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Abuse of dominance in competition law  Clip

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When there is perfect competition in the market, the consumer is sovereign, as his welfare is maximised. However, monopoly is bad for the consumer and the economy. The monopolist controls the market and can increase prices or reduce volumes. There is 'allocative inefficiency' and in economic terms there is 'deadweight loss'. Since the monopolist is under no pressure to minimise cost, he is often content to enjoy a quiet life rather than face vigorous rivalry. As economist Liebenstein put it there is 'X-inefficiency'.

Thus modern competition law contains specific provisions against monopolistic behaviour. The Sherman Act, 1890, to which the origin of competition law is traced, contains specific prohibition against monopolisation. Article 82 of the EU treaty prohibits abuse of dominance (AoD). Similarly, section 4 of the Indian Competition Act, 2002, prohibits and punishes abuse of dominant position. It does not frown on dominance per se. A firm is free to grow as large as it pleases, or achieve as big a market share as it can.

The problem arises only when there is AoD. AoD is one of the most challenging areas of competition law since firms can achieve dominant position legitimately through innovation, superior production or greater entrepreneurial effort, and many practices that appear on the surface to be anti-competitive can serve legitimate pro-competitive purposes. Thus, in a particular case, different competition authorities can reach different conclusions e.g., the divergent decisions in the Microsoft cases. Experts rightly warn of the 'chilling effect' on competition and innovation that may result from mistaken application of AoD provisions.

Three questions typically arise in AoD cases: a) What is the relevant market in which the dominance/abuse is alleged? b) Is the enterprise dominant in the relevant market? c) What are the specific indicted practices and do these amount to abuse?

The relevant market consists of the 'relevant product market' and the 'relevant geographic market'. The 'relevant product market' comprises products/ services that are regarded as interchangeable, or substitutable, by the consumer. In case of soft drinks, should the product market include any or all of aerated drinks, fruit drinks, cold coffee and milk-based drinks? Is Coca-Cola or Pepsi interchangeable with apple-juice?

The 'relevant geographic market' comprises the area where the conditions of the competition are distinctly homogeneous. For example, in case of cement, is the geographic market to be the entire country, or only the local region like say the

Northeast? The Competition Act lists several factors which the commission must consider in determining the relevant product and geographic markets.

The next question is whether in that relevant market the firm is dominant or not? Once again the act gives a long list of factors which the commission should consider in determining dominance, these factors being similar to factors considered in other jurisdictions like the EU and the UK. In the MRTP Act, dominance was defined only in terms of market share (25% or more).

In the Competition Act, market share remains an important factor but other factors too have to be considered such as entry barriers, size, resources, economic power and commercial advantages of the firm, size and importance of the competitors and so on.

Thus, if a firm's share is 45% and the other firm's share is 40%, the first firm may not be considered dominant. But if shares of other firms are 15% and below, the firm could be alleged to be dominant. However, if there are no entry barriers and the firm faces potential competition from new entrants, dominance may be hard to achieve. Entry barriers could be like regulatory barriers, high capital costs, non-availability of technology and so on.

The third question would be that if the firm is indeed dominant in the relevant market, has abused its dominance? The Competition Act lists specific practices as abuse: unfair or discriminatory prices or conditions, limiting or restricting production or technical or scientific development, denying market access, imposing supplementary contractual obligations unconnected to the subject of the contract and using dominance in one market to enter/protect another market.

In the Microsoft case, for example, the allegation was that Microsoft which was dominant (having 95% share) in the operating software market abused its position to gain advantages in the market for applications software viz Internet browser and MP3 player. In the famous United Brands case in Europe, it was alleged that the company abused its dominance by refusing to supply to a long-standing distributor and indulged in discriminatory prices by charging excessively in Denmark where it was dominant while it charged much less in Ireland where it faced effective competition. In another case, Rome Airport was held to be in abuse by refusing access to a competing airline caterer.

AoD cases are particularly common in infrastructure sectors since these sectors have natural monopoly or network features such as ports, airports, highways, electricity transmission or distribution and gas pipelines. In many of these sectors, erstwhile PSUs enjoyed dominant positions. In many countries, a huge proportion of AoD cases relate to the infrastructure or regulated sectors. Regulated sectors in India are in no way immune from the operation of the Competition Act.

What remedies a competition authority can order in an AoD case? The authority can pass a cease and desist order, impose penalty which may be up to 10% of the annual turnover and pass any other order as it may deem fit. It also has the power to recommend to the government the division of a dominant enterprise, which though is resorted to only rarely

by competition authorities. Injured parties can seek compensation under the act. The consequences of AoD can thus be potentially severe.

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