

The Efficiency of Abuse of Dominance Towards Current Market Strategy

Paper Submission: 12/12/2021, Date of Acceptance: 23/12/2021, Date of Publication: 24/12/2021

Abstract

Duties and rights are two faces of one coin, according to the Hohfeld, duty is directly proportionate to the right. This is also applicable in the economic and trading system, whenever an enterprise has a dominant position; it is a duty to him to regulate himself against abuse of the market. Unfortunately, power has additional potential and run as a cob bridle horse. Power should not be used to abuse the market, its mean power of dominant position is not in itself offensive but whenever it is used to exploit and abuse the market it becomes offensive. My research is based on the status of a dominant position in respect of the efficiency of abuse of dominance towards current market strategy. Indian competition law has a huge amount of legislature and precedent but certain conditions are unregulated by legislatures such as collective dominance and digital marketing. Digital marketing is growing tremendously. Since the Act was enforced digital marketing has taken place but today, Indian competition law is struggling to regulate the same. So, researchers wants to study about status of collective dominance and digital marketing in respect to the relevant market. The researcher also studies current case laws to know the view of the competent authority in respect of said concept.

Keywords: Abuse of dominance, collective dominance, relevant market, market share, enterprises, competition law.

Introduction

Abusing is not a good thing for the structure of the society even it has been placed in the social system, economic system or political system. Abusing is an activity by which highly influenced enterprises or persons may use their dominant position to get unreasonable profit in lieu of property or money. Abusive conduct of enterprises in the economic system of the competition market, specifically dominant authority or enterprises, has come into competition law to examine anti-competitive behaviour. The only dominant position is not offensive and not questioned by law even until connected by the abusive activity. The dominant position of the enterprises, group of enterprises and people enjoy exploiting the market. Exploitation may occur by making an unreasonable profit to deter new competitors in the relevant market, make obstacles for existing competition to stay in the relevant market. This list cannot be exclusive to a certain type of conduct used to exploit the market by a dominant position authority. The reason behind the object of abuse of dominant position (AOD) is-

1. For making an unreasonable profit by way of imposing higher price as a comparison to other competitors, control on input or output of the market commodities or services;
2. To stay in the relevant market in a dominant position,

By the way, making unreasonable difficulties for other competitors whether competition exists or potential. Dominant position is not defined in the Competition Act, 2002, (the Act) but only says that "enjoyment of position of strength" is a dominant position. In the other words, the matter of interpretation is the "position of strength". In the erstwhile Monopolies and Restrictive Trade Practices Act, 1969, the concept of dominant position was detailed as "dominant undertaking" and "Monopolistic Trade Practices". For the dominant undertaking, enterprises should have one-fourth of control over services and goods. Enterprises for the AOD may be individual enterprises, groups of enterprises, persons and government departments who indulged in the concerned activity for control of goods and provision of services. Investment is also inserted as enterprises but a sovereign act of the government is kept away from the periphery of AOD. The government department which deals with atomic energy, currency, defence and space due to highly confidential services in respect of the interest of the country do not come in AOD provision but the Act was old 19 year when digitalization and modernization were not at the peak but today, where the certain activity of the government is going to privatization so above list, should but reshuffled by the competent authority. Collective dominance is a good concept of the abusive nature of dominance power but it is not recognized by India yet. Non-compellable provision of collective dominance is taboo of CLP. Collective dominance is a dominance which is occurred by a completely different and individual entity or enterprise but AOD

Richa Sharma

Research Scholar,
Dept. of Law,
University of
Rajasthan
Rajasthan, India

applies to the group of the enterprise. The 'group' word is not similar for collective dominance, as given the section 5 of *the Competition Act, 2002*, (the Act). It refers to different enterprises belonging to the same group in terms of control of the management or equity. Non-applicability of collective dominance, CCI has folded hands to regulate and stop it. Recently, the problem was faced by CCI to punish the alleged party of collective dominance in the Ashok Kumar Vallabhanevi (informant) case[1], where the informant alleged that an opposite party was engaged in the collective dominance. The opposite party indulged in the business of distribution and production of movies in Andhra Pradesh and Telangana. The informant alleged that all parties case together, which are completely individual and abuse its dominant position collectively but "court and tribunal" have stressed all along that dominance per se is not bad. However, the dominant undertaking has a "special responsibility" towards the competitive process not to allow its behaviour to impair genuinely.

Indian competition law does not recognize collective dominance in which more than one independent undertaking acts jointly as cartelization. It presumes that dominant position in the market thereby creating a collective dominance.

The EU has recognized collective dominance, known as "Tacit coordination" which is dealt with by EU merger regulation. In India, it is also known as informal understanding or implied agreement. The European Court in *Airtours Case*[2] established that "A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration were given the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly as it becomes aware of common interest consider to possible, economically rational and hence preferable, to adopt on a lasting basis a common policy on the market to sell at above competitive prices, without having to enter into an agreement or resort to concerted practices within the meaning of article 81 EC and without any actual or potential competitors, let alone customers or consumers, being able to react effectively."

Indian legislature is far away to accept collective dominance as an abuse of dominance but competent authority many times affirms the need for collective dominance. It has proposed by the Competition Amendment Bill, 2012 but unfortunately, said the amendment was not passed by parliament.

Enterprises should be engaged with economic activity but government activities which are acted under the sovereign function such as atomic, energy, currency and defence, but the sovereign function is not clearly neither defined in the Act nor interpreted by CCI. CCI has to follow other laws for the sack of competition law. Bangalore Water Supply case[3] was a milestone for elaborating the sovereign authority.

The dominant position of the alleged parties should be determined by the participation of market share in the relevant market, so the study of market share and the relevant market must be necessary for determining the dominant position in the relevant market. Market share of the particular undertaking must be acknowledged by the competent authority. Not only in India but also in all countries which have competition law and recognized abuse of dominant position forced to accept market share theory to determine dominant position. In the *Akzo Chemie BV case*[4] the European Court observed that market share is the most important indicator for the presumption of market share. So the determination of the dominant position limit should be above a specified level. Specified levels could be different from the different relevant markets. This jurisdictional power of adjudicating authority for determining the level of market sharing is CCI. Market sharing of enterprises must be based on the market data and presence attributable to concerned enterprises. For the collection of market data, CCI may ask each supplier of the relevant market to share sales data to calculate total market share and market size. Data collection is the most relevant to know the status of market share because sale revenue reflects the real position of the relevant market. Market share may be an important factor to determine dominant position but the list is not nevertheless. More than factors are listed by the Act such as size, resource and importance of enterprises, the dependence of consumers, unethical integration, countervailing buying power and so on. The list given under the competition law is not exclusive and other factors may be included by the competent authority. The relevant market is single term which is used in many places of the Act, not only Indian competition law but also other jurisdictions also considered relevant markets as a key

feature of competition law. The relevant market is not covered in a single definition. It is covered by two bifurcations:-

1. Relevant Geographical Market
2. Relevant product Market.

Typically, both concepts are rendered around active supplier and consumer/ customer. But at the level of implication relevant market bifurcated in two parts, former has significant value of territorial level and latter has significance upon product level.

Relevant product markets may be pinned on three elements such as increment of price, the reaction of purchasers and smallest size requirement. The consumer always tries to get more benefits from less prices. Price increases may divert consumers to substitute. Substitutes should be similar and identical. Another thing is that increasing prices should be non-transitory and continue over the foreseeable future. Price increment may be short but should be significant. Significant value is determined by the competent authority.

The relevant geographical market has been described in the Act in which territory relevancy is a must. Supply relevancy and distribution relevancy should be distinctly homogeneous and could be distinguished from the neighbouring area for the prevailing conditions. Demand is considered under relevant geographical market will be affected by consumer behaviour like lifestyle, brand choice, culture, atmosphere, language, expense, capacity, consumption of definite goods and services, the durability of specified goods and services, demographic bifurcate product or services and local climate are also of considered in RGM indirectly.

In Manappuram Jewellers case[5], Opponent has membership in the Kerala Gold & Silver Dealer Association which has 27% jewellers of the relevant market of Treasurer and it has only 10-12% of the market sharing of the total membership. CCI observed that no any jewellers of association as dominant position so there have not arisen over abuse of dominance, but CCI has silence upon collective dominance which may be seen in that case, it was clear that 272 small jewellers collective abusing the relevant market by which Manappuram Jewelers was suffering from huge loose after 2 years, in Indian sugar Mills case[6]CCI has folded hand because no a single enterprises of the jute manufacturer was in a dominant position for the abuse of dominance position. As to offensive activity, they are jointly abusing their power to exploit a relevant market.

According to the Act, Unfair conditions are necessary for determining AOD. The act says that "if enterprises inter alia imposed unfair condition in purchase or sale of goods or services" unfair conditions are not defined in that. The competent authority may interpret according to the circumstance or fact of the case. Belaire Housing (DLP)[7] can be related with the housing complex in which builders have imposed unfair conditions in the agreement by which allottee was not eligible to negotiate according to the agreement, builders have the dominant condition in the agreement in which builders has power to refuse or reject to execute agreement without reasonable condition, allottee cannot be questioned about the competency of DLF and in any case, allottee goes to back foot. He would be eligible to give an 18% interest rate. The commission observed violation of section 4(2)(a) of the Competition Act, 2002 and imposed INR 630 crore as a penalty. COMPAT upheld the decision of communication and confirmed the order of the penalty. Predatory pricing is also a type of AOD. Predatory price means the price is not reasonable and according to the product. It may be below or upper of the variable cost of the product or services. It is also known as price abuse. Price abuse may be bifurcated into two groups:-

1. Exclusionary abuse
2. Exploitive abuse

Examples of exclusionary are predatory pricing, price squeeze, loyalty and rebates. Predatory pricing must be kept in mind that the Competition Act, 2002 is not an equalizer neither it is to bring a different competitor to an equal level in respect of their assets, liabilities or performance. It is a normal condition in the market and faces many obstacles. The market is the place where competitors come and go, but the problem has to face by new entrants and old entrants who have fixed in the market. It is not easy for the new entrants to come into the market and acquire advantages that are enjoyed by the old competitors. Competition law does not have any provision and obligation for the existing entrants which is followed during the intro of new entrants. In one-word competition law is not an equalizer for old or new entrants. The competition is to protect competition and not the competitors in the market.

Remarking An Analisation

As above, abuse of dominant position may be adjudicated by market share and relevant market. Collective dominance is also important part of the abuse of dominance.

Review of literature

Authors	Title of Article	Review of literature
SavitriKore and JyotsnaYadav	Attempts to monopolization and digital market: enforcement gap (2020)	Technology-driven market is considerably world's regulatory bodies. This article is based on loophole of CCI. In respect of digital marketing and e-commerce. A huge number of cases have investigated by CCI.
MilindMurugkar, Bharat Ramaswami, Mahesh Shelar. (2007)	Competition and monopoly in Indian Cotton Seed Market.(2007)	Agriculture sector is not untouched by abusive nature. Private supplier of seeds plays a vital role relevant market and became a concern for the competent authority. Seed private sector of seed market was a concerned point of this article.
Dr. Navdeep Singh Suhag, Abhishek Raj.	Anti-trust investigation against e-commerce platforms in goods category in India. A review from timeline perspective. (2020)	This paper is based on antitrust investigation specifically upon goods in the light of fast-moving nature of e-commerce business.
Tilottama Raychaudhuri	Abuse of dominance in digital platforms: An analysis of Indian Competition Jurisprudence. (2020)	In the article, competition jurisprudence is studied with enforcement of competition law in Digital market. Assessment of dominance and assessment of abuse in the digital market are focal point for it.
Dr. KalpanaTyagi	Big Data Mergers: Bridging, the leap for an effective merger control framework (2020)	Intelligent world is new business phenomena and has more way to study. This article is based on connected devices and Internet of Thing (IoT). Data Merger cases are rapidly increasing in the way of advertisement. Data merger is violation of right to privacy.

Aim of the Study

The study is cumulated under below object

1. To determine the necessity of the provision in respect of collective dominance;
2. To determine the necessity for elaborating market sharing and relevant market towards abuse of dominance.

Conclusion

Abuse of dominance has effectiveness in the Indian competition law. It tries to make harmony between digital and non-digital market conditions but it is not enough. Due to developing countries, market sharing and relevant market conditions may vary per territorial division.

Suggestions

Indian competition law needs more amendments because, since 2009, the market scenario has fully changed; the market has converted into a digital market. Boundaries between countries have elapsed. Government has disinvestment from government companies, may lead to exploitation in a common market. The researcher wants to suggest certain points in respect of my research:-

- a. Collective dominance should have come under the surveillance of CCI.
- b. Market sharing conditions should be clear according to contribution to the market. Uncertainty of market sharing may lead to biasness of competent authority.
- c. CCI should be more active in the case of abuse of dominance.
- d. Online trading needs more study to defend it.
- e. The online trading platform should be controlled by CCI.

Reference

1. *Competition Commission of India, Provisions Relating To Public Procurement*(CCI, New Delhi).
2. *Richard Whish And David Bailey, Competition Law (Oxford University Press, United Kingdom, 9th Edi., 2019)*
3. *Dr S.C. Tripathi, Competition Law (Central Law Publications, Allahabad, 1st Edi., Reprint 2017)*
4. *DrSouvikChatterji, Competition Law In India And Cartels In India & USA (Allahabad Law Agency, Haryana, 2nd Edi., 2017)*
5. *VinodDhall (Ed), Competition Law Today - Concept, Issues And The Law In Practice (Oxford University Press, New Delhi, 2nd Edi., 2019)*
6. *T. Ramappa, Competition Law In India - Policy Issues And Developments (Oxford University Press, 3rd Edi., 2014)*
7. *S.M. Dugar, Guide To Competition Law – Commentary On MRTP Act, Competition Act And Consumer Protection Act (LexisnexisButterworthsWadhwa Nagpur, 6th Edi., Vol 1, 2016)*
8. *Big Data Mergers: Bridging, the leap for an effective merger control framework (2020)*<https://www.cci.gov.in/sites/default/files/whats_newdocument/Volume1-Dec-2020.pdf>
9. *Abuse of dominance in digital platforms: An analysis of Indian Competition Jurisprudence. (2020)*<<https://ccijournal.in/index.php/ccijoclp/article/view/5>>
10. *Anti-trust investigation against e-commerce platforms in goods category in India. A review from timeline perspective. (2020)*<<https://ccijournal.in/index.php/ccijoclp/article/view/10>>
11. *Competition and monopoly in Indian Cotton Seed Market.(2007)*<<https://www.epw.in/journal/2007/37/special-articles/competition-and-monopoly-indian-cotton-seed-market.html>>
12. *Attempts to monopolization and digital market: enforcement gap (2020)*<<https://ccijournal.in/index.php/ccijoclp/article/view/12>>