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Abuse of Dominance under Indian Competition Law as Compared to the EU Competition Law

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ABSTRACT

The Competition regime is still in its nascent stage when it comes to India, with the Competition Act coming into force in 2002. However, the competition regulation in the European Union (EU) region dates back to the late 18th and early 19th centuries. Competition in India is regulated by the Competition Commission of India (CCI), whereas the European Commission (EC) overlooks the same in the European Union region.

This research study aims to study and analyse in detail the differences and similarities between the two competition policy regimes. One of the major aims of this study would be to point out the procedural aspects of abuse of dominance and how do the courts and authorities go about dealing with a problem on this issue.

The reason to choose this area of antitrust law as the topic for the purpose of this study is to point out and establish the relation of the Indian Antitrust policy to either the EU Antitrust policy or the US Competition Policy. These two jurisdictions were chosen in particular as these are the ones where the competition policy is the strongest as well as the oldest in the world. Therefore, it is very much possible that the Indian policy might be bent more towards one side as compared to the other.

I. PROCEDURAL COMPARISONS BETWEEN THE EU AND THE INDIAN COMPETITION POLICIES

Abuse of dominant position has been defined in the Section 4 of the Indian Competition Act (“The Act”), 2002 and in the Article 102 (ex Article 82) of the Treaty on the Functioning of the European Union (TFEU). The basic concept and understanding behind both the legislations remains the same, holding a dominant position in a market of relevant importance does not violate any provision, but the abuse of such a dominant position in one’s favour to cause an appreciable adverse effect on the competition in a market is unlawful. Generally, a three step test is used to establish dominance, Defining the relevant market; Assessing dominance in the relevant market; Establishing abuse of such dominance.

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One factor to be noted is that the procedure followed by the EU and the Indian courts is called the 'rule of season' approach, wherein the courts and the parties analyse each situation separately. On the other hand, the US courts used to follow the 'per se' rule where certain activities are termed to be anticompetitive without any further or detailed inquiries. This limits the scope of antitrust litigation. However, the US courts have started to make a shift gradually towards the rule of season approach.

II. DEFINING THE RELEVANT MARKET

The relevant market is mostly defined in two broad senses-

- **Product Market-** The relevant product market is defined by the total market of the products/services of similar nature. In other words, a product market consists of products and services which are interchangeable or can be used as substitutes of one another. All the variables in a product market are in competition with each other over sales, market share, product image, consumer preferences, etc. For example, a smart phone market where the products of different companies are competing with each other for gaining customers will be termed as a product market. Similarly, telecommunications market, where the services of different providers compete with each other to gain subscribers will also be termed as a product market.
- **Geographical Market-** The relevant geographical market is defined on the basis of the homogeneity of the market conditions prevailing in a particular geographical area. There are no fixed norms or boundaries to a geographical market. A geographical market can encompass a region, a state, a country, or a number of countries. For example, the smart phone market in the EU, or the automobile market in the Indian state of Uttar Pradesh, etc.

III. ESTABLISHMENT OF DOMINANCE

In India, the fact that a firm is a dominant firm in a market is not established using a set benchmark of market share, but by comparing that firm's market share with the other firms' market shares in the same competitive market. Similarly, in the EU, there are no set benchmarks to calculate whether there is market dominance or not, but, there is pre conceived notion, that between 50% and 70% of market share there is a presumption of dominance. Whereas, above 70%, there is a clear establishment of dominance. Dominance is not presumed for market shares below 40%. However, this 40% is not a hard and fast rule. There have been cases where dominance abuse proceedings have been made against firms having lower than 40% of the

market share. For example, in *British Airways v. Commission*, 2007, the British Airways were held to be dominant at 39.7% of the market share, as the next largest competitor held a mere 5.5%. In other words, even if the market share of the dominating firm is lower than the mark of 40%, but the share of the firm or enterprise standing second is not a very large or significant part of the total market base, as in the above case, the abusive conduct of the dominating party will be considered to be the abuse of dominance.

Market share is one of the major factors of determining of dominance in a market, but not the only determinant as laid down in *Mr Ramakant Kini v Dr L H Hiranandani Hospital, Powai, Mumbai*. Certain other factors that might be considered while assessing dominance are financial resources, presence of competitors, dependence of consumers, etc.

IV. ESTABLISHMENT OF ABUSE OF DOMINANCE

The abuse of dominance by an entity in a relevant market can be established by proving 4 elements-

- The conduct of the abusing enterprise must be hindering access to supplies or market resources to the competitors. If the abusive conduct is placing barriers on the competitors from either entering the relevant competitive market or from accessing or using market resources, clear abuse of dominant position is established. For example, the dominant entity preventing the suppliers from supplying goods to its competitors by blackmailing them by putting their own supplying contract as a way to frighten them.
- Presence of anticompetitive conditions in a relevant market will be ascertained by comparing the prevailing competitive conditions to that of a counterpart where such an abusive conduct has not taken place. Once established that the anticompetitive conditions prevail, the role played by the dominant party is determined. The abusive conduct of the dominant entity must be the cause of the anticompetitive conditions. That is, the anticompetitive conditions prevailing, if any, must be due to the abusive conduct of the dominant enterprise and not due to some other causes.
- Anticompetitive conditions must have been caused. In other words, if the abusive conduct has been going on for a longer period of time without having any appreciable adverse effect on the competition conditions of the market, such an abusive conduct might not be punishable. If the abusive conduct does not cause any noticeable effect on the market competitive conditions, then it is deemed that the conduct is not likely to cause any disruption to the market, in other words, then the conduct is not dangerous enough.

- The anticompetitive efforts must be significant enough to cause disturbance in the future and to restore the market power back to the dominant party. If the conduct has been conducted very recently and has caused no harm as of yet, but is capable of causing competition restrictive conditions in the future, then the commission might deem the dominant party liable. However, in certain situations, the General Court, Luxembourg has noted that it would be unfit to allow the Commission to consider only possible future consequences when the conduct has been committed and its effects have already been started to be observed.

Once an enterprise or group of enterprises is found guilty of having abused their dominant position in a relevant market in India, the Competition Commission of India, has, the following powers

- Pass a cease and desist order to stop the dominating party for continuing their abusive and violating conduct.
- Impose a fine of upto 10% of the annual turnover of the dominating party.
- Pass any other order which it may deem fit as per the situation at hand.
- The Commission might even advise the Government of India, the division of the abusive party. However, this is very rare and might only happen when the abuse has been a very severe one.

As far as the victims of such an abuse are concerned, the injured parties can seek compensation from the violating party. The extent and amount of compensation depends on the case.

In the EU, on finding an enterprise guilty, the commission has the following powers-

- The commission might itself not prove infringement but just issue its concerns. Now the infringing party issues certain commitments which are reviewed by the commission and the other existing members of the relevant market. This is the quickest and easiest way of resolving an antitrust matter.
- The commission can impose fines on the dominating party. The sales generated from the sales of the product or service concerned with the infringement is multiplied by the number of months or years the infringement has been going on. The fine may be increased in case of a repeated offender, or decreased in case of limited involvement. This fine can be maximum upto 10% of the company's annual turnover.
- The parties who suffer due to the proven infringement can claim for damages and compensation.

The defendant party has a right to appeal against any decision given by the commission to the General Court.

V. CONCLUSION

The two major Competition regimes existing in the world are the US Competition Policy and the EU Competition Policy. On comparison, it may be noted that India's competition policy is closer in nature to the EU policy than it is to the US policy. It is further proven from the language of the provisions, intention of the legislator and the recent interpretations of the law given by the Competition Commission of India, COMPAT, the Supreme Court and the High Courts alike.

This can be noticed from the procedural as well as substantive similarities mentioned above. Another aspect which tilts the Indian Antitrust policy a bit towards the European policy is the aim of the policy and the approach of the courts. The US Policy pushes more for economic efficiency, whereas the EU as well as the Indian policies aim for better and fair competition in the market.

However, India's competition policy still has a long way to go to be comparable and to be on an equal standing with the regimes mentioned and discussed above.

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