

Right to Health - A Study of Abuse of Dominance with Special Reference Pharmaceutical Industry

Dr. Sukhvinder Singh Dari

Abstract— The Competition Act, 2002 seeks to regulate those activities that may cause appreciable adverse effect on the competition. Having an effective competition regime ensures that the consumer interest is not being compromised in any way and that the market is free from any anticompetitive element. The scope of this research paper is limited to Section 4 of The Competition Act 2002. An abuse of dominance occurs when an entity that holds a dominant position prevents or lessens the competition in the market, by using its power. The Competition Commission of India on many occasions has condemned enterprises abusing their dominant status and has imposed huge penalties. This paper is a comprehensive guide for those who want to understand how Section 4 of the Act that pertains to abuse of dominance, can be applied in various scenarios. What amounts to abuse of dominance cannot be determined easily and requires a detailed investigation. This paper will furnish a basic idea as to how the Competition Commission of India has assessed a Section 4 violation in sector like Health care and pharmaceuticals. The research paper sets forth the law in relation to Abuse of Dominance in India with reference to health care and pharmaceutical industries and explains the various requirements to bring out a successful case under Section 4 of the Act. Subsequently deals with a specific sector and demonstrates with the help of case studies how the Commission defined the relevant market, how the assessment was pertaining to dominance done and how did the Commission come to a conclusion that there was an abuse. Finally the paper gives a fair idea as to how risk can be identified, assessed and mitigated.

Keywords: Competition Commission of India, Abuse of Dominance, Section 4, Healthcare and Pharmaceutical Sector.

1. INTRODUCTION

The Competition Commission of India (‘CCI’) has been entrusted with the responsibility to promote and protect fair competition in India. The substantive Indian Competition law can be broadly sub-divided into three categories - Anti-competitive agreements, Abuse of Dominance and Merger Control. Section 4 of the Competition Act, 2002 (‘the Act’) deals with the unilateral conduct of enterprises and is of prime relevance for the purposes of this paper. It is interesting to note that as a nascent regulator CCI has closely followed the European Union (‘EU’), which as opposed to India has a developed competition regime. While conducting their research the CCI take into account the decisions of the European Commission (‘EC’) and seldom go against the rationale put forth in those cases. Dominance is a positive term which is often achieved by the virtue of hard work, strong entrepreneurial vision and delivery of quality product. Therefore Section 4 of the Act does not condemn a dominant entity per se. It is the abusive conduct of such a dominant player that triggers the application of Section 4.

Understanding Dominance in context of Competition Law

Establishing that an enterprise is dominant is a sine qua non for application of Section 4 of the Act. Therefore, it is imperative to understand the scope of the term ‘dominance’ as contemplated by the regulators. 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."

Competitive Assessment of an Abuse of Dominance Case
 The CCI follows three steps involved in determination of an instance of abuse of dominance:



Step 1: Delineation of Relevant Market

The term Relevant Market is the function of Relevant Product Market and Relevant Geographic Market. Section 2(t) of the Act; defines the "Relevant Product Market" as "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." On the demand side the Relevant Product Market would include every substitute that the consumers would switch to if the price of the product increases. Whereas on the supply side, the Relevant Product Market all producers who could, with their existing facilities, switch to the production of such substitute goods. The end use is an important factor to be considered while taking a call on the question whether the given set of products are substitutable and can be construed in the same Relevant Product Market.

NOTE: The competition authorities would always try and delineate the market in a very narrow manner whereas the opposite parties would want to have a broader definition for the market. A narrow definition of the relevant market makes it easier to establish an entity's dominance.

Step 2: Establishing Dominant Position In The Relevant Market

Under the archaic MRTP Act, Dominance was defined in terms of market share (25% or more). The present Act accommodates more than just one factor. Section 19(4) of the Act sets out the factors that must be considered while assessing the dominant position of an enterprise. There is no thumb rule to evaluate the significance of market share while assessing the dominance of an entity but market share continues to be evidence of dominant position.

I HAVE 49% MARKET SHARE- AM I DOMINANT?

The answer to this question can be affirmative or negative depending upon the existence of other competitors in the market. In India, the determination of 'dominance' is based on the relative position of strength enjoyed by the market participants. Therefore a player with a market share of 35% may be dominant if no other competitors own a significant share in the market. Also, if a firm's share is 45% and the other firm's share is 40%, the first firm may not be considered dominant.

If new firms can easily enter the Relevant Market, such a market is viewed as contestable; meaning thereby the firm with a large market share cannot exploit its customers. Factors such as Sunk Cost, Access to distribution network, Interference of Regulatory authorities, Economies of Scale etc. can prove to be barriers to entry.

Barriers to Entry

Industry	Significant Industry specific barriers
Telecom	High Cost incurred to get spectrum
Professional, Scientific & Technical Services	No significant barrier
Pharmaceuticals	R&D cost, Patents

The market structure is a crucial factor that the CCI would look into while assessing the dominant position of an entity. A market with one player is more susceptible to Abuse of Dominance than a market with multiple players.

POINT TO PONDER-IS THE DELHI AIRPORT ABUSING ITS STATUS?

International Airport in Delhi is the sole supplier of airport services to the airlines and the passengers. The rising airport charges is reportedly alleged to be one of the reasons necessitating foreign airlines (Virgin Atlantic, Delta, Lufthansa, Singapore Airlines etc.) to withdraw over 100 flights during the last 6 months.
 Source: Business Standard of 17th April, 2009 under the caption "Foreign Airlines pull out of India."

The aforementioned points are just an indicative list of what the Competition authorities generally get into while deciding a case under Section 4. Section 19(4) under sub clause (m)

confers wide power on the CCI to consider 'Any other' factor as required to be considered. The term 'Any other' has to be read ejusdem generis to the aforementioned clauses.

Step 3: Identification of The Abusive Conduct

There are several ways of categorising the abusive conducts that have been contemplated under Section 4. Section 4 stipulates two types of abuse- Pricing and Non Pricing. There is another way of classifying the abuse envisaged under Section 4- Exploitative and Exclusionary. The nomenclature is self-explanatory and does not require a detailed discussion. Some of the most common abusive conduct has been briefly discussed in the subsequent paragraphs.

Predatory Pricing, Margin Squeeze, Excessive/Discriminatory Pricing, Imposition of unfair conditions-Tying in & Bundling, Limiting, Restricting, and Denial of Market Access , Penalty for contravention of Section 4

HEALTHCARE & PHARMACEUTICAL SECTOR

Introduction

Ensuring competition in the Healthcare sector ensures constant R&D. Lack of competition in this would mean poor quality of services, limited access to medicines and unreasonably high prices. In this paper we shall analyse the abusive conduct of multi-speciality Healthcare facilities and see how the CCI has analysed their status in the Indian market.

The Healthcare sector has seen a drastic change in recent years. Healthcare sector was predominantly monopolized by the government for a long period. However, it must be noted that with passage of time several private players such as Hiranandani, Max, Fortis have entered the market. They are not driven with the sole object of social welfare and function like any ordinary business enterprise would. These modern private hospitals are firms organised to provide comprehensive medical services directly or through a third party.

These hospitals act as a facilitator between the doctors and consumers. There are several competition concerns that can arise in the healthcare sector. The arrangements in the healthcare sector with the third parties often give rise to vertical relations. However all of that can be covered broadly under Section 3 of the Act and thus is beyond the scope of our analysis. It is true that the Healthcare industry in India is yet to see a locus classicus under Section 4. It is primarily because of the market structure. There are several competitors fighting in the same market. Thus, in order to have a successful prosecution under Section 4, the relevant market must be defined in the narrowest manner possible. In the light of these observations let us now proceed to the case of Shri Ramakant Kini v. Hiranandani Hospital ('Hiranandani Case').

Analysis of the Hiranandani Case

As per the information filed, the Opposite Party was stated to be a provider of comprehensive health care in India. Due to strong R&D it has acquired the same status as the best hospitals in the world. The facts leading to the complaint in the instant matter are as follows:

Facts of the Case

Mrs. Jain an expecting mother sought maternity services from the Opposite Party. They entered into an agreement with Life Cell India for umbilical cord stem cell banking services. Prior to the delivery when the husband of this lady tried to obtain permission from the Opposite Party for getting the stem cell banking procedure done at the Hospital's premise. He was denied the permission. The management of the Opposite Party informed him that they had entered into an arrangement with Cyrobanks India. The terms of that arrangement dictates that the Opposite Party may not engage any other provider of stem cell banking. As a result of this the patient opted for another high end multispecialty hospital for maternity services.

Summary of Charges

The Informants alleged that the Opposite Party in the instant matter had contravened Section 4 by denying market access and imposition of unfair conditions without any objective justification. The informants also made averments with respect to Section 3 which as earlier stated is beyond the scope of this chapter.

Analysis

The major drawback in the case of the informant was that they failed to place on record the evidence that could conclusively establish the Dominance of the Opposite Party in the Relevant Market. Even though penalty was levied upon for contravention of Section 3, claims relating to Section 4 could not be substantiated.

Why is it difficult to establish 'Dominance' in these cases?

In several cases it could be seen that establishing of Dominance is a difficult proposition when it comes to this specific sector. The structure of the market is extremely competitive. CCI has been broadly defining the Relevant Product Market in these cases. If the market is taken to be 'Provision of Medical Services by Hospitals', it is very difficult to establish dominance in a metropolitan city or a town that has lots of available options. In the Tarun Patel case, CCI enumerated some of the available substitutes in its order including Ashirwad Hospital, Surya Hospital, Adarsh Hospital, etc to establish that the enterprise could not be held to be dominant.

The Max Hospital Case: A new approach?

CCI in the Max Super Speciality case has discussed the dynamics of healthcare sector in detail. It is imperative to

understand that the Healthcare services can be broadly classified into two classes- Non-Super Speciality hospitals and Super Speciality Hospitals. According to National Accreditation Board for Hospitals and Health Care Providers, Super speciality centres are centres which provide specialized health services related to Cardiology, Immunology, Genetics, Oncology, and Nephrology etc. On the contrary, a non super speciality hospital only caters to general healthcare services.

While assessing the dominance, CCI observed that even though there are various super speciality hospitals such as BLK, Primus, Rajiv Gandhi, Saroj etc., Max is larger and bigger than most of these. Max in Delhi, has five super speciality hospitals. CCI has observed that in terms of size, resource and R&D Max is much ahead of its competitors. This view is a departure from what the CCI has been consistently following. This approach has made it easier for CCI to establish dominance which initially was a difficult proposition altogether.

II. CONCLUSION

Several pharmaceutical giants are capable of flouting Section 4. This capacity can be attributed to their dominant statuses in certain markets. With the help of certain case studies it will be demonstrated how these companies may indulge in abusive conduct. This paper gives an insight of those practices that the players in the aforementioned sectors must refrain from in order to evade CCI's scrutiny.

The Indian pharmaceuticals market is the third largest in terms of volume and thirteen largest in terms of value. The Indian pharmaceutical industry is estimated to grow at 20 per cent compound annual growth rate (CAGR) over the next five years. In such a promising sector there should not be any impediment on account of anticompetitive practices.

Defining the Relevant Product Market is slightly complex when it comes to Pharmaceutical sector. The market can be divided into therapeutic segments such as vitamins, cardio ailments, antibiotics etc. Having understood the structure of the market we shall now see what violations can take place in this sector. The patents regime in India prior to 1970s was process oriented. In 1970 India amended its Patents Act to ensure compliance with TRIPS Agreement and became a product patent regime. The patent regime now grants patent to the final product irrespective of the process used. A person is precluded from applying for patent even if he has invented that product through a new process. Patent abuse can come in various forms. A pharmaceutical company that holds patent in a formulation would be dominant by the virtue of statutory protection. CCI is yet to face such a case in the Pharmaceutical Sector.

REFERENCES

1. Cyril Shroff, Nisha Kaur Uberoi, India: Abuse of Dominance, The Asia Pacific Anti-Trust Review, Available at [http : // globalcompetitionreview.com / reviews /69 /sections /235 /chapters /2749 /india-abuse-dominance /](http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2749/india-abuse-dominance/), Last visited 20.10.2015.
2. Section 4 of the Competition Act, 2002.
3. Section 2(r) of the Competition Act, 2002.
4. Section 2(t) of the Competition Act, 2002.
5. Dr. S. Chakravarthy, 'Relevant Market in Competition Case Analyses', Available at http://circ.in/pdf/relevant_market-in-competition-case-analyses.pdf , Last Visited 16.10.2015.
6. Vinod Dhall, 'Abuse of Dominance in Competition Law', Available at http://articles.economictimes.indiatimes.com/2007-04-04/news/28385373_1_competition-law_dominance_market , Last Visited 16.09.2015. Case No. 39 of 2012
7. Shri Tarun Patel v. Haria Lakhmshi Govindji Rotary Hospital Case 49 of 2015 Available at [http : // consumer- voice. Org /comparative -product -testing /Service-Test /What -are- Super -Speciality -Hospitals](http://consumer-voice.Org/comparative-product-testing/Service-Test/What-are-Super-Speciality-Hospitals) and accessed as on 12.10.2015.
8. Paragraph 9 Order under Section 26(1) Vivek Sharma v. Max Super Speciality Hospital Case No. 77 of 2015.