

TREATMENT OF
**ABUSE OF
DOMINANT POSITION**



(UNDER COMPETITION ACT, 2002)

Sate Level Seminar

On

“Competition Policy and Law”

9th January, 2009

KOLKATA

By

AUGUSTINE PETER

ECONOMIC ADVISER

Competition Commission of India

Tel: 011 26701681: Fax: 011 26107131: email paugustine@nic.in

15-05-2008



MARKET POWER

- ***Market power is defined as the ability of a firm or group of firms to raise price above the level that would prevail under competitive conditions and thereby to enjoy increased profits from the action***
 - > ***Exercise of market power leads to lower output/increase in price***
 - > ***The increase in price must lead to an increase in profitability***
 - > ***Market power is exercised against the benchmark of the 'outcome' under conditions of effective competition***

MARKET POWER

- **Market power, market dominance, monopoly power etc. used interchangeably in different jurisdictions**
- **Market power can be acquired by an enterprise by:**
 - **Sheer efficiency in production, resource allocation and operation /organic growth**
 - **Natural monopoly status/Government statute**
 - **Agreement with other enterprises**
 - **Merger, amalgamations, acquisitions**

APPRECIABLE ADVERSE EFFECT ON COMPETITION (AAEC)



- The philosophy guiding ‘competition analysis’ shifted over the years *from*:
 - > Treating structure as *per se* bad
 - To*
 - > Treating certain types of conduct as bad
 - To*
 - > Treating acts based on their ‘Effects’ on Competition
- Competition Act, 2002 frowns upon act(ion)s that have ‘appreciable adverse effects on competition’ (AAEC)

COMPETITION ASSESSMENT



- **‘Appreciable adverse effect’ is the touch stone**
- **‘Presumptive’ logic and ‘rule of reason’ are applied in certain cases**
- ***Per se* approach also applied in certain cases**
- **Assessment has to be against the bench mark set by the law in vogue**
- **In India the bench mark is (the provisions of) the Competition Act, 2002**



DEFINITION OF DOMINANCE

- Position of strength enjoyed by an enterprise in the **relevant market** which enables it to:
 - Operate independently of competitive forces prevailing in the **relevant market** *or*
 - Affect its competitors or consumers or the relevant market in its favour



ABUSE OF DOMINANCE

- Analysis of Abuse of Dominance involves:

Determining status of an enterprise as dominant in the relevant market;
and

Examining conduct of dominant enterprise as abusive

PURPOSE OF MARKET DEFINITION

- **The market definition serves the following purposes:**
 - **It helps restrict attention to those products or services which have impact on Competition**
 - **The Basic objective of Competition Law is to identify situations where an enterprise or group of enterprises is exercising market power to the detriment of competition.**
 - **The relevant market is defined with reference to the competition constraints that exist between products and regions.**

RELEVANT MARKET



DOMINANCE IS IN THE CONTEXT OF RELEVANT MARKET

Relevant market is based on:

- Relevant product market; *and*
- Relevant geographical market

RELEVANT MARKET

- 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”.
- The Act lays down the factors, any one or all of which shall be taken into account by the Commission while defining the relevant product/geographic market as the case may be.

RELEVANT PRODUCT MARKET

- **Relevant product market** is defined in terms of substitutability of products. It means the “ a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.”
- It can be taken as the smallest set of products which are substitutable given a small but significant non-transitory increase in price (SSNIP).

RELEVANT GEOGRAPHIC MARKET

- **Relevant geographic market** is defined in the Act 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 neighbouring areas”.

RELEVANT PRODUCT MARKET-1



- Relevant product market is the smallest set of close substitutes
- **Determination of substitutability of products:**
 - **Demand side substitutability-** shift of demand to competing product on price rise
 - **Supply side substitutability-** shift of production to meet demand

RELEVANT MARKET

RELEVANT PRODUCT MARKET



(CA, 2002)

In determining 'Relevant Product Market', CCI is required to consider:

- Physical characteristics or end-use of goods
- Price of goods or service
- Consumer preferences
- Existence of specialized producers
- Classification of industrial products

RELEVANT MARKET
RELEVANT GEOGRAPHIC MARKET 
(CA, 2002)

In determining ‘Relevant Geographic Market’, CCI is required to consider:

- Regulatory trade barriers
- Local specification requirements
- National procurement policies
- Adequate distribution facilities
- Transport costs
- Language
- Consumer preferences
- Need for secure or regular supplies or rapid after sales services

EXISTENCE AND EXERCISE

- Existence of dominance is not frowned upon
- Exercise of dominant position if it falls in the category of 'abuse' is void under the Act

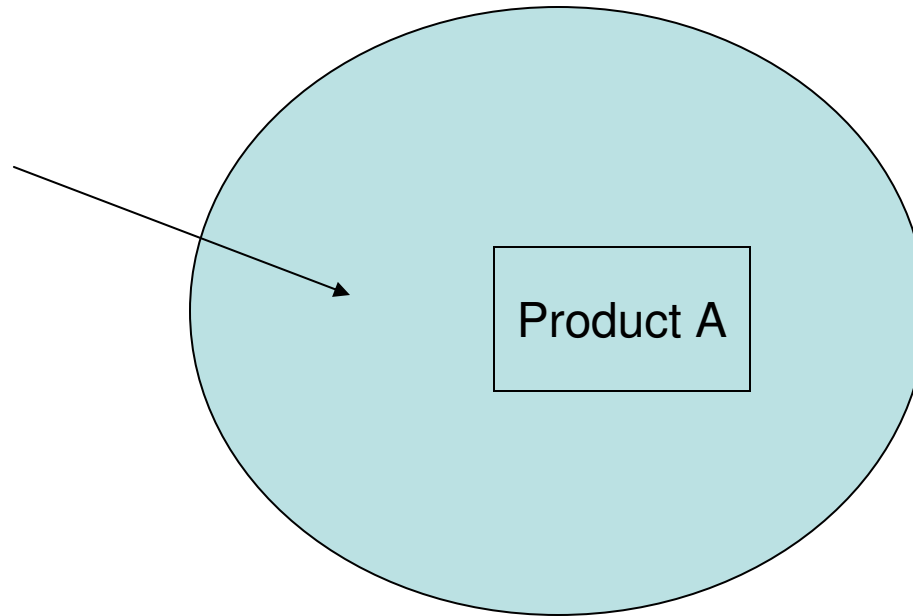
MARKET DEFINITION

SSNIP TEST

- Hypothetical monopolist test defined on the basis of the 'SSNIP' (Small But Significant Non Transitory Increase in Price) will cover most of the competitive constraints posed by demand side and supply side substitution.
- A relevant market is worth monopolizing
- And it is worth monopolizing in case if monopolization permits prices to be profitably increased

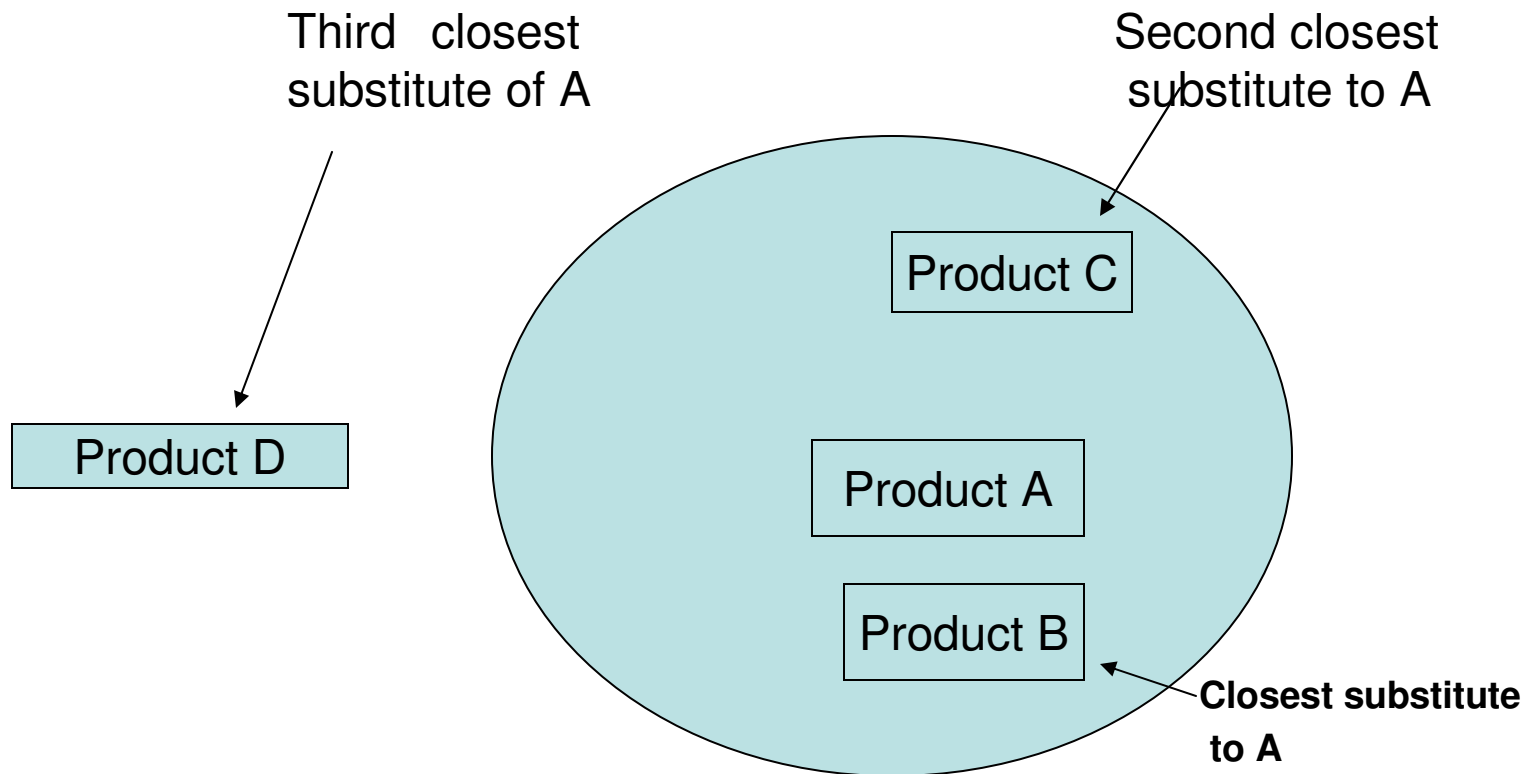
HYPOTHETICAL MONOPOLIST - PRODUCT MARKET (I)

**Product
Subject of
investigation**



Can the hypothetical monopolist of product **A** profitably sustain price 5-10 per cent above competitive levels ? If yes, test complete. If no, assume Hypothetical Monopolist controls closest substitute to **A** as well....

HYPOTHETICAL MONOPOLIST TEST: PRODUCT MARKET (2)



Can Hypothetical Monopolist of A and B profitably sustain prices 5-10 per cent above competitive levels? If yes, test complete. If no, add in Brand C and repeat process. And so on

MARKET DEFINITION

MATEL - 1

- In this case, Mattel contested the findings of the case-handler of the French Competition Council who found that the relevant market was that for fashion dolls.
- Mattel argued that there was no specific market for fashion dolls but a market which encompassed at least fashion dolls, traditional dolls, artistic games and plushes. Mattel argued that tests of cross-elasticity were the only relevant method to define the market and provided an econometric study which demonstrated that the relevant market was not that of fashion dolls.

MARKET DEFINITION

MATEL - 2

- The Competition Council stated that the market definition must be made by examining successively, and in the case of contradiction, by combining the different findings of the investigation. Accordingly, the econometric study presented by Mattel had been taken into account but not exclusively, as there were other relevant elements.

MARKET DEFINITION

MATEL - 3

- Competition Council scrutinized the different criteria for the assessment of the market. It took into account the:
 - specific characteristics of the product (the typical allure of fashion dolls) compared to other games,
 - price differences between fashion dolls and other games,
 - studies about children behaviour which revealed that fashion dolls and traditional dolls did not have the same psychologic and game potentialities.

MARKET DEFINITION

MATEL - 4

- Mattel argued that the fact that children behaved differently with a fashion doll and a traditional doll was irrelevant as both types of dolls satisfied children's needs for play. It also argued that demand analysis could not be limited to children's demand, as such a demand was different from parents' purchases.
- The econometric studies provided by Mattel showed, on the one hand, that sales of Barbies would decrease by 15.4% if their price increased by 10% and, on the other hand, that a price increase of 5% would lead to a decrease in the benefits of Mattel.

MARKET DEFINITION

MATEL - 5

- The Competition Council observed that these findings were not sufficient to define the market as they could be coherent either with the Mattel thesis (a situation in which fashion dolls compete with other dolls or games) or with a situation where Mattel would be in a monopolistic situation (fashion dolls being un- substitutable to other dolls or games)
- In this latter case, if Mattel's price was already fixed at a level to maximize its profits, any increase of such price will necessarily lead to a decrease in its benefits (Cellophane fallacy)

MARKET DEFINITION

MATEL - 6

- In view of all those elements, the Competition Council stated that the relevant market was that of fashion dolls
- It is interesting to note that in 1997, the issue of market definition was also discussed during the in-depth investigation of the merger between Mattel and Tyco by the Belgian Competition Commission.

RELEVANT MAREKT

RELEVANT GEOGRAPHIC MARKET

- Relevant geographic market for the purpose of competition law is some geographic area in which a firm can increase its price without:
 - Large number of customers turning to alternative supply sources outside the area; *or*
 - Producers outside the area quickly flooding the area with substitute products

DEMAND SIDE AND SUPPLY SIDE SUBSTITUTION

- Assessing the likely extent of lost sales requires a case by case assessment and that assessment will generally focus on three aspects:
 - Demand side substitution
 - Supply side substitution

DEMAND SIDE SUBSTITUTION

‘TOOTHLESS FALLACY’

- It is the marginal consumer and not the average consumer that matters
- The mistake of focusing on one segment of consumers rather than the marginal consumers has come to be known as the ‘Toothless Fallacy’, after the *United Brands* decision
- In this case the Commission argued that bananas defined a separate relevant market because the very young and the very old ((i.e. those without teeth) did not consider other fruits a suitable substitute for bananas

DEMAND SIDE SUBSTITUTION 'TOOTHLESS FALLACY'

- However, the main question in United Brand was not “will enough consumers switch to other fruit in response to the rise in the price of bananas”, but “will enough consumers switch to other fruit in response to a rise in the price of bananas to make that price rise unprofitable”
- The effort is to identify which products are sufficiently similar to be regarded by users as reasonable substitutes for one another
- There is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned



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EXISTENCE AND EXERCISE



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ELEMENTS IN DOMINANCE



- Ability to prevent effective competition and
- Ability to behave independently of two sets of market actors, namely:
 - Competitors
 - Consumers

DOMINANCE DEFINITION



- Position of strength enjoyed by an enterprise in the **relevant market** which enables it to:
 - Operate independently of competitive forces prevailing in relevant market; or
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DOMINANCE - 2

FACTORS TO BE CONSIDERED

Dominant position linked to a host of factors

- Market share of enterprise
- Size and resources of enterprise
- Size and importance of competitors
- Commercial advantage of enterprise over competitors
- Vertical integration
- Dependence of consumers
- Dominant position as a result of a statute
- Entry barriers
- Countervailing buying power
- Market structure and size of market
- Social obligations and costs
- Contribution to economic development
- Any other factor

DOMINANCE - 3

ABUSE OF DOMINANCE



- Imposing **unfair** or discriminatory price or **condition** in purchase or sale, including predatory pricing
- **Limits or restricts production** of goods or provision of services or market therefor
- Limiting scientific development to the prejudice of consumers
- Denial of market access in any manner
- **Conclusion of contract subject to supplementary obligations**
- **Use of position in one relevant market to enter into or protect other relevant market**

ABUSE OF DOMIANNACE

ESSENTIAL FACILITIES

- In Snam /Tariffe di Vettoriamento, the Italian Competition Authority defined essential facility as:
“ all infrastructure that is necessary for accessing a market and which is neither easily reproducible at a reasonable cost in the short term nor interchangeable with other products/services”

ABUSE OF DOMIANNACE

ESSENTIAL FACILITIES

Essential Facilities Test:

- In US the seventh Circuit Court of Appeal stated that proof of actual monopolization through use of the essential facilities doctrine requires the following:
 - Control by a monopolist of an essential facility
 - Competitor's inability to duplicate the essential facility
 - Denial of the use of the facility to a competitor
 - Feasibility of providing access to the facility

A CASE

ESSENTIAL FACILITY

- Heli-Inter, France
Helicopter Service

ESSENTIAL FACILITY

HELI-INTER - 1

- This case was before the French Competition Commission
- Heli-Inter Assistance held the monopoly for the operation of the heliport of Narbonne, and was at the same time also in charge of medical transports by helicopter to the hospital of Narbonne
- At the end of 1994 the Narbonne Hospital granted the medical transport activity based on competitive bidding to Jet System, one of Heli-Inter's competitors.

ESSENTIAL FACILITY

HELI-INTER - 2

- Jet System asked Heli- Inter to communicate its tariffs for the use of several services of the heliport (parking, premises for the pilots, refueling, etc.)
- Considering that the tariffs were abusive, Jet System lodged a complaint with the Competition Council.
- The procurement conditions imposed that one helicopter stayed at the disposal of the hospital on the Narbonne heliport
- An interesting element in this case is that the essential character of the infrastructure resulted from the conditions imposed by the hospital. There was no possible alternative solution for Jet System

ESSENTIAL FACILITY

HELI-INTER - 3

- The Competition Council held that for an undertaking who operates an essential infrastructure, to refuse without justifications the access of such infrastructure to competitors or to grant access at an abusive price, not in proportion with the nature and the importance of the services requested, at a price which is non-cost-oriented and non-transparent, thereby preventing competitors to set up their offers or to make business in competitive conditions

ESSENTIAL FACILITY

HELI-INTER - 4

- Similarly, for an undertaking who operates an essential infrastructure to carry on discriminatory pricing aimed at invoicing itself access charges inferior to those invoiced to its competitors, would be qualified as an anti-competitive practice
- The price proposed by Heli-Inter to Jet System was a price per day, which was not decomposed service by service

ESSENTIAL FACILITY

HELI-INTER - 5

- The Competition Council considered that the lack of decomposition of the price per service, together with the absence of reply from Heli-Inter about the cost of these services if Jet System was to send one of Heli-Inter's helicopters, limited the possibilities of negotiations of Jet Systems and rendered the price non-transparent.
- Moreover, the Council concluded that the price was abusive as it included fees for take off and landing despite the fact that these fees are not applicable to medical transports.
- The Council also found that parking fees and landing fees did not correspond to the flights of the helicopter.

ESSENTIAL FACILITY

HELI-INTER - 6

- Finally, the Council estimated several costs (*inter alia*, the costs for refueling) and indicated that the services requested by Jet System could not justify the price asked by Heli-Inter.
- It stated that Heli-Inter did not provide any element to demonstrate that its tariffs were proportional to the nature and to the importance of the services and cost-oriented.
- Heli-Inter lodged an appeal to the Court of Appeal and, subsequently, to the Supreme Court. They confirmed the Council's decision.



REMEDIES

- Prohibiting the abuse in future
- Specifying future contract terms and conditions
- Structural remedies include 'division of enterprise'
- Such other order as may be deemed appropriate by Commission



THANK YOU

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