



ABUSE OF DOMINANT POSITION

**K.K. Sharma,
Adviser (Law),
Kolkata, 04-10-2008**



Should AOD be prohibited?

- Who should be protected ?
 - Competition; or
 - Competitor
- Does prohibition of AOD amount to protection of competitor?
- Non violence – not the weapon of the weak
- CA 02 prohibits AOD



AOD prohibited

- No enterprise or group shall abuse its 'dominant position'(S4(1))
- Existence of dominant position is not frowned upon
- Conduct of dominant enterprise ,if it falls in 'Abuse', is prohibited under the Act



'Enterprise' (2(h))-I

- A person or a department of the government
- Engaged in any activity relating to
- Production, Storage, Supply, Distribution, Acquisition or Control of articles or goods, or
- The provision of services, of any kind, or
- In investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities or any other body corporate



'Enterprise'-II

- Either directly or through one or more of its units or divisions or subsidiaries,
- Whether such unit or division or subsidiaries is located at the same place where the enterprise is located or at a different place or at different places,



'Enterprise'-III

- But does not include any activity of the government relating to
- The sovereign functions of the government
- Including all activities carried on by the department of the central government dealing with Atomic Energy, Currency, Defence and Space



'Enterprise'-IV

Explanation

- (a) 'Activity' – includes profession or occupation
- (b) 'Article' – includes a new article and
- (b) 'Service' – includes a new service
- (c) 'Unit' or 'Division' – in relation to an enterprise, includes –
 - i. A plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods
 - ii. Any branch or office established for the provision of any service



'Person' (S 2(I))-I

Includes:

- (i) an individual
- (ii) a Hindu undivided family
- (iii) a company
- (iv) a firm
- (v) an AOP or a BOI, whether incorporated or not, in India or outside



'Person' (S 2(I))-II

- (vi) any corporation established by/ under any central/state or provincial act
- (vii) any body corporate under laws of a country outside India
- (viii) a co-operative society
- (ix) a local authority
- (x) every Artificial Juridical Person, not following in any of the previous sub-clauses



'Group' (Expl 2(c) S 4)

- Same as in Expl (b) to S 5
- Means two or more enterprises which, directly or indirectly are in a position to
 - (i) exercise 26% or more of voting rights in the other enterprise
 - (ii) appoint more than 50% of the members of BOD in the other enterprises
 - (iii) control the management or affairs of the other enterprise



'ABUSE'(S4(2))-I

- Imposing unfair or discriminatory price or condition in purchase or sale, including predatory pricing (a)
- Limits or restricts production of goods or provision of services or market therefor (b)
- Limiting scientific development to the prejudice of consumers (b)



'ABUSE'(S4(2))-II

- Denial of market access in any manner (c)
- Conclusion of contract subject to supplementary obligations (d)
- Use of dominant position in one relevant market to enter into or protect other relevant market (e)



'Dominant Position'

- Position of strength enjoyed by an enterprise in the relevant market which enables it to:
(Expl S 2(a))
 - (i) Operate independently of competitive forces prevailing in relevant market, or
 - (ii) Affect its competitors or consumers or the relevant market in its favour



The two elements are: -

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

Factors to determine dominance- 1



- 13 listed factors (S19(4))
- Market share – no threshold in CA02 (a)
 - 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

- Size and resources of the enterprise (b) - size - technological lead – capacity [Hoffman La Roche 1979]
 - Vitamins A, B2, B3, B6, C, E and H
 - 1964 onwards agreements with 22 purchasers with obligations to buy all or most of the requirements exclusively or in preference from Roche
 - Capacity of Roche alone sufficient to meet world demand.
 - At that time operating at 50% capacity
 - ECJ confirmed EC decision with reduced fine



Factors to determine dominance - 3

- Size and importance of the competitors (c) – relative size is important [A firm's market share is 46% and its next biggest rival's is about 22 United Brands 1976]
- Olesen – Denmark distributor began promoting 'Dole' rival of 'Chiquita' – refusal to supply
- A must have brand
- Distributors cannot afford not to offer Chiquita to consumers



Factors to determine dominance - 4

- Economic power of the enterprise including commercial advantage over competitors (d) – control over source of supply – brand value – distribution network - credit sales
- A company in a dominant position on the market in raw materials, with the aim of reserving it for its own manufacturing refused to supply a rival manufacturer and thereby sought to eliminate competition. Such behavior was termed as abuse of dominant position by the ECJ [Commercial Solvents (1974)]



Factors to determine dominance - 5

- Vertical integration of the enterprise or sale or service network of such enterprise (e) – network cannot be established in the short run – supply and/or distribution channels secured
- Dependence of consumers on the enterprise (f) – habit – inertia - inelastic demand



Factors to determine dominance - 6

- Dominance created by statute or government authority – sole licensee/concessionaire – public sector monopoly (g)
- Entry barriers – regulatory barriers – high sunk cost – technical entry barriers – economies of scale (h)
 - legal provisions
 - superior technology
 - Deep pockets
 - economy of scale



Factors to determine dominance - 7

- vertical integration
- well developed distribution systems
- product differentiation
- overall size and strength
- opportunity costs
- obligatory trading partner
- conduct
- performance
- evidence of managers



Factors to determine dominance - 8

- Countervailing buying power(i)
- Market structure and size of the market (j)– (Structure-Conduct-Performance)
- Social obligation and social costs – cost benefit analysis (k)
- Relative advantage of the dominant firm to economic development-having or likely to have AAEC (l)
- Any other factor – discretion of CCI – residual factors (m)



'Predatory price'-I

- 'Predatory price' (Expl 2(b))
means the sale of goods or provision of services at a price which is below cost with a view to reduce competition or eliminate competitors (Expl. (b) to S 4)



'Predatory price'-II

- Predatory pricing
 - Intent to oust and selling below "cost" necessary for a successful charge of predation
 - Spare capacity to absorb additional demand
 - What "cost" to take
 - Is predatory pricing 'good' for the consumer?
 - What time period should be looked at ?



Predatory pricing in the US

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



Predatory pricing in the EU

- 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]



Two stage process

- Two stage procedure:
 - Determining the relevant market; and
 - Determining whether the firm is dominant



Analysis of abuse of dominance

- 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-where?-I

- Dominance is relative and cannot exist in the abstract – it exists in relation to a market (relevant market) Continental Can (1972)
- Light Metal Containers (LMC)
- Whether competition is possible from substitute (such as glass and plastic) products



Dominance-where?-II

- 'A dominant position on market for LMC for meat and fish cannot be decisive as long as it has not proved that competitors from other sectors of the market for LMC are not in a position to enter this market by a single adaptation, with sufficient strength to create a serious counterweight'
- ECJ annulled EC decision



Relevant market

- 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
 - Temporal market(?)



Relevant Product Market

- Commission is required to consider:(S19(7))
 - (a) Physical characteristics or end-use of goods
 - (b) Price of goods or service
 - (c) Consumer preferences
 - (d) Exclusion of in-house production
 - (e) Existence of specialised producers
 - (f) Classification of industrial products



Relevant Geographic Market

- Commission is required to consider:(S19(6))
 - (a) Regulatory trade barriers
 - (b) Local specification requirements
 - (c) National procurement policies
 - (d) Adequate distribution facilities
 - (e) Transport costs
 - (f) Language
 - (h) Consumer preferences
 - (i) Need for secure or regular supplies or rapid after-sales services



Essential facilities doctrine - 1

- 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” [Terminal Railroad Association of St. Louis 1912]



Essential facilities doctrine - 2

- EC did not use term 'Essential facilities' until Sealink-Holy head 1992
- Comparison with Commercial Solvents.

Essential facilities doctrine in the US



- 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
 - Must provide access on FAIR terms.



Essential facilities doctrine in the EU

- 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]



Concept of abuse

- 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

- The 'special responsibility' of dominant firms
 - 'has a special responsibility not to allow its conduct to impair undistorted competition in common market' ECJ
Michelin v Commission 1985
 - In comparison to non dominant firm, a dominant firm bears more responsibility
- List of abusive conduct seems to be exhaustive unlike the EU [Art 82, Michelin 1981]



Some salient points - 2

- Intervention only if conduct is covered in the definition of 'Abuse'
- Injury is not necessary – appreciable adverse effect on competition need not be proved
- No provision for rebuttal
- No concession in case of abusive use of intellectual property right



Some salient points - 3

- 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]



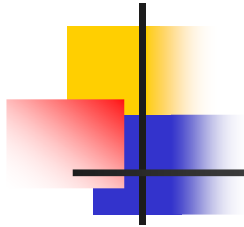
Some salient points - 4

- 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



Remedies for AOD

- Cease and desist order (27(a))
- Imposition of penalties (S 27(b))
 - Not more than 10% of the average of the turnover for the last three preceding FYs
- 'Division of enterprise enjoying dominant position' (S 28 (1))
 - S 28(2) – consequential details to be included in order u/s S 28(1)
- Such other order or directions as may be deemed fit by Commission (S 27(g))



THANK YOU

kksharmairs@gmail.com