

DISCLAIMER

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ABUSE OF DOMINANCE UNDER THE COMPETITION ACT, 2002

INTRODUCTION

This competition advocacy and awareness booklet addresses the applicability of Section 4 relating to abuse of dominant position (dominance) by enterprises under the Competition Act, 2002.

Competition laws all over the world are primarily concerned with the acquisition and/or exercise of market power and its abuse. Market power is variously known in competition jurisdictions as dominant position, monopoly power and substantial market power.

The Competition Act, 2002 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 and abuse of dominant position by enterprises, and regulates combinations (consisting of mergers, amalgamations and acquisitions), and thus lays down practices from which enterprises should desist.

DEFINITION OF 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 dominant position. In a perfectly competitive market no enterprise has control over the market, especially in the determination of price of the product. Each enterprise is a price taker. However, perfect market conditions do not obtain in 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”¹. The Act lays down the factors any one or all of which shall be taken into account by the Commission while defining the relevant market. The **relevant product market** is defined in terms of substitutability². 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, 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 neighboring areas”³.

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, besides 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

¹ sub-section (r) of Section 2

² sub-section (t) of Section 2

³ sub-section (s) of Section 2

and contribution of enterprise enjoying dominant position to economic development⁴. 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 *per se* bad. 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 dominance position and, therefore, stand prohibited. Such practices *shall* constitute abuse only when engaged in 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 engaged in by a dominant enterprise alone or in concert, and shall remain prohibited. 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.

The Act specifies the following practices by a dominant enterprises or group of enterprises as abuses:

- (i) unfair or discriminatory condition or price;
- (ii) limiting or restricting production of goods or provision of services or market;
- (iii) limiting or restricting technical or scientific development to the prejudice of consumers;
- (iv) denying market access in any manner;
- (v) 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;
- (vi) Using its dominant position in one relevant market to enter into, or protect, other relevant market.

⁴ Sub section (4) of Section 19

⁵ Clauses (a) to (e) of sub section (2) of Section 4

**ACTIONS THAT SHALL BE CONSIDERED AS
ABUSES UNDER THE ACT**

- (a) Imposing unfair or discriminatory conditions or price (including predatory pricing) as an abuse of dominant position [Section 4 (2) (a)]**

A dominant enterprise has been prohibited from limiting production, market or technical development to the detriment of consumers. The Act requires a dominant enterprise to act fairly and to treat like cases alike.

- (b) Limiting or restricting production, market, technical or scientific development relating to goods or services as abuse of dominant position [Section (4) (2) (b)]**

A dominant enterprise has been prohibited from imposing directly or indirectly any unfair or discriminatory conditions in purchase or sale of goods or services.

Limiting or restricting production of goods or provision of services or market thereof, technical or scientific development relating to goods or services to the prejudice of customers, shall be treated as abusive.

- (c) Practice(s) resulting in denial of market access as abuse of dominant position [Section (4) (2) (c)]**

A dominant enterprise shall not indulge in any practice or practices resulting in denial of market access in any manner. Any practice by the dominant enterprise which forecloses the market access to other market players or deter entry to new players shall be considered as abuse of dominant position by the Commission.

- (d) Conditional contracts as abuse of dominant position [Section (4) (2) (d)]**

Conditional contract by a dominant enterprise shall be abuse of dominance if conclusion of that contract is 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.

(e) Using dominant position in one relevant market to enter other relevant market as abuse of dominant position [Section (4) (2) (e)]

An enterprise using its dominant position in one relevant market to enter into, or to protect, other relevant market(s) shall be treated as having abused its dominant position.

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, will be defined in the regulations to be 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 working of competition. When an enterprise with dominance 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 essential facilities doctrine 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.

IPRs AND ABUSE OF DOMINANCE

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.

CONSEQUENCES OF ABUSE OF DOMINANCE

Section 27 of the Act deals with orders by the Commission after inquiry into abuse of dominant position. The Commission may pass all or any of the following orders, namely, -

- may direct an enterprise with dominant position which has contravened Section 4 to discontinue such abuse of dominant position;
- may impose penalty not exceeding ten percent of the average turnover of last three preceding financial years, upon a dominant enterprise contravening Section 4.

In addition, the Competition Appellate Tribunal can be approached for award of compensation to be paid by any dominant enterprise for any loss or damage shown to have been suffered by any applicant as a result of any contravention of the section 4 by such enterprise, if established by the Commission.

The Act also provides for direction to the dominant enterprise concerned to comply with such other orders and directions, including payment of cost, if any.

DIVISION OF ENTERPRISE ABUSING DOMINANT POSITION

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 RELIEF

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.

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