July 08, 2013

CUTS INTERNATIONAL

COMMENTS ON
CONSULTATION PAPER ON MONOPOLY/MARKET DOMINANCE IN CABLE TV SERVICES
(Consultation Paper No.: 5/2013)

Q.1 Do you agree that there is a need to address the issue of monopoly/market dominance in cable TV distribution? In case the answer is in the negative, please elaborate with justification as to how the ill effects of monopoly/market dominance can be addressed?

Dominance is not considered bad per se but its abuse is. Section 4 of the Indian Competition Act, 2002 (Act), deals with abuse of dominance. Market dominance means 'having authority or control'. Hence, a dominant firm would mean a firm having authority or control over the market. With that authority and control a dominant firm can restrict new entry in the market or foreclose the commercial opportunity of weaker traders or create barriers in economic freedom of its probable competitors. In other words, a dominant firm is in place to adversely affect existing as well as future competition in the market.

However, it is not dominance in itself that is a cause of concern but when the same is abused. At times, it becomes a very complex issue from the competition policy perspective. First, the existence of dominance has to be determined, which takes into account many factors such as defining relevant market, determining market share and market power etc.

Thus, there is a need to address the issue of monopoly/market dominance in the cable TV distribution (only with the objective of prosecuting its abuse, if any) and if the monopoly/market dominance is established, then possibility of its abuse needs to be explored and investigated. However, dominance without abuse does not have any ill effects which need to be addressed.

Q.2 Do you agree that the State should be the relevant market for measuring market power in the cable TV sector? If the answer is in the negative, please suggest what should be the relevant market for measuring market power? Please elaborate your response with justifications.

Dominance has significance for competition only when the relevant market has been defined. The relevant market as defined in sub-section (r) of Section 2 of the Act means "*the market that 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*".

The Act lays down several factors of which any one or all shall be taken into account by the Commission while defining the relevant market.

The relevant product market is defined in terms of substitutability. It is the smallest set of products (both goods and services) which are substitutable among themselves, given a small but significant non-transitory increase in price. If we take the case of cable TV services, in small cities it might not be substitutable as it is not penetrated by high end technology but in bigger cities especially cosmopolitan cities, cable TV might easily be substitutable with several other technologies like ITV.

Similarly in relevant geographic market, as defined in sub-section (s) of Section 2, '*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 neighbouring areas*'. If we take the case of cable TV, provisions and demand of services may vary from state to state. Further conditions prevailing in a particular state may not necessarily be distinctly homogeneous and distinct conditions may be prevailing within a particular state itself. Also, conditions prevailing in a state may or may not be distinguished from the conditions prevailing in neighbouring states.

Consequently, cable TV services might be substitutable with different television services in different states, depending on consumer tastes, preferences and availability of technology. Further, conditions of competition for demand/supply of television services may not be distinctly homogenous within a particular state and such conditions might not be easily distinguishable from the conditions prevailing in the neighbouring states.. Therefore, it would not be advisable to consider state to be a relevant market for measuring market power in the cable TV sector
CUTS suggest that relevant market for cable TV should be determined on a case to case basis, as there cannot be any straight jacket formula for the same.

Q.3 To curb market dominance and monopolistic trends, should restrictions in the relevant cable TV market be:
(i) Based on area of operation?
(ii) Based on market share?
(iii) Any other?
Please elaborate your response with justifications.

The stated query can be broken down in following issues –

- The need to curb dominance and monopolistic trends.

- The need to put outright restrictions in the relevant cable TV market and the nature thereof.

We deal with each of these points in subsequent paragraphs.

Need to curb dominance/ monopolistic trends

It is a well-established principle that dominant position and mergers/amalgamation are not illegal *per se*. Their abuse within a relevant market leading to appreciable adverse effect on competition is a cause of concern. Section 4 of the Act makes this amply clear.

Dominance itself has the potential to bring economies of scale, low costs and consequently may result in low prices for consumers. Marriage between dominance and efficient, vigilant supervisory mechanism (that prevents its abuse) can become progenitor for ideal consumer-oriented market. Consequently, regulatory energies must be dedicated towards checking abuse of dominant position and possible appreciable adverse effects arising out of mergers/amalgamation, and not preventing attainment of dominant position or mergers/amalgamations.

Need to put restrictions and nature thereof

Restrictions/regulations on market players can be motivated by two considerations –

1. The need to regulate and monitor entities operating within a prescribed area/having certain minimum market share, in light of supervisory objectives, administrative efficiency and regulatory reach. The aim is to ensure that the entities are complying with provisions of all the applicable laws and to facilitate interaction between market players and regulator.

2. The need to prevent appreciable adverse effect on competition emanating from abuse of dominant position or mergers/acquisition in a relevant market. The objective here is to protect competition and prevent anti-competitive practices. This has a much restricted and focused scope when compared with the point 1 above.

It is of utmost importance that the area/market share identified (in point 1 above) for efficient regulatory supervision is not confused with the relevant market identified (in point 2 above) for competition purposes.

While the Consultation Paper rightly has consumer protection as its centrifugal force, it seems to go off-track by loosing clarity between the distinct markets mentioned above.
Majority of statutes provide area specific licenses and prescribe for supervision by area specific regulators. For instance, companies incorporated in a particular state are required to be registered with the registrar of companies having jurisdiction over that particular state. Similarly, companies undertaking public offering under securities market regulation have to file the draft prospectus with the relevant regional office of the securities market regulator, SEBI. Same is the case in electricity sector, wherein the relevant state electricity regulatory boards are the regulators for the electricity market players in a specific state. The objective of such delegation of power under the legislation is to enable efficient supervision and oversight over the operation of the market players in a specific area.

In none of these sectors, does the area of operation is automatically considered as relevant market for competition law purposes. At the most, the area of operation of a particular entity and the consequent entry barriers constitute one of the considerations for determination of relevant market. For competition law purposes, there may be more than one relevant geographical markets in the area licensed for operation to a particular market player (See sections 19(6) and 19(7) of the Act). Similarly, market share in the relevant market (determined for competition purposes – and not necessarily in the entire area of operation), is only one of the considerations to determine whether an enterprise enjoys dominant position (See section 19(4) of the Act).

Consequently, if the objective of the proposed TRAI regulation is to supervise the actions and operations of MSOs operating in particular area (such as district/state/ zones) licensing and operational conditions may be imposed accordingly in light of its resources, capabilities and regulatory objectives of TRAI.

However, if the objectives are to promote competition and prevent anti-competitive practices, the approach needs to be different. At the outset, the unnecessary barriers to competition incorporated in the statutes must be done away with, in order to promote competition.

Further, it must be understood that as firms operating in the market are capable of having different strategies, dominance/mergers/amalgamations must be reviewed on case-by-case basis and putting blanket restrictions to protect competition may not serve the purpose but might end up promoting undesirable innovation from market players. What can, however, prove beneficial, is imposing some kind of approval requirement if value of particular merger/ amalgamation crosses prescribed threshold. Such strategy is adopted under section 5 of the Act, which provides that a merger resulting in assets or turnover above a specific limit, would have to be notified to the CCI. If the CCI determines that the merger/amalgamation has, or is likely to have appreciable adverse effect on competition, only then such transaction (in its original form) is not permitted to be concluded.

As has been rightly pointed out in the Discussion Paper, US, UK and South Korea have adopted HHI as a tool to measure dominance (in relevant market) subsequent to a merger/acquisition. Similarly, Canada has adopted the CR4 tool to measure dominance. However, it must be remembered that such HHI/CR4 are calculated for the relevant markets identified for competition purposes and not the area of operation. None of these statutes define relevant markets (for competition law purposes) in the statute and leave for determination by competition regulator on case-to-case basis. Likewise, it is suggested that in cable in TV sector, if a merger/ acquisition results in HHI within/above a specific range, prior permission of the regulator for such transaction must be required (and there should be no blanket restriction). The regulator must then assess each case on its facts and provide reasoned order for its decision. The parties to the transaction must be allowed to put forth their arguments and the decision of the regulator must be appealable. Such incorporation of due process brings in transparency, accountability and broader acceptability of regulatory decision.

However, it must be borne in mind that the HHI specified in other jurisdictions have been presumably identified on the basis of research and local conditions prevalent in the respective countries and such range must not be blindly copied for Indian cable TV market, without undertaking proper research and considering local conditions.

Q.4 In case your response to Q3 is (i), please comment as to how the area of a relevant market ought to be divided amongst MSOs for providing cable TV service. Please elaborate your response with justifications.

N.A.

Q.5 In case your response to Q3 is (ii), please comment as to what should be the threshold value of market share beyond which an MSO is not allowed to build market share on its own? How could this be achieved in markets where an MSO already possesses market share beyond the threshold value? Please elaborate your response with justifications.

N.A.

Q.6 In case your response to Q3 is (iii), please comment on the suitability of the rules defined in para 2.26 for imposing restrictions on M&A. Do you agree with the threshold values of HHI and increase in HHI (X, Y and Delta) indicated in this para. If the answer is in the negative, what threshold values for HHI and delta could be prescribed for defining restrictions? Please elaborate your response with justifications.

See response to question 3. In addition, we suggest that in place of putting blanket restrictions on M&As resulting increase in HHI above the specified threshold, requirement of prior approval from the regulator should be prescribed. The regulator must then assess each case on its facts and provide reasoned order for its decision. The parties to the transaction must be allowed to put forth their arguments and the decision of the regulator must be appealable. Such incorporation of due process brings in transparency, accountability and broader acceptability of regulatory decision.

Q.7 Should 'control' of an entity over other MSOs/LCOs be decided as per the conditions mentioned in para 2.29? In case the answer is in the negative, what measures should be used to define control? Please elaborate your response with justifications.

We agree with the definition of control under para 2.29.

Q.8 Please comment on the suitability of the rules defined in para 2.31 for imposing restrictions on control. Do you agree with the threshold values of HHI and increase in HHI (X, Y and Delta) indicated in this para. If the answer is in the negative, what threshold values for HHI and delta could be prescribed for defining restrictions? Please elaborate your response with justifications.

See response to question 6. In addition, we suggest that in place of putting blanket restrictions on acquisition of control that results in increase of HHI above the specified threshold, requirement of prior approval from the regulator should be prescribed. The regulator must then assess each case on its facts and provide reasoned order for its decision. The parties to the transaction must be allowed to put forth their arguments and the decision of the regulator must be appealable. Such incorporation of due process brings in transparency, accountability and broader acceptability of regulatory decision.

Q.9 In case your response to Q3 is (iii), you may support your view with a fully developed methodology indicating a measure arrived at to determine market power and proposed restrictions to prevent monopoly/ market dominance in the relevant market.

See response to question 3. At the cost of repetition, we would like to mention that restrictions should not be put to prevent market dominance but to check abuse of such dominance.

Q.10 In case rules defined in para 2.31 are laid down, how much time should be given to existing entities in the cable TV sector (which are in breach of these rules as on date), for complying with the prescribed rules by diluting their control? Please elaborate your response with justifications.

We do not believe that any restrictions should be placed on entities in the cable TV sector.

Q.11 Whether the parameters listed in para 2.33 are adequate with respect to mandatory disclosures for effective monitoring and compliance of restrictions on market dominance in Cable TV sector? What additional variables could be relevant? Please elaborate your response with justifications.

We believe that the existing filing / reporting requirements imposed by the MIB in terms of the amendments to the Cable Television Act, 1995 and the Cable Television Networks Rules 1994 (in view of digitization) and the reporting requirements to TRAI in terms of the amendments to the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations 2004 are sufficient for effective monitoring and determining market share of players in the cable TV sector and the parameters listed in para 2.33 are, therefore, not required to be implemented.

Q.12 What should be the periodicity of such disclosures?

In light of our response to issue 11 above, this issue will not be applicable.

Q.13 Which of the disclosures made by the Cable TV entities should be made available in the public domain? Please elaborate your response with justifications.

While assessing the disclosures required from cable TV operators; periodicity of disclosures; and availability of disclosures in public domain, following issues need to be considered –

1. Need of disclosures from cable TV sector perspective.

2. Need of such information by public.

3. Similar disclosures required by other regulators, and availability of such information in public domain.

Many of the disclosures mentioned in paragraph 2.33 of the Consultation Paper are already required under other legislations. For instance, Indian companies are required to file Form 20B (annual report) with the Ministry of Corporate Affairs. The information required to be disclosed under Form 20B comprise of capital structure, equity break-up, details of directors, amongst others. Most of such information can be assessed by public at the MCA website by payment of nominal fee. Some of the information required also forms part of the information disclosed to the stock exchanges (in case of listed companies – again easily available to interested public) and annual reports.

Some of the information specific to cable TV sector includes -

1. Interests of the entity /company in other entities/companies engaged in Cable TV distribution (2.33(d)) – This could be disclosed to TRAI on quarterly basis

2. Details of Subscribers served (2.33(h)) – This could be disclosed to TRAI on quarterly basis

3. Details of areas of cable TV operation (2.33(i)) – This could be disclosed to TRAI on quarterly basis

4. Details of revenue earned from services provided through cable TV network (2.33(j)) – This could be disclosed to TRAI on annual basis.

The information disclosed to TRAI can be uploaded by TRAI on its website simultaneously with the disclosure made, so that the public could access the same.

The benefits arising from disclosure to the market regulator and dissemination of such information in public domain must be balanced with the costs of such exercise to the market players. The regulator must adopt a cautious approach while requesting relevant information and may not require disclosing (or putting in public domain) sensitive information as soon as it is in place. Such sensitive information could be disclosed (or put in public domain) with a lag. This balances the need-to-know requirement of public and business interests of market players.

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