



# ABUSE OF DOMINANCE

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**Presentation by  
Amitabh Kumar, DG, CCI**



# Analysis of Abuse of Dominance

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Involves two distinct parts:

- Determining whether firm has dominant position; and
- Examining whether conduct of the dominant firm falls within the definition of abuse



# Dominance

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- Dominance cannot exist in the abstract – it exists in relation to a market (relevant market)  
Continental Can (1972)



# Dominance means

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- 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
  - Affect its competitors or consumers or the relevant market in its favour



## The two elements are: -

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- An ability to prevent effective competition and
- Ability to behave independently of three sets of market actors namely:
  - Competitors
  - Customers
  - Consumers



# Relevant market

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- Relevant product market
- Relevant geographic market



## Relevant Product Market

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the Commission is required to consider:

- Physical characteristics or end-use of goods
- Price of goods or service
- Consumer preferences
- Exclusion of in-house production
- Existence of specialised producers
- Classification of industrial products



# Relevant Geographic Market

the Commission 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





## Size alone does not matter

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- Existence of dominance is not frowned upon
- Conduct of dominant enterprise if it falls in 'Abuse' is prohibited under the Act



## Factors to determine dominance-1

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- Market share – no threshold in CA02
- In the EU, market share of 50% is taken to imply dominance except in exceptional circumstances [AZKO 1981]
- Even less than 40% market share can be regarded sufficient to establish dominance [Virgin/BA 1999]



## Factors to determine dominance-2

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- Size and resources of the enterprise – size- technological lead – capacity [Hoffman La Roche 1979]
- Size and importance of the competitors – relative size is important [ A firm's market share is 45% and its next biggest rival's is about 22 United Brands 1976]



## Factors to determine dominance-3

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- Economic power of the enterprise including commercial advantage over competitors – control over source of supply – brand value – distribution network - credit sales
- Vertical integration of the enterprise or sale or service network of such enterprise – network cannot be established in the short run – supply and/or distribution channels secured
- Dependence of consumers on the enterprise – habit – inertia - inelastic demand



## Factors to determine dominance-4

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- **Dominance created by statute or government authority** – sole licensee/concessionaire – public sector monopoly
- **Entry barriers** – regulatory barriers – high sunk cost – technical entry barriers – economies of scale – endogenous & exogenous
- **Countervailing buying power** – does it offset market power? –



## Factors to determine dominance-5

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- **Market structure** – Structure-Conduct-Performance model
- **Social obligation and social costs** – cost benefit analysis
- **Relative advantage of the dominant firm to economic development**
- **Any other factor** – discretion of CCI – residual factors



# Relevant market

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- Dominance must be established in the relevant market
- Determination of the relevant market first
- Relevant market has two aspects
  - Relevant product market
  - Relevant geographic market



# Exploitative behavior-1

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- Excessive price

In relation to what? How does one determine competitive price? Having determined excessive price, does the Commission set “price”?

- United Brand’s prices in different countries permitted ECJ to conclude that this was a case of excessive pricing [United Brand 1976]





## Exploitative behaviour-2

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- Discriminatory pricing
- Three types –
  - First degree, second degree and third degree
  - Welfare effects ambiguous
  - ECJ does not accept price discrimination, including discounts/rebates by dominant firms [Michelin replacement truck tyres market in Netherlands 1983]



## Exploitative behaviour-3

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- Aftermarkets
  - Sale of spares/complementary products or services
  - Customers 'locked in' – hence chance of excessive pricing
  - A firm having only 12 % market share in the cash register market was held to be dominant for those who owned its machine since its spares were not interchangeable – price of spares important [Hugin 1978]



# Exclusionary behavior

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- Predatory pricing
  - Intent to oust and selling below “cost” necessary for a successful charge of predation
  - What “cost” to take
  - Is predatory pricing ‘good’ for the consumer?



# Predatory pricing

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- Areeda-Turner test
  - Price is predatory if it is less than SRMC
  - MC is difficult to calculate
  - Good proxy for MC is AVC
  - Price is predatory if it is below AVC
  - Should it be AVC or average avoidable cost?



## Predatory pricing in the EU

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- If a dominant firm sells below AVC there is presumption of predatory intent since it has no “interest in applying such price except that of eliminating its competitors” [Akzo 1982]
- ECJ did not accept plea that recoupment was not a distinct possibility [Tetrapak II 1997]



# Predatory pricing in the US

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- The possibility of recoupment in addition to predatory intent and price below AVC must be shown to prove a charge of predatory pricing [Matsushita 1986]



## Essential facilities doctrine-1

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- Railroad firms owned a terminal and bridge leading to the terminal and refused access to these facilities to a competitor railroad firm. The US SC held it to anti-competitive since the new firm could not compete without access to the “essential facilities” [Railroad Terminal Association 1912]



## Essential facilities doctrine-2

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- Concept of EFD runs contrary to property rights.
- Whether the behaviour is protection of legal property rights or denial of access harms competition?





## Common Law approach

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- The London Dock Company owned, through a licence from the Parliament, monopoly to receive wines. “Where a person had the benefit of a monopoly this entailed a correlative responsibility, the consequence of which was that he could charge no more than a reasonable price for the service offered. The monopoly itself could be either “legal” or “factual”.....” [Allnutt v. Inglis 1810 in Craig, 3<sup>rd</sup> ed. Universal (2002) at 223]



## Essential facilities doctrine in the US

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- Four elements necessary to establish liability:
  - Control of essential facility by a dominant player
  - Competitor's inability, practically or reasonably, to duplicate the facility
  - Denial of use to a competitor
  - Feasibility of providing the facility

[MCI 7<sup>th</sup> Cir 1983]
- Must provide access on FAIR terms.



## Essential facilities doctrine in the EU

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- Sealink was a ferry operator and owner of a harbour. It permitted use of the harbour to another ferry operator but changed its sailing times to suit customers. This adversely affected the operations of the rival. The harbour was held to be an essential facility whose sharing had to be on fair terms. [Sealink 1992]



## Abuses

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- Imposing unfair or discriminatory price or condition in purchase or sale
- Limiting production or 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



# Concept of abuse

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- Not necessary for the firm to use its market power
- It is an 'objective' concept – the behaviour of a dominant firm may be such to influence the structure of the market and thereby weaken competition [Hoffman La Roche 1979]



## Some salient points-1

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- List of abusive conduct seems to be exhaustive unlike the EU [Art 82, Michelin 1981]
- Intervention only if conduct is covered in the definition of 'Abuse'
- Injury is not necessary - Adverse appreciable effect on competition need not be proved
- No concession in case of abusive use of intellectual property right



## Some salient points-2

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- A firm may be dominant in one market and abuse that dominance in another market. [Tetra Pak 1997]
- A dominant position may be on the buying side [ BA 2004]
- The same conduct can be charged under Art 81 (sec 3) and Art 82 (sec 4) [ Hoffman La Roche 1979]



## Some salient points-3

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- CA02 recognises dominance by “group” – closely linked enterprises
- In the EU dominance can be by “one or more” undertakings – this extends to oligopolies – requires economic link but no structural link  
[Compagnie Maritime Belge 2000]





## US vs EU on AOD

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- Conduct violates section 2 of the Sherman Act only if it limits output – excessive price is not an abuse
  - Monopoly power must be acquired or maintained willfully and not as a result of superior product, business acumen or historical accident
  - Reaping market power is not an offence
- In the EU reaping the power is an offence
- Responsibility on the dominant firm is higher – more strict interpretation
- Different treatment of discounts/loyalty rebate



# REMEDIES

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- Cease and desist
- Imposition of penalty
- Award of compensation
- Structural remedies - division of enterprise
- Such other order as may be deemed appropriate by Commission



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**Thank You**

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