



Competition Act, 2002

ABUSE OF DOMINANCE AND COMBINATIONS



Presentation

by

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INTRODUCTION

- Competition Act, 2002, like all modern competition laws:
 - Prohibits Agreements – Horizontal and Vertical
 - Prohibits Abuse of Dominant Position
 - Regulates Combinations
 - Undertakes Competition Advocacy



ABUSE OF DOMINANCE

- Analysis of Abuse of Dominance involves:
 - Determining status of firm as dominant; and
 - Examining conduct of dominant firm as abusive

DOMINANCE



- 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

ELEMENTS IN DOMINANCE



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

RELEVANT MARKET



DOMINANCE IS IN THE CONTEXT OF RELEVANT MARKET

Relevant market is based on:

- Relevant product market; and
- Relevant geographical market

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 PRODUCT MARKET-2



- Factors to be considered while determining relevant product market:
 - Physical characteristic of product
 - End-use of product
 - Price
 - Consumer preference – empirical evidence
 - Classification of industrial products - NIC



RELEVANT GEOGRAPHIC MARKET-1

- Relevant geographic market can be defined as the area in which products are available at approximately the same price given transport costs and any increase in demand can be met from neighbouring areas profitably
- Elzinga - Hogarty test to determine relevant geographic market:
 - **LIFO (Little In From Outside)**
 - **LOFI (Little Out From Inside)**

Usually both should be at least 90% to define the relevant geographic market – shipment data required



RELEVANT GEOGRAPHIC MARKET-2

- **Factors to be considered:**
 - **Shipment cost** – very important
 - **Regulatory trade barriers** – octroi/sales tax
 - **Local specification requirements** – language display
 - **National procurement policy** – only local (state-level or national) suppliers permitted
 - **Adequate distribution facilities** – perishable products

RELEVANT MARKET
Relevant Product Market
(Competition Act, 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**
- **Exclusion of in-house production**
- Existence of specialized producers
- Classification of industrial products

RELEVANT MARKET

Relevant Geographic Market

(Competition Act, 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 'Abuse' is void under the Act

FACTORS TO BE CONSIDERED IN DETERMINING DOMINANCE



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

FACTORS TO BE CONSIDERED IN DETERMINING DOMINANCE



- 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



ABUSE OF DOMINANCE

- 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**

ABUSE OF DOMINANCE



- List of Abuses in the Act are **exhaustive**
- No action if an ‘act(ion)’ is not covered in ‘Abuse’
- Abuses are of two types:
 - > Exploitative (predatory pricing, e.g.)
 - > Exclusionary
(interference with competitive process)
- Dominance is a single enterprise concept
- No concession in case of abusive use of intellectual property
- Adverse appreciable effect on competition need not be proved



REMEDIES

- Prohibiting the abuse in future
- Specifying future contracts terms and conditions
- Imposition of fines
- Award of compensation/damages
- Structural remedies includes 'division of enterprise'
- Such other order as may be deemed appropriate by Commission

REMEDIES



- The dimension of ‘dominance’ differ in different jurisdictions.
- The treatment of ‘specific conduct’ also differ in different jurisdictions.
- Duration and reversibility play important role between behavioral and structural remedies.



COMBINATIONS

- Combination covers
 - Merger
 - Acquisition
 - Amalgamation
 - Acquiring control
- Any combination which causes or is likely to cause appreciable adverse effect on competition (AAEC) is void

VOLUNTARY NOTIFICATION & HIGH THRESHOLD



- While Agreements and abuse of dominance are prohibited, **combinations are regulated**
- Indian Combination regulation liberal
- High threshold limits

If combining parties are in India:

- **Combining parties' assets in India > Rs 1000 cr
or turnover > Rs 3000 cr**
- **If combining parties are a group, assets in India > Rs 4000 cr
or turnover > Rs 12000 cr**

If any of the combining parties are outside India:

- **Assets in India and outside India > US\$ 500 m or turnover > US\$ 1500 m**
- **If any of the combining parties belong to a group and any one of them is outside India, assets > US\$ 2 b or turnover > US\$ 6 b**



INQUIRY

- Voluntary notification regime - notice to CCI under section 6
- CCI can inquire into a combination on its own but not beyond 1 year of the combination taking place
- Inquiry upon reference by a statutory authority under section 21
 - Issue of show cause notice
 - May call for report from DG
 - Prima facie opinion that the combination causes or is likely to cause AAEC – direct parties to publish details calling for written objections
 - May call for additional information from parties



APPRECIABLE ADVERSE EFFECT ON COMPETITION (AAEC)

Market definition

- AAEC has to be determined in the relevant market
- Relevant market determination depends upon determination of the relevant product market and the relevant geographic market

DETERMINING FACTORS - 1



Factors to be considered to determine AAEC in the Relevant Market (Competition Act, 2002):

- Actual and potential competition through imports- imports/trade agreements
- Entry barriers- sunk cost/technological lead
- Concentration level - CR, HHI
- Countervailing power
- Likelihood of increase in prices or profit margins
- Effective competition after combination

DETERMINING FACTORS -2



(Competition Act, 2002)

- Substitutes – actual or potential
- Market share
- Removal of vigorous and effective competitor or competitors in the market
- Extent of vertical integration
- Failing business
- Nature and extent of innovation
- Contribution to economic development
- Whether benefits outweigh the adverse impact

ORDER OF THE COMMISSION



Competition Commission of India can:

- Approve
- Approve with modifications
- Not approve

If no order within 90 days, the combination is deemed to have been approved.

AN EXAMPLE



- **Staples-Office Depot case**
- Competition assessment begins with analysing conduct which distorts competition and then turns to law to determine whether distortion harms those whose protection is required under law
- Check for potential of unilateral action or collusive behaviour



THANK YOU

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