RECENT DEVELOPMENTS IN ABUSE OF DOMINANCE REGIME IN INDIA WITH SPECIAL REFERENCE TO THE DLF CASE

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1. INTRODUCTION

India, after adopting the philosophy of globalisation, liberalisation and privatisation in 1991, began a journey in which she relies on the competition and market forces as the ultimate principle for the resource allocation in the economy. However, considering that the invisible hands under the Adam Smith's classic theory have their inherent limitations, the role of abuse of domination regime in preserving fairness and level playing in a market can hardly be underestimated.

Almost every modern competition law contains specific provisions against anti-competitive monopolistic behaviour. The Sherman Act, 1890, to which the origin of competition law is traced, contains specific prohibition against monopolisation. Again, Article 82 of the EU treaty prohibits abuse of dominance. The Competition Act, 2002 (hereinafter referred to as the Act) like other competition regimes in the world seeks to detect and prevent abusive conduct by dominant enterprises[2].

The abuse of the dominance regime under the Act was notified by the Central Government on 20th May, 2009. Since then the Competition Commission of India (hereinafter referred to as the Commission) has done a commendable job in implementing this statute. The Commission in such a short span has made some excellent decisions, which is quite evident from the judgment of the DLF Case. However, the awareness in the legal profession as a whole about this Act seems to be inadequate. It is quite apparent from the fact that a lot cases filed in the Commission especially in the initial stages were mere consumer disputes and had nothing do with the regulation of competition at all.

This paper seeks to study the various provisions related to abuse of dominant position under the Act and development of this regime after its notification in 2009 with special reference to the judgments given by the Commission in the NSE and DLF cases. The concept of relevant market in relation to dominance enjoyed by an enterprise or group

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[2]Vinod Dhall, 'Abuse of dominance in competition law' *The Economic Times* (India, 4 April 2007)

is also explained by the author. Lastly the author has tried to analyse the applicable ratios laid down by the courts of other territories such as US, UK and EU in various landmark cases like Hoffmann-La Roche case, Tetra Pak case etc.

2. ABUSE OF DOMINANT POSITION

Section 4(1) of the Act prohibits abuse of a dominant position by an enterprise or group. In order to completely understand this section, we first need to address the issue what the terms enterprise and group means.

2.1 Enterprise – Definition

The Act provides a very lengthy definition for the term 'enterprise', but in simple language the term can be defined to mean a person (including artificial, judicial person) or a government department engaged in any kind of business activity excluding Government's sovereign functions dealing with atomic energy, currency, defence and space. An important feature of this definition is that even a government department undertaking any commercial activity is included in the definition.

2.2 Group - Definition

The term group is defined under the Act to mean two or more enterprises which, directly or indirectly, are in a position to —

(i) Exercise twenty-six per cent or more of the voting rights in the other enterprise; or

(ii) Appoint more than fifty per cent of the members of the board of directors in the other enterprise; or

(iii) Control the management or affairs of the other enterprise[3];

The term group was introduced in the Act by an amendment in 2007[4], with a view to incorporate the concept of "Collective Dominance" which is quite evolved in the West. Under this concept, a dominant position need not be held by a single undertaking and separate undertakings may be found to hold a dominant position together when certain conditions are met. After this amendment the conduct of such undertakings enjoying collective dominance also comes under the purview of section 4 of the Act.

[3]Clause (b) of the Explanation to section 5.

[4]Competition (Amendment) Act 2007

It is important to understand that it is not in itself illegal for an undertaking to be in a dominant position and such a dominant undertaking is entitled to compete on the merits. However, according to many cases, it is clearly established that the undertaking enjoying a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition on the relevant market[5]. In order to successfully establish the claim of abuse of dominant position, three questions need to be answered, viz.-

- What is the scope of relevant market for the alleged undertaking?,
- Whether the alleged undertaking enjoys dominance in such relevant market or not, and finally
- Whether the conduct of the alleged undertaking can be considered as abusive?

If the answers to the last two questions are in the affirmative, the undertaking can be prosecuted for abusing its dominant position, prohibited by section 4 of the Act.

3. RELEVANT MARKET

To establish the claim of abuse of dominant position, the first and foremost step is to define the scope of relevant market in which the alleged firm competes. The relevant market for an undertaking is that part of whole market, which can influence or be influenced by the conduct of an undertaking.

It important to understand that relevant market does not exist in abstract; it exists in relation to an undertaking. The European Commission's Notice on the "Definition of relevant market for the purposes of Community Competition Law" prescribes three methods for defining relevant market, these methods are –

Demand substitution

Under the method of demand substitution, a list of products capable of acting as substitutes for the product in question is prepared. Thereafter, the Commission tries to find out whether the consumers of the product in question would switch to other alternatives if the relative price of such product is increased by a hypothetical small but permanent amount, generally in range of 5 % to 10 %. If the increase in relative price results in product substitution, then the entire range of alternatives are included in the relevant market.

[5]*Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461 [57]; *Tetra Pak v Commission* [1993] ECR II-755 [114]; *Promedia v Commission* [1998] ECR II-2937 [112]; *Sugar v Commission* [1999] ECR II-2969; *Michelin v Commission* [2003] ECR II-4071

Supply substitution

Under this method, all those product substitutes are included in the relevant market, the suppliers of which are able to switch production to these substitutes and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. However, under this method, if producing alternatives would require significant adjustment to existing tangible and intangible assets, additional investments, strategic decisions or time delays, these alternatives will not be included in the relevant market.

Potential competition

The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general, once the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view.[6]

The expression "relevant market" is also defined under section 2(r) and 19(5) to mean a market which may be determined by the Competition Commission of India with reference to either or both –

- Relevant product market, or
- Relevant geographic market.

Thus, the Act defines relevant market as the combination of relevant product and relevant geographic markets. The Supreme Court of United States defines relevant market as the area of effective competition within which the defendant operates[7].

It is pertinent to note that it is not mandatory for the Commission to consider both the aspects while determining the relevant market. The Commission can even consider either relevant product market or relevant geographic market while defining the relevant market for a firm.

[6]European Commission's Notice on the definition of relevant market for the purposes of Community competition law [1997] OJ C372, 9.12.97, [13]-[24]

[7]*Standard Oil Co v United States* [1949]337 US 293

3.1 Relevant Product Market

The expression "relevant product market" has been defined under the Act as the market comprising of 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.[8]

Relevant product market, thus, includes all reasonable substitutable products or services of nearby competitors, to which consumers could turn without compromising substantially with their needs. A good example of this would be the market of toothpastes and tooth powder. Even though they are quite different products, they act as competitive restraints on each other and thus part of same relevant product market. The Act prescribes certain factors and all or any of them can be considered by the Commission while defining the relevant product market.

These factors can be listed as follows –

(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.[9]

Hoffman – La Roche Case[10] -

In this case, the defendants were seller of Vitamins C and E. These two products were mainly used for two purposes –

- **Bio-nutritive use or additives to food stuffs**, under which both the products performed different functions and could not substitute each other in respect of function.
- **Technological use**, under which their use as anti-oxidants and fermentation agents were interchangeable.

[8]Section 2(t)

[9]Section 19(7)

[10]*Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECR 461

The defendants contested that due to the technological use, Vitamins C and E are part of much larger market comprising of other products suitable for the same and the Commission has exaggerated its share in the said market. The court did not agree and held that each of these groups must be placed in separate market, one comprising of vitamins for bio-nutritive use and other vitamins for technological use.

3.2 Relevant Geographic Market

Geographic dimension involves identification of the geographical area within which competition takes place. The Act defines the term "relevant geographic market" to mean a market comprising the area in which the conditions of competition are distinctly homogenous, and can be distinguished from the conditions prevailing in the neighbouring areas, in regards to -

(a) Supply of goods or provision of services, or

(b) Demand of goods or services [11]

The Act also prescribes some factors and any or all of these factors can be considered by the Commission while defining the scope of relevant geographic market, these factors are –

(a) Regulatory trade barriers;

(b) Local specification requirements;

(c) National procurement policies;

(d) Adequate distribution facilities;

(e) Transport costs;

(f) Language;

(g) Consumer preferences;

(h) Need for secure or regular supplies or rapid after-sales services.[12]

4. DOMINANT POSITION

After determining the scope of relevant market, the next question that needs to be answered is whether the alleged enterprise or group enjoys dominance in that relevant market. The concept of dominance is broader than economic power over price. The Act first provides a definition of dominant position and then also lists some factors, all or

[11]Section 2(s)

[12]Section 19(6)

any of which may be considered by the Commission while inquiring about dominance of an undertaking.

4.1 Definition

The Act defines dominant position to means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) Operate independently of competitive forces prevailing in the relevant market; or

(ii) Affect its competitors or consumers or the relevant market in its favour.[13]

This definition has two aspects. The first aspect defines the dominance in terms of ability of an undertaking to conduct its business irrespective of competitive force or restraints in the market and the other aspect defines the dominance in terms of ability of an undertaking to influence the competitors, consumers or relevant market in its economic interests.

As observed in the Raghavan Committee Report, "This definition may perhaps appear to be somewhat ambiguous and to be capable of different interpretations by different judicial authorities. But then, this ambiguity has a justification having regard to the fact that even a firm with a low market share of just 20 per cent with the remaining 80 per cent diffusedly held by a large number of competitors may be in a position to abuse its dominance."[14]

The European Court of Justice in the *United Brands* case[15] has defined the term dominant position to mean "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers." This definition has been reiterated and relied upon in a number of subsequent decisions.[16]

4.2 Factors for Determination of Dominant Position

While assessing the dominance of an undertaking it is important to consider all the

[13]Explanation Clause (a) to section 4.

[14]Raghavan Committee's Report, (n 12) [4.4.5]

[15]*United Brands Co and United Brands Continental BV v The Commission of European Communities* [1978] 1 CMLR 429

[16]*Hoffmann-La Roche* (n 10); *NV Netherlands Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3451; *Hilti v Commission* [1991] ECR II-1439

constraints present in the market, which hinders its ability to act independently and affect the relevant market in its favour. The Act lists some factors to answer this question. These factors can be classified into three broad categories:

- **Ability to influence the relevant market**

The first category objectively analyses *inter alia*, the market power of an undertaking, its ability to influence the market and restrain competition.

- **Features and structure of the market**

In order to completely understand the effects of an alleged dominant undertaking on the relevant market, it is necessary to understand the conditions and structure of the relevant market in which the dominant undertaking operates, the second category seeks to do the same.

- **Discretionary factor**

The last category seeks to provide some discretionary power to the Commission, to include certain factors relevant for assessing dominance of an undertaking, not included in any of preceding provisions.

It is pertinent to note that dominance of an undertaking in the relevant market is completely a question of fact and selection of above mentioned factors for assessing dominance will depend solely upon facts and circumstances of each case. Some factors quite relevant in a certain case can be futile in another.

5. ABUSIVE CONDUCT

After the dominance has been established the next question which needs to be answered is whether the conduct of the alleged enterprise or group can be considered as abusive. It must be noted that the acts prohibited under the section are not punishable *per se*, as the same acts will not amount to contravention of section 4 if committed by a firm not dominant in the relevant market. It is also pertinent to point that the list of acts under section 4(2) is exhaustive in nature and no action can be taken if the conduct of an undertaking does not fall within the sub-section.

It is not necessary to show that the abuse was committed by a firm in the same market in which it holds dominance. In certain circumstances, prohibition under section 4 may apply where an undertaking that is dominant in one market commits an abuse in a different but closely associated market. This principle was set out by the European

Court in the case of *Tetra Pak II*[17] and was also adopted by the Commission in the NSE case.[18]

Under the Act the following conducts of a dominant enterprise or group are considered abusive -

5.1 Discriminatory or Unfair Pricing and Conditions of Sale

The term unfair has not been defined under the Act, but in common parlance means something which is not fair and can't be justified. The Act prohibits unfair pricing and conditions in sale. The European Court of Justice in the *United Brands* case[19] held that charging excessive prices which has no reasonable relation to the economic value of the product supplied is unfair pricing.

5.2 Predatory Pricing –

Under the traditional theory of predatory pricing, the predator, already a dominant firm, sets prices so low for a sufficient period of time that its competitors leave the market and others are deterred from entering and the losses incurred due to the low prices, which like any investment, will be recovered by future gains.[20]

Distinguishing predatory behaviour from legitimate competition is difficult. The distinction between low prices which result from predatory behaviour and low prices which result from legitimate competitive behaviour is often very thin and not easily ascertainable[21].

There are two essential conditions for establishing predatory pricing –

- Sale of goods or provision of services, at a price which is below the prescribed cost, and
- With an intention to reduce competition or eliminate the competitors.

[17] *Tetra Pak v European Commission* [1994] ECR II-755. In this case the European Court found that Tetra Pak's activities in relation to the markets in non-aseptic machines and cartons constituted an abuse of its dominant position in the distinct, but closely associated, markets for aseptic machines and cartons intended for the packaging of liquid foods.

[18] *MCX Stock Exchange Ltd &Ors v National Stock Exchange of India Ltd & Ors* <http://cci.gov.in/May2011/OrderOfCommission/MCXMainOrder240611.pdf> accessed on 10 July 2011

[19] *United Brands* (n 18).

[20] OECD, 'Predatory Pricing' (1989) <http://www.oecd.org/dataoecd/7/54/2375661.pdf> accessed 2 September 2011

[21] Raghavan Committee's Report (n 12) [4]

The Act does not prescribe any specific type of cost per se but leaves it to be determined by regulations made under the Act. This issue is addressed by the Competition Commission of India (Determination of Cost of Production) Regulations, 2009.The regulation provided that "Cost" in the Explanation to section 4 of the Act shall, generally, be taken as average variable cost[22], as a proxy for marginal cost[23]. Provided that in specific cases, for reasons to be recorded in writing, the Commission may, depending on the nature of the industry, market and technology used, consider any other relevant cost concept such as avoidable cost, long run average incremental cost, market value.

5.3 Limiting Production, Technical or Scientific Development

Under the Act, the conduct of an enterprise which results in limiting production, technical or scientific development to the prejudice of consumers is prohibited.

5.4 Denial of Market Access

A dominant undertaking with a view to exclude competition from the market and conducting its business in a way other than legitimate competition on the merits is a violation of section 4 of Act.

5.5 Supplementary Obligations Having No Connection with the Subject Matter of Contracts

Under the Act, forcing supplementary obligations by their nature or commercial usage having no connection with the subject matter of the contract are classified as anti-competitive.

5.6 Using Dominance to Enter Into Other Relevant Markets

The Act prohibits an undertaking from using its dominant position in one relevant market to enter into, or protect, other relevant market.

NSE Case[24] –

In this case the MCX-Stock Exchange had alleged that NSE was indulging in predatory

[22]Average variable cost means the variable cost involved in production of one unit. In other words total variable costs divided by number of units produced.

[23]Marginal cost means the increase in total costs of the firm cause by increasing the output by one extra unit.

[24]*MCX v NSE* (n 21)

pricing by waiving the transaction fee on currency derivatives. The MCX contended that NSE has waived its transaction fee on currency derivatives and instead, charges a fee of Rs. 2/ Lakh on the turnover in its derivatives segment. Due to NSE's waiver, MCX-SX is also unable to levy such a fee leading to significant losses and new investors are not likely to be attracted in the market of currency derivatives.

NSE, in its reply to the Commission, contended that the intention to eliminate competition is an important ingredient of predatory pricing, and the fee waiver in the new currency derivative segment, referred to in the allegation, is in the nature of introductory pricing with no intention to eliminate competition.[25]

The Commission in its decision observed that the NSE had used every tactic to harm competition by using its dominant position in the relevant market of stock exchange space and has also protected its dominant position in Currency Derivatives segment by using its monopoly revenues from other segments."[26]

6. REMEDIES

After the abuse of dominance has been established the Commission can pass any of the order listed below –

a) A cease and desist order,

b) Impose penalty which may be up to 10% of the annual turnover,

c) Direct the enterprises concerned to abide by such other orders as the authority may pass and comply with the directions, including payment of costs, if any,

d) Pass any other order as it may deem fit,

e) Direct the division of a dominant enterprise, and

f) Awarding compensation but applicable only on Competition Appellate Tribunal.

7. DLF CASE

In the year 2010 two sets of information were filed against the DLF Limited (hereinafter referred as DLF) in the Commission under Section 19 (1) (a) of the Act. Subsequently On the basis of these two sets of information the Commission registered two cases against the DLF, namely –

[25]Lalit Mohan Agarwal, 'NSE under CCI lens' Journal Of Finance <http://www.journaloffinance.in/?p=811> accessed 15 Feb 2011

[26]Partha Sinha, 'NSE abused dominant position: CCI' *The Economics Times* (India 29 Nov 2010)

a) Belaire Owner's Association v DLF Limited & HUDA,[27] and

b) DLF Park Place Residents v DLF Limited.[28]

The legal issues raised in these two cases were more or less similar legally. The only distinction was that they both were related two different residential complexes. From the academic point of view these two cases can be studied together. In these two cases following issues were raised –

Issue 1: Do the provisions of the Act apply to the facts and circumstances of the instant case?

Issue 2: What is the relevant market, in the context of section 4 read with section 2 (r), section 19 (5), section 19(6) and section 19(7) of the Act?

Issue 3: Is DLF Ltd. dominant in the above relevant market, in the context of section 4 read with section 19 (4) of the Act?

Issue 4: In case DLF Ltd. is found to be dominant, is there any abuse of its dominant position in the relevant market by the above party?

The Commission, in adjudication of these issues, held that the present case is within the jurisdiction of the Act. Therefore, in accordance with provisions of the Act it has delineated the relevant market as the market for services of developer / builder in respect of high-end residential properties in Gurgaon. In the relevant market the DLF has a dominant position within the meaning of the term as per explanation (a) to section 4, read with section 19 (4). Finally, the Commission has concluded that DLF Ltd. is in contravention of section 4 (2) (a) (i) has abused its dominant position by imposing unfair conditions on the sale of its services to consumers.

Consequently in exercise of powers under section 27 (a) of the Act, the Commission directs DLF and its group companies offering services of building / developing:-

i. To cease and desist from formulating and imposing such unfair conditions in its agreements with buyers in Gurgaon.

ii. To suitably modify unfair conditions imposed on its buyers as referred to above, within 3 months of the date of receipt of this order.

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[27]Certified Copy available on <http://cci.gov.in/May2011/OrderOfCommission/DLFMainOrder110811.pdf> accessed 5 September 2011

[28]ibid

In addition to these directions the Commission also imposed a penalty of 7% of average of last three years of turnover i.e. Rs. 630 crores on DLF.

8. CONCLUSION

The above analysis indicates that the Act has made an attempt to remove the bottlenecks and curb the practice of abusing the dominant position by an enterprise. The Government deserves a pat on the back for creating an effective legal framework, wherein such practice can be easily detected and subsequently prevented. The work done by the Commission in this direction is also commendable. In the end, to conclude it can be said that prohibition on abuse of dominant position is absolutely necessary for preserving sustainable development in any economy and especially for a developing economy like ours.