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STUDY OF ABUSE OF DOMINANT POSITION

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ABSTRACT

A perfect competition is a boon for the consumer as it can maximize its welfare. Unfortunately the position is not the same for seller, as for him blessing would come in the shape of enjoying the monopoly. The monopolists control the market and can increase the prices or reduce the volume of goods to be infused in the market. Well in proper terms this position is definitely called a “dominant” position, as to how one or few people can actually bring a standstill in the market and affect the customers at large along with detrimental effect on its competitors in the market. Looking into the dictionary meaning of “dominance” one would find having control or influence over other as the meaning which can definitely not be termed as adverse. It is only when the word is prefixed by “Abuse” that makes it a matter of concern. We have the Competition Act, 2002 which aims at encouraging competition and shielding Indian markets against anti-competitive practises like “abuse of dominance” forming vital part of. The mere fact of dominance is inconsequential in so far as attracting the Act is concerned. Abuse of dominance is what is required to be proved. There are numerous factors determining dominance of an enterprise, like market share, economic power, entry and exit barriers to name a few. The paper will address the economic concept of dominance before attempting a narrative which can do justice to the title. This paper attempts to look at dominance and its abuse with supporting case laws and experiences along with coming of the Competition Act, 2002 to chain the menace of Abuse of Dominance. In addition the paper will have comparisons with the international scenario in this respect.

Keywords: competition, dominance, abuse of dominant position.

1. INTRODUCTION

The abuse of dominant position in competition law is a subject that has gained a lot of interest in recent times. The abuse of dominant position refers to the situation where a dominant company or group of companies use their market power to exploit other competitors or consumers. This paper will examine the concept of abuse of dominant position in competition law, the impact of the abuse of dominant position on competition, and the remedies available to deal with the abuse of dominant position. Abuse of dominant position is a crucial concept in competition law, which aims to promote fair competition and protect consumer welfare by preventing instances of market power abuse by dominant firms. The term "dominant position" refers to a situation where a firm has significant market power, enabling it to act independently of its competitors, suppliers, and customers. However, this power can be misused in a variety of ways, resulting in harm to consumers and competition. This research paper will examine the concept of abuse of dominant position, its legal framework, and its implications for competition and consumer welfare. Abuse of dominant position refers to a situation where a dominant player in a market or industry engages in practices that are aimed at maintaining or increasing their market power, to the detriment of competition and consumers. Such practices can take many forms, including exclusionary conduct, predatory pricing, tying and bundling, and discriminatory practices. The abuse of dominant position is considered a violation of competition law, which is designed to promote and protect competition in markets. The rationale behind competition law is that competition leads to better outcomes for consumers, such as lower prices, greater choice, and innovation. When a dominant player engages in abusive conduct, it can harm competition by making it difficult for smaller players to enter or compete in the market. This can lead to higher prices, reduced choice, and lower quality products or services for consumers. To prevent the abuse of dominant position, competition authorities have the power to investigate and sanction companies that engage in such practices. Sanctions can include fines, orders to cease abusive conduct, and divestitures of assets. Overall, the abuse of dominant position is a serious issue that can have significant negative impacts on competition and consumers. It is therefore important for competition authorities to be vigilant in enforcing competition law and preventing such abuses.

Dominance/Dominant Position- “Abuse”

Dominance in one line would mean power and influence over others. ‘Dominant position’ means position of strength, paramount position enjoyed by an enterprise, in the relevant market, in India, which facilitates it to operate independently of competitive forces prevailing in relevant market; or affect its competitors or consumers or the relevant market in its favour. Dominance is not based on any straightjacket formula or some mathematical calculations, rather it can be measured in a comparative environment. One can enjoy the dominant position by way of having considerable market share to its credit, or by the resources under operation of a particular enterprises, or by the size of any enterprise, or the size of its competitors, or if the enterprise enjoys some commercial importance over its other players in the market i.e. its competitors. As per Section 19(4) of the Competition Act, 2002 the Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section, have due regard to all or any of the factors, namely which may include the market share of the enterprise, or size factor and resources of the enterprise and of the competitors, or economic power of the enterprise, sale or service networks of such enterprises, how much dependence of consumers is there on the enterprise, or whether the monopolistic feature or dominant position is acquired by virtue of any statute or by virtue of being a Government company or a public sector undertaking or otherwise, or entry barriers, or relevance could be placed upon the market structure and size of market, or relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition and to sum up in last any other factor which the Commission may consider relevant for the inquiry. The nature of dominance can also be attributed to the ability of an enterprise to behave interdependently rather being dependently. If one enterprise is in a position to reap the benefits in the market without being dependent on any external factor, then yes it does enjoy a dominant position. The enterprise is independent of its competitors & customers. The matter of concern is not that an enterprise is enjoying the dominant position in the markets but the trigger point is achieved when dominance is prefixed by the word "abuse". The dictionary meaning of abuse is the improper use of something and in the market scenario a little liberty can be taken to construe the meaning of word abuse affixed with dominant position as some enterprise enjoying dominance in the market and exploiting the same. The enterprise in the market can improperly use its dominant position by any of the below mentioned ways:- Imposing unfair or discriminatory price or condition in purchase or sale Limiting production to the prejudice of consumers Denial of market access in any manner Use of position in one relevant market to enter into or protect other relevant market. Competition in the market is adversely affected if an enterprise abuses its dominant position by indulging in various actions. These actions could be in the shape of an enterprise imposing directly or indirectly unfair or inequitable conditions in either purchase or sale of the goods or services. They could even indulge in price factor of purchase or sale of goods or services which can include very well in its ambit predatory pricing. Predatory pricing is understood when the pricing of goods or services are determined at such a low level that other firms cannot compete because it is not feasible for them to carry out their operations at such a low level and thereby are at the end forced to leave the market. The enterprise could be smart enough to limit or restrict its production of goods or provision of services in market, which would again be abuse of its dominance. They could even restrict their technical development relating to the goods or services. When one enterprise enjoys dominance in one market it could use that dominance as a tool to enter other relevant markets too.

2. PREDATORY PRICING

Predatory pricing in plain vanilla means that a firm enjoying dominance in the relevant market slashes the prices of its products to an unprofitable level i.e. below the cost of the product and by this eliminating its existing rivals in the market. This also has detrimental effect upon the new entrants as entry barriers are created for them. It is a market strategy by which a dominant firm at the first go lower down its prices to a level which is no more feasible for the counterparts and as a result will force them out of the market. When the latter class of established counterparts have been successfully expelled, the former can now raise its prices again and reap the rewards of its solitary existence by expelling its rivals. The act of dominant undertaking may deter new entrants because not only of the predatory pricing factor but also because the predation becomes a barrier to entry. The indispensable characteristic of competition is that the firms should compete by reducing their prices in the market but care must be borne in mind that a situation must not occur where a dominant firm starts abusing its dominant position in the relevant market. The Competition Act,2002 defines predatory pricing as "the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors". Although customers may perceive the situation beneficial for a short span of time from such lower prices, but if long term effects are taken into account customers will be impaired due to weakened competition which leads to soaring prices, reduced quality and limited choice. There are number of problems which are relevant for assessment of whether predation is taking place or has taken place. The major issues to tackle under predatory pricing are :-

1. Pricing below the cost;
2. Intention of eliminate the competitor; and
3. The feasibility to recurring the losses.

There are differences of opinions about occurrence of predatory pricing. This was famously adopted by Bork and said that 'it seems unwise to construct rules about phenomenon that probably does not exists or which, should it exists in very rare cases, the courts would have grave difficulty in distinguishing from competitive price behaviour'.

Dominant Position:

The substance of the definition is that a dominant enterprise is the one that has the power to disregard market forces, that is, competitors, customers and others and to take unilateral decisions that would benefit itself and also, in the process, cause harm to the process of free competition, injuring the consumers by saddling them with higher prices, limited supplies, etc. The capacity to engage in the market in this manner is what is called 'market power', which is quite different from 'market share', though, the structure of a particular market, may aid an enterprise with a significant market share in acquiring market power. The elements that constitute a dominant position are: A position of strength; Position being enjoyed in a relevant market in Such a position that gives the enterprise the power to 'operate independently of Its competitive forces in the relevant market', meaning that it can at will, disregard the market forces and conditions and impose its own trading conditions, which will include the prices at which it is prepared to supply goods or service. Impact of dominant position:

Barriers to entry and re-entry: Successful predatory pricing requires certain level of entry barriers to the market. Otherwise other potential rival enterprises would immediately re-enter the market once the predator raises its prices and by adding their output to that of the predator drive the prices back to competitive level.21The entrant must incur such costs and hence faces the risk of under-pricing by an incumbent with sunk costs, the latter acting as a barrier to entry, giving the incumbent the power to raise prices above the competition level. Re-entry barriers can be said to exist when a firm that has left a market bears considerable costs in seeking to reopen its business.

Excess Capacity: One of the important factors to bear in mind for predatory pricing is the production capacity of the enterprise. When the dominant enterprise indulges in predatory pricing then the prices of its products reduces and therefore the demand for their products increases automatically. Even the customers of the competitor shift its preference to the product of the dominant enterprise. If the enterprise fails to cope up with the increasing demand in the market, then the price of product will increase which will eventually help the rivals and the strategy of the enterprise will not work.

Deep Pocket Requirement: The enterprises which have strong financial reserves & back up can indulge in predatory pricing. Although it is not termed as of the main pre-requisites of predatory pricing but it is vital for the simple reason that if the enterprise will not have more than sound financial position than its rival then it will not be able to eliminate him from the market and in that process they themselves will get destroyed. As already discussed, predatory pricing has two phases. In the first phase the enterprise has to suffer from heavy losses, therefore, it must have sufficient financial resources in order to complete this phase. After this, in the second phase, that is, recoupment the enterprise will be able to be able to recoup its losses which it has suffered during the sacrifice phase.

Competition Act, 2002 –Remedies for Abuse of Dominance

The Competition Act, 2002 by virtue of section 27 of the act finds mention regarding the orders of the Commission after inquiry into agreements or abuse of dominant position25referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass orders directing any enterprise which is involved in such abuse of dominant position to discontinue such practise and not to return with the same in future, which is generally called as cease & desist order. The commission is also conferred with power to impose penalties as it deems fit to be not more than 10 % of the average of the turnover for the last three preceding financial years on each of such person or enterprises that are found to be parties to such agreements or abuse procedure, which is generally called as power of imposition of penalty. Section 28 also contains relevant provisions in relation to AOD and mentions that Commission may, by order in writing, direct division of an enterprise enjoying dominant position to ensure that such enterprise does not abuse its dominant position in the market.

Consequences of abuse of dominant position

The Competition Commission, after an inquiry into the abuse of dominant position, may pass all or any of the following orders under section 27 of the Competition Act:

- direct an enterprise with dominant position involved in abuse of such dominant position to discontinue such abuse;
- impose penalty not exceeding ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such abuse;

- direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of cost, if any.
- In addition to the aforesaid orders, the Competition Commission has the power to order division of enterprise enjoying dominant position to ensure that it does not abuse its dominant position under section 28 of the Competition Act.

3. CONCLUSION

The economic development of any nation is possible through protecting consumers & ensuring freedom of businesses from abuse of dominant position by firms. the process of determining dominant nature of a firm is a cumbersome procedure because there exists no straight jacket formula to put into to determine the characteristic of dominance. Erroneously determining the dominance will have detrimental effect upon the competitiveness of the firms. Most modern competition laws do not concern upon dominance but gloom over abuse of dominance. Thus, CCI need to strike a chord in the concerned matter. In conclusion, the abuse of dominant position is a pervasive problem in the economy, and preventing it is an essential goal of competition law. Abuse of dominant position is harmful not only to competitors but also to consumers and the economy as a whole. The legal framework for abuse of dominant position varies across jurisdictions, but the goal is the same – promoting fair competition and protecting consumer welfare. Jurisprudence on abuse of dominant position has evolved over time, covering a wide range of industries and practices, and has established important precedents and tests for proving anticompetitive behaviour.

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