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**Assessing public sector dominance**

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***Abuse of monopoly power is disallowed, regardless of the perpetrator***

MANY observers of the Indian market place have urged the Competition Commission of India to look into government monopolies. Often, the exhortation flows from a not-so-accurate appreciation of the law in India.

There are two broad issues that are raised, typically. One deals with the scope of the Competition Act, 2002 in terms of coverage. The second issue is about dealing with monopolies.

Take the first. The Competition Act is very wide in its coverage. It covers all entities engaged in commercial activities. It covers, therefore, natural as well as artificial/jurisdictional entities, including individuals, public and private companies, domestic and foreign firms, Hindu undivided families, firms, trusts, statutory authorities (like sector regulators and municipal corporations), cooperative societies and also government departments with commercial interests. Only a narrow band of sovereign functions of the government - including atomic energy, currency, defence and space - are specifically excluded from the purview of the competition law.

You will notice that the coverage of the law is based on the activity of the entity rather than the organizational form it acquires. There is no discrimination on the ground of ownership of business ('competition neutrality'). The remedies available under the law, such as 'cease & desist' orders and monetary penalties, are equally applicable to all, irrespective of ownership.

Having put almost all economic agents under its purview, the law does provide a gateway - albeit through positive action - for the

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granting exemptions. The central government has the power to make such a grant by issuing a notification under three circumstances. 1) For security reasons or in public interest. 2) To honour a treaty, agreement or convention with other countries. 3) On grounds of the entity in question performing sovereign functions.

The exemption, however, will be applicable only for a limited period of time to be specified by the government. It is not unusual for competition laws in other parts of the world to provide exemptions; even matured jurisdictions have similar provisions, although it is the competition agency that either exercises this power directly or is consulted in the decision.

The second issue is how public sector monopolies are to be dealt with. Here, it is important to recognize that the Competition Act does not frown upon position of market dominance *per se* unlike the Monopolies and Restrictive Trade Practices Act, 1969. Size alone matters no more. It is the abuse of the market power that is prohibited.

Market power is the ability of an enterprise to raise price or reduce output, or both, independently of its consumers, customers or suppliers. The determination of dominance in itself is based on several factors enunciated by the law. Notably, market share alone is not determinative of the acquisition of market power. There are 12 factors which the Competition Commission must consider to establish dominant position. Some of the factors are market share, size of the enterprise, size of competitors, market structure, entry barriers and dominance created by law. No single factor can be used to dispose of a charge of abuse of dominance. Also, an entity's dominant position has to be assessed in relation to the relevant market, the determination of which requires the Competition Commission to consider another set of six factors for defining the 'relevant product market' and a set of eight factors for defining the 'relevant geographic market'. The relevant product market could comprise substitutes and the geographical examination must take into account neighbouring areas from which products can profitably be brought to the area under study.

Once a dominant position has been established, abuse is easier to determine, since abusive behaviour is clearly stated in the law. Discriminatory or unfair pricing, predatory pricing, denying access to the market and limiting/restricting production of goods or provision of services are included in the list of abuses. The law unambiguously states that indulging in any of the five categories of behaviour by a dominant enterprise shall be termed an abuse.

In the event of abuse of dominant position by an enterprise, the Commission can, besides ordering it to refrain from such behaviour, penalize it up to ten percent of the average turnover of the preceding three years. The law also provides for division of enterprise. If the behavioural remedy is not found adequate, a structural remedy can be resorted to. This will most likely happen when the market structure does not permit a less intrusive solution. A famous example is the division of the giant American telecom company, AT&T, in the 1980s into five Baby Bell companies.

The charge of abuse of dominant position can be proved against a government monopoly in the same way as against a private enterprise. The remedies available to the Commission are equally applicable to both public and private sector enterprises engaged in commercial activities.