in case of abuse of Intellectual Property Rights by right holders, in respect of specified abusive acts.

Intellectual Property Rights (IPR) involve grant of exclusive rights to the right holders to exploit the results of their innovation so as to provide incentive to innovate. Competition Act, 2002 exempts the reasonable use of such rights by right holders from the provisions of Sec. 3 related to agreements. However, the actions by enterprises that shall be treated as abuse (specified under Section 4 (2)) shall stand applicable equally to IPR holders provided such rights are considered by the Commission to render the holder a dominant player in the relevant market.

INQUIRY INTO ABUSE OF DOMINANCE

In exercise of powers vested under section 19 of the Act, the Commission may inquire into any alleged contravention of section 4 (1) of the Act that proscribes abuse of dominance. Section 19 (4) gives a detailed list of factors that the Commission shall consider while inquiring into any allegation of abuse of dominance. Some of these factors are market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, dependence of consumers, entry barriers, and social obligations and costs in the relevant geographic and product market. The Commission, on being satisfied that there exists a prima facie case of abuse of dominance, shall direct the Director General to cause an investigation and furnish a report. The Commission has the powers vested in a Civil Court under the Code of Civil Procedure in respect of matters like summoning or enforcing attendance of any person and examining him on oath, requiring discovery and production of documents and receiving evidence on affidavit. The Director General, for the purpose of carrying out investigation, is vested with powers of civil court besides powers to conduct 'search and seizure'.

POWERS OF THE COMMISSION

After inquiry the Commission may pass inter- alia any or all of the following orders under section 27 of the Act:

1. direct the parties to discontinue and not to re-enter such agreement;
2. direct the enterprise concerned to modify the agreement.
3. direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any; and
4. pass such other orders or issue such directions as it may deem fit.

5. can impose such penalty as it may deem fit. The penalty can be up to 10% of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to bid-rigging or collusive bidding.
6. Section 28 empowers the Commission to direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position.

INTERIM ORDER

Under section 33 of the Act, , during the pendency of an inquiry into abuse of dominant position, the Commission may temporarily restrain any party from continuance with the alleged contravention the offending act until conclusion of the inquiry or until further orders, without giving notice to such party, where it deems it necessary.

APPEALS

The Competition Appellate Tribunal (CAT) is established under section 53A of the Act, to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act. An appeal has to be filed within 60 days of receipt of the order / direction / decision of the Commission.