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ABUSE OF DOMINANT POSITION UNDER COMPETITION ACT, 2002



Ankita Kashyap

Research Scholar & Asstt. Professor, University of Delhi, Delhi

Abstract: The Competition Act was passed by the parliament in 2002. Due to the economic development of the country, the need was felt to repeal the Monopolistic Restrictive & Trade Practices Act and bring in a bigger and more comprehensive form of competition law that protects the consumers. The Competition Act prohibits anti-competitive agreements, prevents abuse of dominance, regulates combinations (mergers & acquisitions) and empowers the ten member Competition Commission of India (CCI) with different powers in various sections contained within the ambit of the Act.

Keywords: Dominant Position, Competition Act, economic development, acquisitions.

INTRODUCTION:

U/s 4 of the said Act, the enterprises are prohibited to abuse the dominant position. Now the question arises: what is dominance? Are there set parameters to assess dominance?

In order to adjudicate whether dominant position exists or not, the Competition Commission of India has been empowered to examine the following factors to assess the dominant position, u/s 19(4) of the Competition Act, 2002:

Market share of the enterprise
Size and resources of the competitors
Size and importance of the competitors
Economic power of the enterprise including commercial advantages over competitors
Vertical integration of enterprises or sale or service network of such enterprises
Degree of dependence of consumers on the enterprise
Monopoly of dominant position
Entry barriers
Countervailing buying powers
Market structure and size of the market
Social obligations
Relative advantage by way of contribution to economic development
Any other factor which the Commission may consider relevant.

On the basis of the above-mentioned factors, the CCI decides if the enterprise is at the helm of affairs within that particular sector or industry and whether or not it is enjoying a dominant position.

According to the Competition Act, 2002, dominant position is not prohibited; one can enjoy the privilege of monopoly and dominant position but abuse of dominant position by any enterprise is in contravention to Section 4 of the said Act.

Having understood the factors which constitute dominant position, we move on to analyze the meaning of abuse of dominant position. Not all dominant organisations may be abusing their dominant position. Then how is it decided whether a particular enterprise is unduly abusing its dominant position?

Section 4(1) clearly stipulates the activities that would point towards enterprises abusing their dominant position. According to the provisions contained under this section, if an enterprise –

- a) Directly or indirectly imposes unfair or discriminatory practices either in purchase or sale of goods/services or price in purchase or sale of goods/services
 - b) Limits or restricts production of goods and services or conducts technical or scientific development against the interest of the consumer
 - c) Indulges in practices that result in denial of market access
 - d) Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations
 - e) Uses the dominant position in one relevant market to enter into or protect other relevant market.
- then it will be considered to have abused its dominant position.

There are various factors that are studied in combination to find out if the dominant position is actually being misused. The Competition Commission of India takes into consideration the ground realities which may differ in different sectors. The unique circumstances and situations peculiar in every case are studied on its merits to decide if the dominant position is abused or not.

1. CASE STUDY

The following case study will further enlighten how independent cases are decided by the CCI taking into

consideration the realm of activities operating in the industry.

Shri Sonam Sharma
Vs
Apple Inc. USA (OP1)
Apple India Pvt. Ltd. (OP2)
Vodafone Essar Ltd. (OP3)
Bharti Airtel Ltd. (OP4)

2.1 Facts:

The informant Shri Sonam Sharma has accused Apple Inc. USA, an electronic manufacturer and its Indian subsidiary Apple India Pvt. Ltd. to have secretly entered into exclusive selling agreements with Vodafone Essar Ltd. (OP3) and Bharti Airtel Ltd.(OP4) in selling its iPhone 3G/3GS.

The usage of iPhone which is an internet embedded mobile phone requires an internet connection. Exclusive selling rights were given to OP3 and OP4 for several years which meant iPhone did not operate with any other network and it became operational only when its lock is decoded by the mobile service provider. In lieu of this exclusive right, OP3 and OP4 (leading mobile service providers with over combined 52% of their share in market) charged high package rates of internet for iPhone users as they had monopoly in the market.

The informant accused the above four opponents of abuse of dominant position.

2.2 Relevant Legal Provisions under Competition Act, 2002

Section 3 stipulates that no enterprise shall indulge in any activity that adversely affects or is likely to affect the competition.

Section 4 states that no enterprise shall abuse its dominant position.

Section 3(4) (a) provides that there should not be any agreement among organisations or persons in respect of production, supply etc. if it leads to tie-in-arrangements, exclusive selling agreements etc.

Section 19 (3) prescribes that for determining adverse effect in respect of abuse of dominance position, Commission has to keep in regard various aspects like: barriers to entry, driving existing competitors out of the market, accrual of consumer benefits etc.

2.3 Company's view:

Airtel (OP4) submitted that this case is outside the purview of Competition Act and fall under Telecom Regulatory Authority of India (TRAI).

The opponent (OP4) also submits that this practice was discontinued from June 2011 and this case is only academic in nature.

Vodafone alleges that the informant has not purchased any iPhone from its store and thus has not faced any discriminatory practices in respect of tariff charges for internet usage.

Vodafone also affirmed that there were various other distributors of iPhone in India and also it offers same

internet packages both for iPhone and other users. The charge of both types of internet usage plans are approved by TRAI regulations.

In response to informant's allegation that OP3 and OP4 jointly occupy over 52% of the market share, Vodafone states that Sec 4 of Competition Act does not recognize combined dominance

2.4 Findings of Director General:

The Director General, finds as under:

That CCI has jurisdiction over any competition issues arising out of competition activities of the entities.

That even if the alleged practices of the opponents do not operate today but abuse of dominance needs to be investigated for the period when such activity was followed.

That the informant did use iPhone in India and also used the services of telecom service providers. However, the informant is not under the obligation to use the product to report any violation of any section of Competition Act.

That Apple entered with agreements with Airtel and Vodafone. Though Airtel agreement was renewed but Vodafone did not get this agreement renewed.

That Apple contacted other telecom service providers operating in India like Airtel, Reliance, Idea, Tata DoCoMo but the agreements did not materialize.

That tie-in arrangements restricted the iPhone users in switching over to other service provider but on a whole Apple did not hold a major share in the market (1-2.4% only market share) and thus tie- in- arrangement did not cause appreciable adverse affect.

It was concluded that Apple did not enter into exclusive selling contracts with Airtel and Vodafone. However, it did enter into tie-in arrangements with the above two telecom service provider to unlock the phones but this did not cause any adverse affect.

2.5 Court's Verdict:

Apple in India does not occupy a dominant position.

Airtel and Vodafone cannot be termed as dominant entities which occupy only 27.68% and 22.44% respectively and their market share cannot be combined as they are horizontal competitors.

The agreement between Apple, Airtel and Vodafone should not be seen as a tie-in-arrangement but as bundled service wherein the consumer has a choice to go in for any other network provider as well.

Further, tie-in-arrangements would not come into any role as the entities do not have a dominant share in the market.

No appreciable affect has been caused to the competition in Smartphone market.

CONCLUSION

We find, what on the onset might appear to be a dominant position or abuse of dominant position may not always be inconsistent or in violation of the legal provisions laid down in Competition Act, in this regard. So the important factors peculiar to the particular sector in which the enterprise operates needs to be analysed to satisfy, if there is any abuse of dominant position.

Abuse Of Dominant Position Under Competition Act, 2002

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