

NyaayShastra LawReview

Volume 1, Issue 2



NLR

NyaayShastra
Law
Review

ABUSE OF DOMINANCE UNDER INDIAN COMPETITION LAW:

A CASE FOR PROHIBITION OF DOMINANCE PER SE

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ABSTRACT

This Article aims to explain the concept of abuse of dominance in the context of Indian Competition law. The Article explores the existing position of abuse of dominance, and explains key concepts related to the dominance such as relevant market, factors affecting dominance and the role and powers of the Competition Commission of India in regulating dominance and prohibiting its abuse.

The author further looks at the concept of dominance per se and abuse of dominance through the lens of a recent judgement. As an analysis, the author juxtaposes that the current position of the Competition Act with regards to Section 4 is in contradiction to the stance in the Preamble of the Act that seeks to prevent practices that have an adverse impact on competition and as a result is inadequate in its scope. As a conclusion, the author suggests that given the paradigm shift in sectors such as telecom, internet related and e-commerce, where dominance of certain enterprises are visibly evident, India should look to restrict dominance per se and this can be achieved by proceeding completely to an effect based approach to analysing dominance of an enterprise approach rather than the current form based approach.

INTRODUCTION

The Indian Competition Act of 2002 (hereafter referred to as the Act) defines a dominant position as a position of strength enjoyed by an enterprise in its relevant market in the country that allows it to operate independently of market forces and affects its consumers and competitors prevailing in its relevant market in its favour.¹ Simply put a dominant position is a position of superiority exercised by an enterprise based on certain comparative factors. In the Indian context however, merely being in a position of dominance without exploiting that power is not bad per se. Consequences are invited only when that dominance is abused.

Abuse of a dominant position is prohibited under the Act. This occurs when an enterprise uses its superior position in the prevailing market to exploit or exclude the competition. The Act lays down the practices that enable an enterprise to do so under Section 4(2) such as

- Imposition of discriminatory and /or unfair conditions or price through direct or indirect means in the purchase or sale of goods and services.
- Limiting the production of goods and services or limiting the technical development and innovation relating to goods and services in an effort to prejudice consumers.
- Denying market access by indulging in practices that do so.
- Makes conditional contracts subject to other parties accepting supplementary obligations which have no nexus to the subject of the contract.
- To enter and protect a relevant market by making use of a dominant position already possessed in another relevant market.

¹ The Competition Act, 2002 (12 of 2003), Section 4(2)(a)

The above points clearly state the identification of abusive use of a dominant position. These acts can lead to both exploitation of dominant position and exclusion by dominant position. Exploitive act is a show of force by a dominant enterprise to instil and force poor conditions on the existing enterprises such as predatory pricing whereas an exclusionary act is one which a dominant party employs to confine and restrict the entry of competition in a relevant market such as denying access to the market.²

To clearly understand the intricacies surrounding a dominant position and its extended abuse, it is important to understand a certain term, which is relevant market.

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RELEVANT MARKET

The emphasis of laying the boundaries of a relevant market is to solidify the limits inside which the prevalent situation or act of an endeavour is to be analysed for its dominance and abuse. Relevant market is categorized and further determined by two means namely the relevant product market or the relevant geographic market. The Commission may place a market with reference with these two categories or a combination of both.

² Provisions related to Abuse of Dominance, Competition Commission of India
https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf

Relevant Product Market

A Relevant Market is meant by all those goods and services that can be interchanged and substituted by consumers.³ This can be concluded by analysing factors such as, price, physical characteristics, consumer preference, classification and intended use, existence of specialised producers etc. of goods and services⁴. These characteristics are to be analysed and understood from both a demand and supply perspective.

Relevant Geographic Market

Relevant Geographic Market is to be understood as the area in which the market conditions affecting supply and demand are distinctly homogenous and can be differentiated from neighbouring markets⁵. This is analysed and studied through factors such as regulations and trade barriers, distribution and its related costs, specialized local requirements, language, procurement policies and consumer preference as well etc.⁶ If all such factors remained homogenous across a Nation then the entire Nation would account for a Relevant Geographic Market.

³ The Competition Act, 2002 (12 of 2003), Section 2(t)

⁴ The Competition Act, 2002 (12 of 2003), Section 19(7)

⁵ The Competition Act, 2002 (12 of 2003), Section 2(s)

⁶ The Competition Act, 2002 (12 of 2003), Section 19(6)

INQUIRY INTO ACTS OF ABUSE OF DOMINANT POSITION

The Competition Commission of India (CCI) is vested with certain powers under Section 19 of the Act. The Commission can inquire into claims of abuse of dominant position by enterprises. This is done through analysing certain factors of said enterprise. These factors are laid down under Section 19(4) of the Act which includes:

1. Market share of the enterprise
2. Size and assets
3. Economic power of the Enterprise
4. Vertical integration of Enterprise
5. Reliance of customers on the enterprise
6. Social Obligations and Social Costs
7. Market structure
8. Significance of competition'
9. Entry and Exit barriers in the relevant market
10. Source of dominant position
11. Any other factor that the Commission deems necessary

After thorough examination of the above factors, if the Commission deems true that there exists an abuse of dominant position will guide the Director-General to perform an examination and create a report. The Commission has powers vested in the Civil Court under the CrPC with regards to issues relating to summoning, examining records ad accepting proofs of affidavit etc.

After request, the Commission pursuant to powers under Section 27 of the Act may pronounce any or the entirety of the following Orders:

1. A restraining order directing to suspend such an act or agreement/understanding.
2. Direct the Enterprise to alter or modify the agreement to curb the abuse of dominant position as specified by the Commission
3. Impose a penalty as deemed fit by the commission which shall be not more than 10% of the average of the turnover for the last three preceding financial years.
4. The Commission may direct the enterprise to obey any such orders that may be passed as well as directions, including those amounting to payments of costs etc.
5. Commission can pass a request to cause the division of the prevailing venture to ensure that it no longer abuses its dominant position.

Now proceeding to the case at hand to analyse the current scenario surrounding abuse of dominant position, in the case of *Baglekar Akash Kumar v. Google LLC*⁷, information was filed under Section 19 (1)(a) by informant Mr Baglekar Akash Kumar against Google LLC and Google India Digital Services Private Limited alleging contravention of Section 4(2) of the Act.

FACTUAL BACKGROUND

Google Digital Services is a subsidiary of Google LLC. The informant made an allegation that G-Mail an email service provided by Google enjoys a dominant position in the e-mail and direct messaging market as it is pre-installed and in built inn almost all mobile phones and laptops. Further Google holds a dominant position in the Internet services market. Google integrated its video-conferencing app Google Meet with its E-mail service app G-Mail and this was claimed to amount to using a dominant position in one market to claim another market and was in contravention of Section 4(2) (e).

⁷ Baglekar Akash Kumar v. Google LLC 2021 SCC OnLine CCI 2

It was stated that due to the onset of Covid-19, there has been an increased reliance on video-conferencing apps to conduct meeting etc. and Google has made use of its dominant position in the email market to claim another relevant market of video-conferencing. CCI went on to pass an order claiming a response from the opposite party in this regard.

ISSUE

Firstly, the initial challenge before the CCI was to identify the *locus standi* of the informant and whether a member of public can bring a claim for an anti-competitive behaviour under the Act. Secondly, the issue in regards to the present matter is to identify if Google is truly a dominant player in the internet services related market and further if the integration of Google Meet with Gmail is an abuse of its dominant position under Section 4(2) (e)⁸⁸.

OBSERVATION

The CCI heard contentions from both parties and after perusal held that there is no violation by Google under Section 4 of the Act. The Coram set aside the case made by the informant who claimed that Google is abusing its dominant position by integrating Google Meet App into the Gmail App.

⁸⁸ The Competition Act, 2002 (12 of 2003), Section 4(2)(e) -Uses its dominant position in one relevant market to enter into, or protect, other relevant market

ANALYSIS

Discussing the immediate issue of locus standi of the informant who is a stranger to initiate a claim of anti-competitive behaviour, the CCI placed reliance on the judgement of the Ape Court in *Samir Agrawal v. Competition Commission of India*⁹. The Court held that the CCI performs an inquisitorial function and hence the doors of the CCI and its corresponding Tribunal the COMPAT (the Competition Appellate Tribunal) must be kept open. The proceedings before the CCI are inquisitorial and in rem in nature and there is no bearing as to the merit of the claim with regard to locus standi of the informant. Any stranger is free to file information of anti-competitive behaviour before the CCI.

Moving on the actual issues, the CCI after deliberations concluded that there does not appear to be any abuse of dominant power in this matter. Although the feature of Google Met has been integrated within the Gmail App users of Gmail are not forced to necessarily use Google Meet and can choose to do or not to do so of their own volition, and there does not appear to be any adverse consequences on the users of Gmail for not using Google Meet and instead making use of any of the other video-conferencing apps available in the market such as Zoom, Skype, Microsoft Teams etc. The Committee further went on to state that Google Meet still remains an independent app outside the Gmail ecosystem as anyone with a Google Account could create an online meeting using Google Meet. For creating a Google account, it is not mandatory that the user must possess a Gmail account. He/she can use email ID created on any other e-mail service provider for creating a Google account.

This line of reasoning further reinforced the CCI's decision that the integration did not prove to be an abuse of dominant power and that the conduct of Google did not go against the provision of Section 4(2) (e) of the Act.

⁹Samir Agrawal v. Competition Commission of India 2020 SCC OnLine SC 1024

THE LIMITATION OF SECTION 4: AN ANALYSIS

As mentioned that the start of this article, under Indian Jurisprudence dominance per se is not prohibited, in order to promote competitiveness and innovation which means enterprises are allowed to expand and grow as much as they wish without triggering anti-competitive behaviour. However the non-penalization of dominance per se has raised concerns for a while now especially in sectors such as e-commerce, telecom and internet related sectors.

Internationally there has been a varied approach to tackling this issue. In the US Section 2 of the Sherman Act of the United States prohibits both “monopolisation” and an “attempt to monopolise” markets¹⁰. The EU too has seen significant changes and a movement to an effect based approach that is based on an ‘effect v. object’ based test. An effect based approach in competition law works on a case to case analysis that weighs anti-competitive effects against pro-competitive effects in order to arrive at a solution. A form based approach on the other hand is one that strictly sticks to the letter of the law without analysing the effects born out of behaviour.

India adopts a mix of the form and effect based approach by declaring five conducts as abuse when performed by dominant enterprises. However, this is done without analysing the effect of competition on cases of abuse of dominance. Section 4 of the Competition Act does not demand proof of an “appreciable adverse effect on competition other than the factors if satisfied under Section 4(2). The main concern with a form based approach to Section 4 is that it promotes dominance of an enterprise as a pre-requisite to its application without giving due consideration to its effects had it been committed by a non-dominant enterprise.

¹⁰ The Sherman Antitrust Act, 1890, Section 2

The Competition (Amendment) Bill, 2020 based on the report by the CLRC (Competition Law Review Committee) of 2019¹¹ suggested various recommendations at plugging gaps in the enforcement of the Act, however, while the CLRC had noticed the gap in the case of attempted dominance per se, it stressed on the requirement to address this issue solely from the perspective of e-commerce platforms.

The current interpretation of Section 4 is in contradiction to the stance taken in the Preamble of the Act which imposes a statutory obligation on the CCI to prevent practices that have an adverse effect on competition. This should include cases of attempted dominance or monopolization however; the CCI has chosen to interpret it differently.

CONCLUSION

There has been a massive paradigm shift in terms of viewing markets and understanding and analysing the impact and effects of competition. This article provides a direction in the step to prohibit dominance per se under the Indian Competition Regime given the cases in sectors such as Internet related, or e-commerce where companies like Google are in position to dominate the entire market.

While the above case was well decided given the current scenario, it's still another case that should be looked at from the view of changing dynamics. Accordingly to restore a level playing field and bolster the CCI, an amendment should be passed to prohibit dominance per se under the Act. Further an expedited shift to an effects based approach could prove to be an advantageous factor in assessing cases of attempted dominance.

¹¹ Report Of Competition Law Review Committee July, 2019 Ministry of Corporate Affairs Government of India
<https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>