

Abuse of Dominant Position: Contours Changed

1. Introduction

The Competition Act (“**Act**”) prohibits “abuse of dominant position” and section 4 of the Act lists the criterion on the basis of which behavior is considered to be an abuse in the relevant market. In other words, no dominant organization can engage in anti-competitive business practices in order to maintain or increase its position in the market. Ever since the Competition Commission of India (“**CCI**”) was established it has, through a plethora of cases, assessed what conduct constitutes abuse and in findings of abuse of dominant position, has imposed significantly large fines. For example, Google was fined over USD 20 million in 2018 over its search bias in online web search and online search advertising markets. After a detailed inquiry, CCI took the view that Google was “leveraging its dominance in the market for online general web search, to strengthen its position in the market for online syndicate search services.” To be clear, the law does not look down on dominance per se, but prohibits its abuse. Effectively, any dominant entity has a special obligation to ensure that it does not stifle competition. Rather, the actions, practices and conduct of a dominant enterprise have to be examined in light of specific facts and circumstances to determine whether or not an abuse of dominance has occurred in terms of section 4.

This newsletter provides a high-level overview of the legal framework and the recent body of jurisprudence which may potentially be changing the contours of assessment of abuse of dominance.

2. The Legal Framework

The statute prohibits the following acts. A dominant organization cannot **(a)** impose unfair or discriminatory condition or price in sale (including predatory price)¹ and purchase of goods or services; **(b)** limit or restrict production of goods or services or related technical or scientific development to the prejudice of consumers; **(c)** indulge in practice resulting in denial of market access; **(d)** execute contracts subject to acceptance by other parties of unrelated obligations i.e., those which have no nexus with the subject of the contract; **(e)** use its dominant position in one market to enter into another relevant market. The section further explains that a dominant position means a position of strength, enjoyed by an enterprise in the relevant market in India which enables it to either operate independently of competitive forces in the relevant market or affect competitors, consumers or relevant market in its favor.

CCI has the power to inquire into any alleged contravention of abuse of a dominant position volitionally or when an informant notifies it or by a reference of central or state government or a statutory authority. In such situations, it is pivotal to assess whether the organization accused of impugned conduct is dominant in the relevant market. Here, it is crucial to analyze what is the relevant market. Section 2(r) of the Act defines it to be one determined by CCI

¹ Predatory price means sale of goods or services below cost with a view to reduce competition or eliminate competitors

with reference to the relevant product² or geographic³ markets or both. The Act provides detailed methodology to further evaluate the determination of the relevant product or geographic markets. These are covered in sections 19(6) and (7) of the Act. In order to determine the “relevant product market” CCI has to carefully consider all or any of the following factors i.e., physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products. And, for the “relevant geographic market” it is essential to assess all or any of regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services. It is safe to state that a dominant enterprise engages in abusive conduct when it exploits opportunities arising on account of its dominant position to reap benefits which would not have existed had competition was allowed to flourish without restricting market access.

3. The Current Trends

It is clear from the case-law below that the CCI is clearly taking steps to further a key objective of the Act viz., to promote fair competition and, to attain this end, it is not leaving any stone unturned. Both government and private conglomerates need to be very mindful of the type of conduct they engage in and how their actions, particularly, when they have a large market share can be construed as anti-competitive. Some important trends emerge from these judgments.

3.1 ONGC: In June 2018, the CCI launched an investigation under section 26(1) of the Act against Oil and Natural Gas Limited (“**ONGC**”) for abuse of its dominant position in the relevant market of charter hire of offshore support vehicles in the Indian exclusive economic zone. The informant was the Indian National Shipowners' Association who alleged that ONGC had imposed one-sided and onerous terms in its charter hire agreements. For example, a specific contractual clause gave ONGC an exclusive right to terminate the agreement. CCI observed that one-sided clauses which grant an unfettered unilateral right to a dominant party without any reciprocal right to the other party to the agreement are *prima facie* abuse of a dominant position.

3.2 Flipkart & Amazon: All India Online Vendors Association filed a complaint against the two e-retailers, and raised concerns over Flipkart’s preferential treatment to particular sellers on its platform. Examining the online market structure, CCI felt that in the overall retail segment, the online business is nascent and no single market player commands a dominant position. Referring to emerging technology-based models in the e-commerce space, it observed they need to be encouraged given the growth potential of the industry. Effectively, it was reluctant to intervene as it felt market should not be stifled.

3.3 Schott Glass: Here, the appellate body of CCI, COMPAT found that unlawful price discrimination requires evidence of dissimilar treatment to equivalent transactions **and** likely harm to competition. It observed that it is essential to demonstrate competitive disadvantage qua each other which leads to competitive injury in the downstream market. In this case on the basis of the

² This is when market comprises of all those products or services regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use

³ This means the area where the conditions of competition for supply or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas

evidence, the view was there was no effect on the downstream market and ultimate consumer did not suffer. CCI appealed this which is currently pending before the Supreme Court.

3.4 *ESYS & Intel:* In a case filed by ESYS Information Technologies against Intel, the CCI partly dismissed section 4 allegation claims based on Intel's distribution agreements because the distributors of Intel products sell different products of competitors too which means Intel's competitors can deal in Intel's competitors' products which they were doing. Therefore, Intel was not abusing any dominance. Interestingly, CCI held that Intel is dominant in India in the market for micro-processors for servers.

3.5 *Automotive case⁴:* Abuses can be both exploitative and exclusionary and recent body of cases show how excessive pricing or unfair contractual terms are held to violate section 4(2) of the Act. Here, the CCI considered the passenger vehicle and after-market of spare parts, diagnostic tools and provision of after-sales repair and maintenance services. After a thorough investigation, it found that fourteen car companies abused their dominant positions and denied market access in their respective after-markets as they required car customers to purchase spare parts and tools **solely** from the respective car manufacturer or its authorized dealers. They also held that the automotive manufacturers engaged in excessive spare parts pricing which was confirmed by the COMPAT though the Supreme Court stayed operation of COMPAT's judgment when three manufacturers filed an appeal to the apex court.

3.6 *Velankani & Intel:* In November 2018, CCI ordered an investigation against Intel Corporation for allegedly abusing its dominant position in India by restricting the production of servers. The informant, Velankani Electronics, submitted that Intel possessed a market share of more than 80%, was globally recognized for its processors which are considered as industry benchmarks and was a preferred choice. Velankani depended completely on Intel for procuring the processors for its servers. It alleged that Intel refused to provide the necessary design files in order to manufacture server-boards which, apparently, were provided to other original equipment manufacturers, like Dell, HP etc. Despite its commitment to provide the designs, Intel reneged and its rationale was that Velankani lacked the necessary technical plus sales scope and expertise though it did not substantiate this position with any back-up data. Both parties submitted detailed arguments. CCI took the view that the relevant market was the market for processors for servers in India and held that:

- Intel is in a dominant position in the relevant market as it has more than 90% share globally and, at least, 80% share in India
- Intel was unable to provide a reasonable explanation for its discriminatory behavior in failing to give access to Velankani to the necessary files so they could develop the processors when it had provided them to others. Thus, Intel denied market access
- Intel limited and restricted the production of servers and the market and also limited the technical and scientific development relating to servers in the market

CCI also relied on its 2014⁵ finding referenced at 3.4 above where Intel was considered dominant. Consequently, without going into Intel's intent for alleged contravention of the Act,

⁴ See *Shamsher Kataria v Honda Siel Cars India Ltd & Ors* (2014)

⁵ See *ESYS Information Technologies Private Limited v Intel Corporation*, decided on Jan 16, 2014 https://www.cci.gov.in/sites/default/files/482011_0.pdf, last accessed on March 23, 2019

CCI has directed the Director-General to ascertain whether Intel has abused its dominant position in the relevant market.

4. Conclusion

The foregoing cases are illustrative of the thinking of CCI and COMPAT while examining dominance, its abuse and its effects. From insertion of one-sided contractual terms which grant an unfettered right to a dominant party without a corresponding reciprocal right to the other party to rejecting allegations of dominance by mammoth e-commerce entities like Amazon and Flipkart, to the need to demonstrate competitive disadvantage leading to competitive injury in the downstream market, or the need to disregard motive behind the alleged conduct of a dominant company like Intel there is definitely a different thought process when compared with CCI's initial rulings on section 4. But, a high degree of subjectivity remains in the assessment and the findings. Therefore, the government and the regulator should consider if they have to re-assess the rigors of dominance and whether the current parameters of market share are an adequate benchmark. With a changing and increasingly digitized world coupled with the ability of large Indian corporations to have a global footprint, it is, perhaps, time to examine other possible barriers and their impact. The Finance Ministry has constituted a panel of experts to review the existing law in sync with the "economic fundamentals." The hope is that as and when the changes (if any) are given the force of law, CCI will continue to have teeth, be a fair regulator and the market watchdog who will navigate the path of promoting competition.

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