

# Competition Law: Abuse of Dominance

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# Abuse of Dominance

- Analysis involves two distinct parts:
  - Determining whether the enterprise has dominant position; and
  - Examining whether conduct of the dominant enterprise falls within the definition of abuse
    - ✓ Usually abuse is of two types – exclusionary and exploitative

# Dominance: Definition

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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 Relevant Market

- Dominance must be established in the relevant market
- Relevant market has to be first determined
- Relevant market has two aspects:
  - Relevant product market
  - Relevant geographic market

# Relevant Product Market

- 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 specialized 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

# Factors to determine Dominance

- 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]
  - In the US, market share less than 70% will seldom be treated as dominant.
  - 50% approx market share implies dominance [DLF case-CCI]

# Factors to determine Dominance

- 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 46% and its next biggest rival's is about 22 - United Brands 1976] - similar view expressed by CCI in the case of NSE vs MCX - relative financial strength and size of land bank was considered by CCI in the DLF case.

# Factors to determine Dominance

- 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

- 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

- 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

# Dominance: Market Size

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- Size alone does not matter
- Existence of dominance is not frowned upon
- Conduct of dominant enterprise if it falls in 'Abuse' is prohibited under CA02

## CA02: Abuses

- 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

# Some Salient Points

- List of abusive conduct is exhaustive unlike in EU [Art 82, Michelin 1981]
- 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 concession in case of abusive use of intellectual property right

# Some Salient Points

- 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

- CA02 recognizes dominance by “group” - closely linked enterprises - structural relationship
- 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]

# Remedies

- Cease and desist
- Imposition of penalty - up to 10 % of the average turnover of last 3 years
- Award of compensation
- Structural remedies - division of enterprise
- Such other order as may be deemed appropriate by Commission

- Relevant Market
  - market for services of developer / builder in respect of high-end residential accommodation in Gurgaon
- Factors considered by CCI
  - distinction between “high-end” and “economy” / “low-end” residential units
  - “high-end” is not a function of size alone:-
    - complex mix of factors such as size, reputation of the location, characteristics of neighbors, quality of construction etc.
    - Characteristics of customers: “...customer’s capacity to pay because in economics, demand is desire backed by the ability to pay.”
  - Facilities like, schools, shops and commercial spaces within the premises of Bel-aire

- Geographic Market: Gurgaon
- Factors Considered:
  - unique geographical characteristics
  - its proximity to Delhi, proximity to Airports
  - distinct brand image as a destination for upwardly mobile families.
  - A small, 5 % increase (SSNIP Test) in the price of an apartment in Gurgaon would not make the person shift his preference to Ghaziabad, Bahadurgarh or Faridabad on the peripheries of Delhi or even to Delhi in a vast majority of cases.
- DLF was found to have a market share of about 50% in the relevant market in the year 2009-2010.

- Abuse - Inter Alia following terms in the Apartment Buyers Agreement were considered to be amounting to abuse:
  - *Unilateral changes in agreement and supersession of terms by DLF without any right to the allottees.*
  - *DLF's right to change the layout plan without consent of allottees .*
  - *Discretion of DLF to change inter se areas for different uses like residential, commercial etc. without even informing allottees*
  - *Proportion of land on which apartment is situated on which allottees would have ownership rights shall be decided by DLF at its sole discretion*
  - *Total discretion of DLF regarding arrangement for power supply and rates levied for the same*
  - *Arbitrary forfeiture of amounts paid by the allottees in many situations*
  
- Penalty of INR 630 crore imposed on DLF

# MCX Stock Exchange Case

- **Alternative Product Markets explored**
  - Entire stock exchange services- because stock exchange provides only platform with its technical support
  - Currency Derivative segment & Over The Counter currency forwards – taken together
  - Currency Derivative segment
- **Relevant Product Market**
  - market of currency derivatives segment of stock exchange services
- **Relevant Geographic Market**
  - whole of India – as currency derivatives are traded on stock exchanges, whose operations cover entire country.

# MCX Stock Exchange Case...2

- Dominant Position:
  - NSE had a market share of 48% in the relevant market.
- Following conduct was considered abusive:
  - zero price policy of NSE in the relevant market considered to be unfair;
  - denying APIC (interface code) to ODIN (developed by FTIL) and putting FTIL on watch list;
  - use of its position of strength in the non-CD segment to protect its position in the CD segment.
- Penalty amounting to INR 55.50 crore imposed on NSE.

# Schott Glass Case

- Relevant Market – Both upstream and downstream market defined:
  - Relevant upstream markets:
    - Market for ‘Neutral Clear USP-I Borosilcate Glass tubes in India’.
    - Market for ‘Neutral Amber USP-I Borosilcate Glass tubes in India’.
  - Relevant downstream markets:
    - Market for ‘Containers, i.e. ampoules , vials, dental cartridges and syringes made out of Neutral Clear USP-I Borosilcate Glass tubes in India’.
    - Market for Market for ‘Containers, i.e. ampoules , vials, dental cartridges and syringes made out of Neutral Amber USP-I Borosilcate Glass tubes in India’.
- Relevant Geographic Market
  - whole of India

- **Dominant Position:**
  - Market share of 61.49% in terms of quantity and 81.17% in terms of value in the broader upstream market .
  - Schott glass was vertically integrated and had significant size and resources
  - JV market leader in terms of sales in the downstream market.
- **Abusive Conduct:**
  - Discriminatory pricing caused by differential discounting policy which favoured the JV.
  - Leveraging dominance in upstream market to lessen competition in the downstream market.
  - Stipulating conditions for discount which forced tie-in.

THANK YOU

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