

# A Comparative Study of Dominant Position

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Competition law and policy, around the world, seeks to be a means to achieve the ends of efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. An area of concern for most of the legislations regarding competition law in various countries is the abuse of dominant position by enterprises. An abuse of dominant position in a market can be understood to refer to situations where improper means are used to retain or attain a position of economic strength or market power or where such a position is exploited. Such a situation can be costly to the society.

## Definition of Dominant Position

Position as per Indian law: The Indian position regarding dominance is currently governed by the Competition Act, 2002, which deal with the matter in detail. But before going into that it will be worthwhile to take a look at the position under the old law, which is The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. The provisions of this Act were targeted at “dominant undertakings” and as a result firms were being hit merely due to their size. The term “dominant undertaking” was defined under Section 2(d) which is as follows: “dominant undertaking” means-

- i. an undertaking which by itself or along with inter-connected undertaking produces, supplies, distributes or otherwise controls not less than one-fourth of the total goods that are produced, supplied or distributed in India or any substantial part thereof; or
- ii. an undertaking which provides or otherwise controls not less than one-fourth of any services that are rendered in India or any other substantial part thereof.

The SVS Raghavan Committee set up by the Government laid down in crystal clear terms that although dominance is a necessary condition for establishing violation of provision regarding abuse of dominant position; it is by no means a sufficient condition. Therefore the committee suggested that “dominance” and “dominant undertaking” may be appropriately defined in the competition law in terms of “the position of strength enjoyed by an undertaking which enables it to operate independently of competitive pressure in the relevant market and also to appreciably affect the relevant market, competitors and consumers by its actions”

## Following the recommendations of the Raghavan Committee, Competition Act, 2002

It was enacted which includes Section 4, prohibiting the abuse of dominant position by enterprises. Section 4 of the Competition Act, 2002 reads as follows: (1) No enterprise shall abuse its dominant position. (2) There shall be an abuse of dominant position under sub-section (1), if an enterprise.—

(a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods or service,

Explanation (a) to this section defines dominant position as: (a) “dominant position” 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 favor

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It is interesting to note that dominant position is not defined on the basis of any arithmetical parameters or any particular share of the market as is the case in the MRTP Act, 1969. On the other hand, dominance of an enterprise is to be judged by its power to operate independently of competitive forces or to affect its competitors or consumers in its favour. Thus, an enterprise with a share of say less than 25% of the market could possibly be determined to be the "dominant" if it satisfies the above criteria; on the other hand, an enterprise with higher market share may not be considered as "dominant" if it does not meet the criteria mentioned in the Act. The Act also lays down a number of factors which the Commission needs to take into consideration in determining whether an enterprise enjoys a dominant position or not, such as market share, size and resources of the enterprise, size and importance of competitors, economic power of the enterprises, vertical integration of the enterprises, entry barriers, etc. which would involve a fair amount of economic analysis.

### Other Jurisprudences

The laws of numerous countries prohibit or declare illegal the abuse of dominant position/monopoly or attempt to monopolize/ the misuse of market power or provide for a prohibition of certain conduct by undertakings in a dominant position/ having a substantial degree of market power. But the manner in which "dominant position", 'monopoly' or 'substantial degree of market power' is defined is different in different countries. The general definition of dominant position or market power followed in jurisdictions such as the European Commission, United Kingdom, Australia, Germany and India take into account the ability of a firm or enterprise to behave independently of its competitors and the absence of competition or constraint from the conduct of competitors.

Section 19(2) of the German 'Act against Restraints on Competition' gives a general definition and takes into account factors such as predominant position in the market and absence of competition completely or no substantial exposure to competition. It states, "An undertaking is dominant where, as a supplier or purchaser of certain kinds of goods or commercial services, it

1. has no competitors or is not exposed to any substantial competition, or
2. has a paramount market position in relation to its competitors; for this purpose, account shall be taken in particular of its market share, its financial power, its access to supplies or markets, its links with other undertakings, legal or factual barriers to market entry by other undertakings, actual or potential competition by undertakings established within or outside the area of application of this Act, its ability to shift its supply or demand to other goods or commercial services, as well as the ability of the opposite market side to resort to other undertakings.

Article 86 of the EC Treaty prohibits the abuse of dominance, but does not contain a definition of the term 'dominance', leaving it to judicial discretion. It was defined by the Court of Justice in the United Brands case: a dominant position is "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers". This is often quoted as characterization of a dominant position. Similar observations were made by the court in Hoffman-La Roche case and in N. V. Netherlands Banden Industrie Michelin v. Commission of the European Communities [1983] ECR 3451

According to the Competition Act of the United Kingdom, Section 18 (3), "dominant position" means a dominant position within the United Kingdom; and "the United Kingdom" means the United Kingdom or any part of it". Section 18 does not provide what is meant by dominant position. Section 60 (1) of the UK Competition Act provides that the purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community. Accordingly, the Competition Authorities of the United Kingdom have placed reliance on the definition of dominant position laid down by the European Court of Justice.

### Under Section 46(3) of the Australian Trade Practices Act

In determining the degree of power which a firm enjoys in the given market, it should be judged whether the conduct of such a firm is constrained by the conduct of competitors or potential competitors or suppliers or consumers. This is similar to the independence test of the European Union.

### Report of the International Competition Network (ICN)

While analyzing materials received from competition authorities of the various members of the ICN, there were revealed two types of definition of the dominant position: behavioral and structural. The most important elements of the behavioral definition are ability of a company to pursue its market policy in conditions of independence of disciplining its influence from the part of competitors. Structural definition proceeds from the companies' market share. It doesn't mean that share indices are not applied by competition authorities using behavioral definition of dominance. However, they consider market share as one of criteria of market power (even though the most important), but not as an element of the definition of dominance. The majority of jurisdictions reviewed were holding the behavioral definition, and the structural. Some jurisdictions examine the possibility to introduce appropriate alterations to their competition legislation, turning from the structural definition to the behavioral one. The behavioral definition of market power seems to be more preferable compare to the structural one, because it permits to conduct more multilateral analysis of factors defining the dominant position, first of all, barriers of entrance.

### Dominant position in Relevant market

Coming back to the Indian position, it can be seen that dominant position is talked about always in reference to a relevant market. So understanding the market in question will be helpful for a better understanding of dominant position in that market. The concept of relevant market has two dimensions namely, the relevant product market and the relevant geographical market. The Competition Act, 2002 states that for determining the relevant market, the relevant product market or the relevant geographic market, or both are to be taken into account.

The Act defines "relevant market" as: "... the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets; Section 2(r)]. Section 2(s) defines the "relevant product market" as: "...a market comprising 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"; and Section 2(t) defines "relevant geographical market" as: "..... a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas"

The definition of the relevant market in both its product and geographic dimensions often has a decisive influence on the assessment of a competition case. The purpose of ascertaining market is to be able to examine whether an enterprise is dominant in a specific market, made up of the product or service, the competing suppliers and the buyers of the product or service, all operating in a geographical area. The Competition Act requires that the relevant geographic and product market are determined on consideration of certain factors which are given in Section 19(5) to (7).

## Conclusion

Dominance or monopoly power or market power of undertakings is defined in most jurisdictions on the basis of the undertakings ability to operate independently of competition or to raise/control prices. A number of factors are to be taken into consideration to determine dominance/ economic power / monopoly power. Such criteria may have been specified in the statute itself such as in Germany and India or may have to be determined from decided cases.

It can be seen that the Indian competition law mostly follows the EU model and so its influence is evident in the Indian provisions regarding dominant position also. But the Indian definition of dominant position differs from the EU definition in two aspects. First, Section 4 Explanation (a)(i) refers to ability to behave independently of competitive forces only whereas the EU definition talks of behaviour independent of not just competitors but also consumers. Second, the EU definition does not deal with the ability of the enterprise to affect its competitors, consumers or the relevant market, like Explanation (a)(ii) of Section 4.

The meaning given to 'dominant position' in the Indian Competition Act is very much consistent with the 'behavioral definition'- which is referred to in the report of the ICN Unilateral Conduct Working Group as it allows a multidimensional analysis of dominant position. Market share is not the only criterion to establish dominance of an enterprise, as was the case in the earlier MRTP Act. It is important to recognize that the Competition Act does not frown upon positions of market dominance per se, unlike the Monopolies and Restrictive Trade Practices Act, 1969. It is not illegal for an undertaking to have a dominant position; however, where a firm is found to be in a dominant position it has a special responsibility not to allow its conduct to impair genuine competition on the common market.