

Abuse of dominance: Even Non-profit Organizations not exempted!

Introduction

All enterprises in the markets need to adopt fair practices while doing business. A fair competition promotes efficiency, encourages innovation, facilitates better governance and ensures availability of goods at an affordable price. The Competition Act, 2002 (“**Act**”) tries to prevent practices that have an adverse effect on competition in India. Under section 4 of the Act, abuse of a dominant position or market power by an enterprise or a group in the relevant market is one such practice that has an adverse effect on competition. Competition Commission of India (“**CCI**”) is the regulatory body that is tasked with the objective to ensure healthy market competition. So far CCI has passed several striking orders to remove anti-competitive practices in India. In this context, it is noteworthy that the CCI interprets the provisions of the Act strictly and does not allow abuse of dominance in any market, irrespective of the fact that the enterprise may be the only big player or is a non-profit enterprise.

This E-Newsline analyses the concept of dominant position, the practices that can be construed as abusive of dominant possession in the relevant market and then discusses two effective orders of CCI issued against non-profit enterprises to understand how abuse of dominant position is not allowed even in them.

1. Abuse of dominant position – the prevailing law

Dominant position is a position of strength of an enterprise in a relevant market. It can be evaluated based on that enterprise’s size, resources and dependency of consumers. Section 4 of the Act defines dominant position as “*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 favour.*” Misuse of such a dominant position is referred as “abuse” by the enterprise in the relevant market. Abuse of dominant position could be by direct or indirect means imposing unfair or discriminatory conditions or prices in sale or purchase of goods or services and includes practices like predatory pricing,¹ excessive pricing, denial of market access, and leveraging.² As a result, abuse of dominant position affects the competitors and end users in the market, and, ultimately the dominant enterprise remains the sole beneficiary. The dominant position enables an enterprise to control or affect its competitors, consumers and the relevant market. CCI has the obligation to control such anti-competitive practices in India and under section 19, has powers to proceed with an inquiry against such enterprises, whether located in India or outside. In the course of inquiry, CCI follows the following to assess abuse of a dominant position by an enterprise in the relevant market:

¹ Under section 4(2) of the Act, predatory price means 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

² Leveraging is dominance by an enterprise in one market to enter or protect position in another market

(a) **Identifying the relevant market:** The first step involves identifying the relevant market, which has to be done with an analysis of the product as well as the geographic market. Under section 2(t) of the Act, the “product market” comprises 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. Under section 2(s) of the Act, “geographic market” comprises 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.

(b) **Establishing dominance:** The next step is to evaluate if the enterprise is dominant. As per section 19(4) of the Act, a dominant enterprise can be identified based on its market share, size, importance of the competitors, economic power, commercial advantage over the competitors, independence of consumers and entry barriers. Under section 19(4)(h), entry barriers could be regulatory barriers, financial risk, high capital cost entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service.

(c) **Establishing abuse:** Thereafter, CCI assesses if the dominant enterprise is engaged in abuse. As per section 4, abuse in the relevant market of the dominant enterprise can be identified based on the conditions levied by the enterprise on product production, price, transaction and other practices resulting in denial of market access to its competitors in the relevant market. Using its dominant position in the market to enter or protect the other market also will be considered as an abuse of dominant position.

Exemption: The fair competitive practices adopted by enterprises to meet competition in the market cannot be considered as abuse of a dominant position. Some exemptions are prescribed. Enterprises can obtain an exemption order of its dominant position from CCI under section 28 to regulate the business, transfer the property, discharge and reduce of liability, to create, allot, surrender and cancel shares, and to form, wind up and amend the memorandum or articles of association.

The dominant enterprises that engage in anti-competitive practices do not do so apparently. The CCI has been able to assess the situation based on the facts and circumstances of each case following the aforesaid steps carefully. In the process, an analysis of both indirect and circumstantial evidence enables and aids CCI to conclusively determine abuse.

2. **Enforcing the law: strict interpretation**

This section below evaluates two recent orders of the CCI.

2.1 **The BCCI order**

Mr. Surinder Singh Barmi, a cricket fan, alleged irregularities against the Board for Control of Cricket in India (“**BCCI**”) in grant of franchise rights for team ownership, media rights for coverage of the league and award of sponsorship rights, and other contracts related to organization of the Indian Premier League. BCCI refuted the allegations and reasoned that it is a “not-for-profit” society for promotion of cricket and its activities and is not an “enterprise”

under section 2(h) of the Act. It also cited a decision of the Supreme Court³ which directed the government not to denigrate sports organizations by placing them on par with business organizations and took the stand that sport associations exist primarily to educate sportsmen, promote and popularize the sports. The allegations of team ownership, media and sponsorship rights in separate markets, cannot substitute each other and are not interchangeable. However, it agreed with a monopoly position, but only for a pro-competitive effect.

CCI concluded that BCCI is an enterprise. It relied upon an order of the Director of Income Tax – Exemptions, which had withdrawn the exemption granted to BCCI under section 12A of the Income Tax Act. In that order, the tax authority had considered the changes in the status and memorandum of BCCI by an assessment order dated December 28, 2009. It further drew support from the decision of the High Court of Delhi⁴ which declared that the All India Chess Federation is an “enterprise” within the meaning of section 2(h) of the Act. Since revenue is the primary consideration for private professional leagues, CCI identified the relevant market as the “*Organization of Private Professional Cricket Leagues/Events in India*”. Further, dominant position in the market was determined based on BCCI’s regulatory role, monopoly status, control over infrastructure, players and entry of other leagues and use of its regulatory powers to foreclose the market for other competitors by giving an undertaking not to support any competing league. All of this was identified as an abuse of dominant position.

With a view to open up venues for young population to play cricket and to find champions by allowing more private professional leagues, CCI directed the BCCI on February 08, 2013 to cease and desist from any practice in the future denying market access to potential competitors and imposed a penalty of 6% of past three years average annual revenue, i.e. a sum of INR 522,400,000 (about US\$ 7.9 million).

2.2 The NIMPA ruling

Ashtavinayak Cine Vision Limited (“**Cine Vision**”) engaged Eros International Limited (“**Eros**”) to distribute a feature film “Rockstar” in East Punjab territory. The movie required registration with Northern India Motion Pictures Association (“**NIMPA**”), an association of producers and distributors, to release in the territory. In October 2011, Eros approached NIMPA with a request to register the movie and NIMPA refused to register it on the ground that Cine Vision owed some amount to PVR Picture Limited (“**PVR**”). As Cine Vision had failed to repay the due sum, PVR had already filed a complaint with NIMPA in March 2011. NIMPA also informed its other members about PVR’s payment dispute with Cine Vision by a circular dated October 24, 2011. By a letter dated November 04, 2011, NIMPA directed Eros to pay the due amount to PVR in order to process the movie registration.

In the meantime, Cine Vision filed information with CCI on November 04, 2011 against PVR, NIMPA and 16 others complaining about the compulsory registration of all movies with NIMPA before their release. They alleged that other opposite party associations were also involved in anti-competitive activities by imposing restrictions on producers and

³ Ministry of Information and Broadcasting & others Vs. Cricket Association of Bengal and others (1995 2 SCC 161)

⁴ Hemant Sharma & Others Vs. Union of India & Others (186-2012-DLT-17)

distributors regarding release of films, compulsory membership, compulsory registration of films, pressuring the producers and distributors to settle the dispute with their members and restriction on satellite release and home video rights. These allegations were denied by NIMPA. They took the view that the association membership is voluntary and registration of films is not necessary, and the members register their films to protect them from piracy, intellectual property theft and to resolve disputes in relation to distribution and exhibitions to avoid unnecessary litigation among its members. It sent the circulars only to caution its members on the matter and did not give any instructions to cease the movie release. NIMPA also informed CCI that the movie was registered by Eros after three days of its scheduled release and non-registration of the film did not have any effect on the release. PVR's position was that since the dispute with Cine Vision was only a commercial dispute, hence CCI had no jurisdiction. After hearing the parties, CCI observed that NIMPA started to act only when the film was nearing its release date and there was no approach to resolve the pending payment dispute, as claimed by it, between March 2011 and October 2011. NIMPA had clearly indicated in its letter dated November 04, 2011 that registration of the film will be kept pending till the disputed amount was paid to PVR. Eros had to either follow the direction of NIMPA or face the consequences. Eros paid and the movie was smoothly released on the scheduled date. NIMPA reached its objective of settling the dispute between PVR and Cine Vision by adopting pressure tactics.

CCI noted that PVR is not a trade association of film distributors and it has no role and capacity to individually restrict the market of film distribution in the territory of NIMPA. However, being a member of NIMPA, it was involved in the decision making process of the anti-competitive conduct against Cine Vision. Since NIMPA did not restrict the release of the movie there was no abuse of dominant position. But the conduct of NIMPA in issuing circulars to its members notifying them about the payment dispute between PVR and Cine Vision, and letter to Eros insisting payment to PVR in order to pressurize the defaulting party is restrictive in nature.

In light of the foregoing, CCI held that NIMPA contravened the provisions of section 3(3)(b) of the Act⁵, and directed it to cease and desist from the practices of pressurizing the distributors to settle the monetary disputes with its members. CCI also directed it to file an undertaking within 30 days to modify its charter documents so as to remove the condition of compulsory registration of films. Further, it was held that there was no anti-competitive conduct by the other opposite party associations as they did not impose any restriction on release of the film in their territories.

Conclusion

The trade associations and non-profit enterprises play a significant role in encouraging and enforcing codes of ethics. The activities of such organizations should benefit their members and they should stay focused on keeping the members informed of trade developments and improve the quality of products/services. In both the above cases, the

⁵ Section 3(3)(b) states that any agreement between enterprises or associations of enterprises or persons engaged in identical or similar trade of goods or provision of services, which limits or controls production, supply, markets, technical development, investment or provision of service, shall be presumed to have an appreciable adverse effect on competition

opposite party enterprises being non-profit enterprises should have stayed within the ambit of their stated objectives. It appears that the enterprises indulged in anti-competitive practices to achieve their objectives without realizing the effect of such conduct. Possibly, there was an overlap between the way they discharged their dual functions. It is necessary for such organizations to separate their regulatory and commercial roles so that potential violations are prevented.

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