Intellectual Property Rights, And Competition Law
Prof. K D Raju
Rajiv Gandhi School of Intellectual Property Law
Indian Institute of Technology, Kharagpur

Lecture - 13
Abuse of Dominance Combinations

Dear students today we are going to discuss Abuse of Dominance and Combinations as part of our Competition Law class.

(Refer Slide Time: 00:33)

And in the last class we discussed about the Anti-Competitive Agreements.

(Refer Slide Time: 00:37)

And today, we will discuss in detail, what is abuse of dominance and also the other areas of the Competition Law. And, you may have heard about the abuse of dominance, but what is this abuse of dominance actually? And abuse of dominant position is basically the strength enjoyed by any enterprise, any corporate enterprise which enables them to act independently in the market and also to influence the market.

And these enterprise position is to disregard other market forces in order to eliminate all kind of competitions. So, these business enterprises, use their market power to eliminate the competition from the market, then they will be abusing the dominance in market.

(Refer Slide Time: 01:38)

And we can see this abuse of dominance in various forms; which is price fixing, nondiscriminatory pricing practices; predatory pricing, limiting supply of goods and services in the market which will make a scarcity in the market; then denial of market access like refusal to deal.

(Refer Slide Time: 02:05)

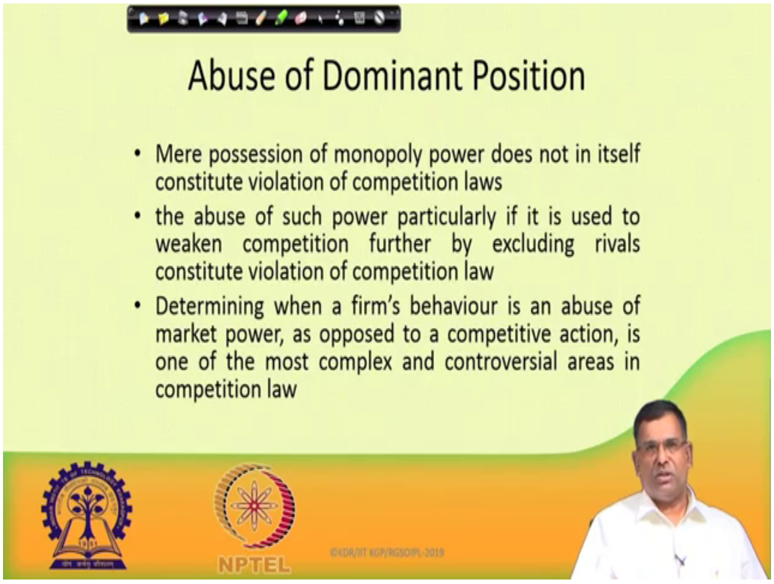
What do you mean by the elements that constitute the dominant position and when an enterprise, business enterprise is going to be in a dominant position in the market?

It is a position of strength accumulated in a period of time due to the technology, due to market conditions and due to certain homogenical conditions which are available in the market. And such position is enjoyed by the enterprise in the Indian market and in the product market and geographical market; both the markets. We will see later on, what is this geographical market and product market. These enterprises, these companies can act in the market irrespective of the competitive process in the market. And these companies and enterprises are a force in the market, which uses its dominant position, irrespective of the competition process in the market.

(Refer Slide Time: 03:16)

And also, they can impose other trading conditions which are not acceptable to others, but there is no other choice for them but to avail these services or the goods. Actually, the abuse of dominant position in the market is considered to be a threat, a strong threat to the free market. Basically, these firms have the ability to raise the prices to an unreasonable extent and can charge the customers. Also they can go for alternative source of supplies. The firms using its dominant position will affect the market forces and ultimately eliminate the competitors from the market.

(Refer Slide Time: 04:07)



The monopolization or the dominant position in the market per se is not illegal under the Competition Act; but the abuse of such position is illegal under the Competition Act. And especially when the big industrial houses or enterprise which use their market power to eliminate others from the market or eliminate competition from the market or eliminate the rivals from the market, then only it will be considered as a violation of competition law. When can such behaviour become abuse of dominance we will have to see in detail.

(Refer Slide Time: 04:54)

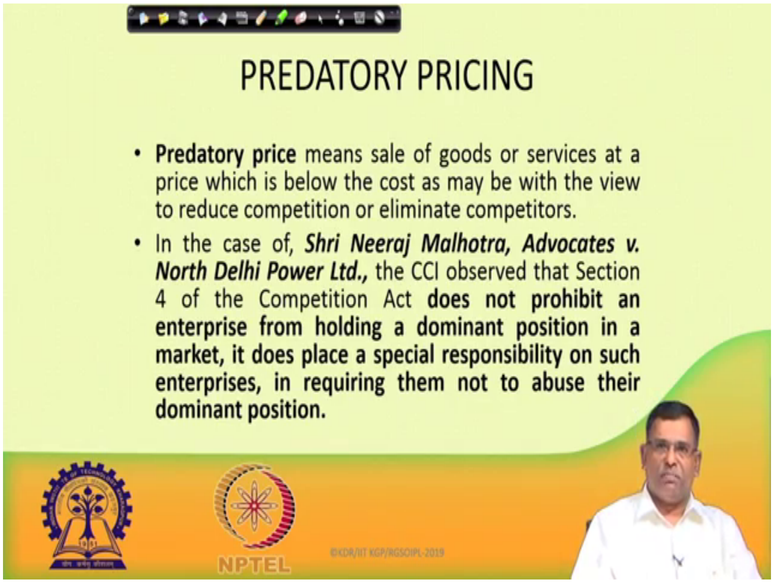
The competition act of India under Section 4(2) prevents certain activities resulting in the abuse of dominant position. Imposing unfair and discriminatory conditions or prices in sale and purchase of goods and services, limiting or restricting production of goods and services will be considered as abuse of dominant position.

Then technical or scientific development relating to goods or services to the prejudice of consumers also will be considered as the abuse of dominant position. Then most importantly denial of market access i.e. refusal to deal; tying agreements, refusal to deal and tying agreements, using the dominant position of an enterprise to enter into another market will be considered as abuse of dominant position.

(Refer Slide Time: 06:01)

We will look into some of the examples of a dominant position. These are predatory pricing, granting loyalty rebates or allowing royalty rebates, then tying and bundling, refusal to deal, margin squeeze and exclusive agreements. All these are considered as abuse of dominant position. And we will elaborately see these one by one.

(Refer Slide Time: 06:32)



And predatory pricing is one of the prominent form of abuse of dominant position; it is when you reduce the prices below the cost of production in order to eliminate, in order to send out the competitor from the market. So the objective or the intention of the prominent player in the market is predatory. And predation is something which wants to eliminate the competitors from the market; so that later on they can capture the market and become more and more strong in the market.

In this particular case of *Neeraj Malhotra, Advocates versus North Delhi Power Limited*; the Competition Commission of India very clearly said that, Section 4 of the Competition Act does not prohibit any enterprises from holding dominant position in the market. So, it means that, the dominant position in the market per se is not violative of any competition law. But if they abuse their dominant position in the market, then only it is actionable under the competition law of India.

(Refer Slide Time: 07:50)

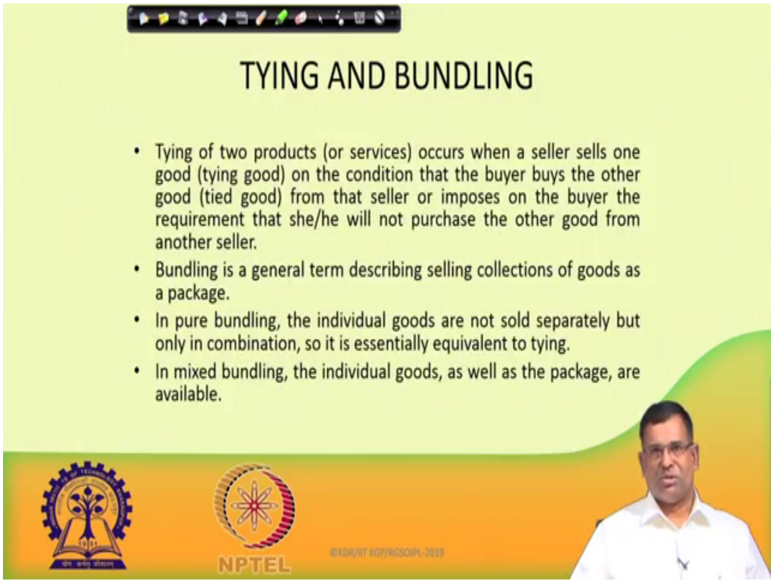
And predatory pricing is forcing somebody out of the market; because of the market conditions, because of the lower price imposed by the market major or the one who plays a dominant position in the market. So, here also we can see that the once the dominant company has successfully excluded all competitors from the market, then they can capture the entire market. So, there is a free riding in the market. So, it means that, in the initial times if the company is not making profits, once you send out all the competitors from market, the company can impose higher prices and make profits out of the market.

(Refer Slide Time: 08:35)

Loyalty rebates are considered to be another form of abuse of market position or abuse of dominant position. The loyalty rebates are a refund given to the customers once they pass certain threshold limit of quantity or threshold limit of the total purchase amount; so that these customers will be compelled to go to these particular suppliers. So, these loyalty rebates prevents other companies from entering into the market or prevents the customers from going to them.

So, it means that this is a kind of incentive given to the customers to go to a particular supplier, who may be a major or a prominent player, in the market. Such arrangements are basically very much prevalent in the e-commerce market as cash back. So, cash back policies are nothing, but loyalty rebates once you avail services or purchase goods.

(Refer Slide Time: 09:43)



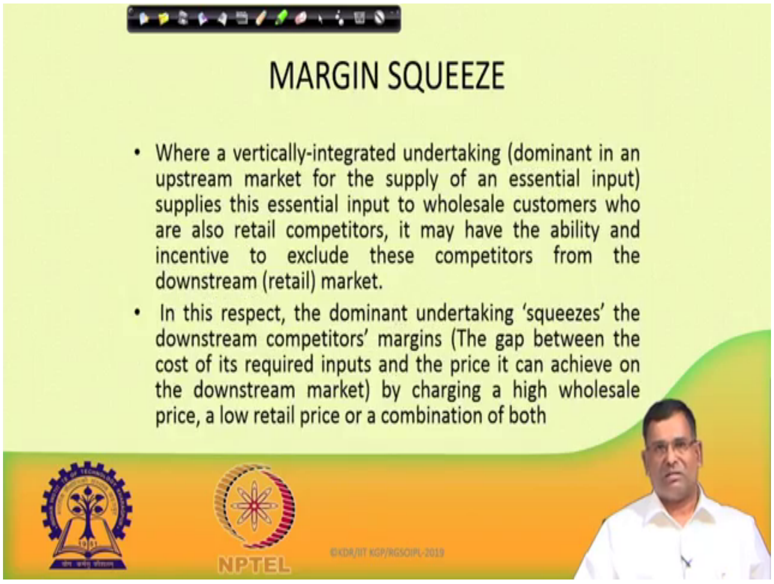
Then tying and bundling. Tying is nothing but tying of two products, i.e. one you require and another one you do not require. So, the goods and services tied with each other will be also considered as abuse of the dominant position. So, here you sell some of the product as a package which customers may require, or may not require. So, you tie a wanted product with an unwanted product and that is the tying and bundling which will be considered as abuse of dominant position.

(Refer Slide Time: 10:23)

Then, refusal to deal, and unreasonable conditions. The dominant firm have the freedom to choose or conduct the business according to their choice. In the last class we talked about the horizontal and vertical agreements and what are the type of agreements. And these vertical and horizontal agreements ultimately eliminate the competitors from the market; so that the dominant firm can charge whatever they want to charge or exploit the market beyond the competition process in the market.

In the western countries, the concept of *essential facilities doctrine* has been evolved in a period of time, where you are forced to license your technologies to a person for a limited time, for a royalty which is determined by them and it must be very reasonable royalty. So, you cannot simply refuse to deal in if you apply the *essential facilities doctrine*. And this *essential facilities doctrine* jurisprudence is evolving not only in the developed countries; but also in the developing countries like India and was applied in the *Micromax versus Ericsson* case. So, you can see that these concepts facilitates the market conditions.

(Refer Slide Time: 12:59)



And another is a margin squeeze. In vertically integrated undertakings there is an upstream market, downstream market, distributors and retailers. So, the dominant firm, will try to control this. The government undertaking squeezes the downstream competitor margins; that means, the gap between the cost and the price. So the achievable profit in the downstream market is very less. So, charging a high wholesale price and a low retail price or a combination of both will be considered as margin squeeze.

There is no question of competition here because you are forced to purchase this, even though there is a very limited margin in the particular products.

(Refer Slide Time: 12:50)

Then, exclusive agreements which we talked about in the last class. So, it is prohibiting one party to enter into a similar contracts with other competitors and third party to allow dominant company to foreclose competition in the upstream and downstream markets. So, it prevents others from entering into any kind of contract with the competitors and will be considered as the abuse of dominant position in the market.

(Refer Slide Time: 13:20)

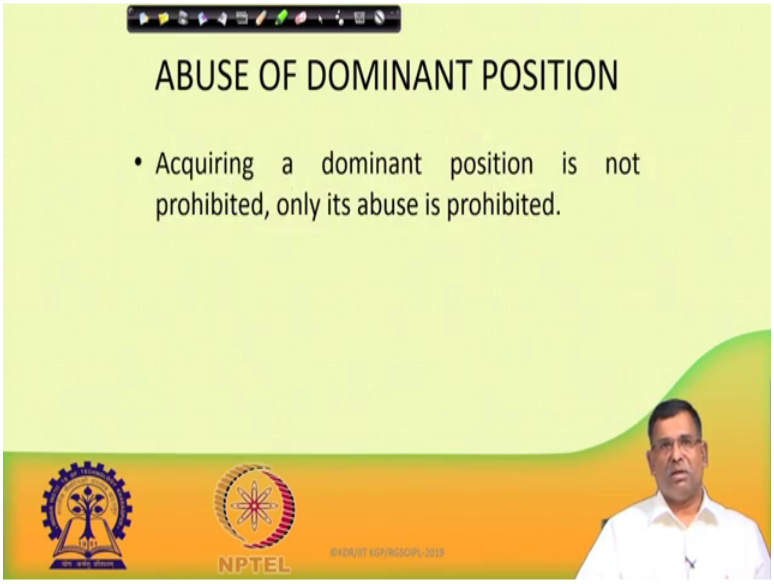
So, monopolization can happen in many ways. The element of monopolization in the market is the monopoly power, itself. This power is acquired for a period of time due to different conditions. One important condition is the allocation of resources. The huge firms spend a lot of money for acquiring markets. Then wilful acquisition or maintenance of that particular power using superior product due to business acumen or maybe just an accident in the market.

You can see the anti-competitive conduct of these bigger firms and the elements of conspiracy to monopolize, like cartelization. So, there will be a combination of conspiracy, combination or conspiracy or agreements between different parties. All these are the symptoms of monopolization in the market.

(Refer Slide Time: 14:27)

In the Section 4 there is a connectivity between Section 19(4), which states the factors to be taken into consideration for considering abuse of a dominant position or abuse of an enterprise or a group of people. So, it directly imposes unfair or discriminatory conditions on the purchase of goods or services. Then secondly, the price or purchases or sale; that means, the price may be predatory price that may be much lower than the cost of production, in order to acquire a new market or to eliminate a competitor from the market.

(Refer Slide Time: 15:05)



So, acquisition of dominant position is absolutely legal under the competition law, but its abuse is actually prohibited.

(Refer Slide Time: 15:24)

So, the abuse of this dominant position may be exclusionary or exploitative in nature. So, exploitative abuses are basically on the consumer, exploitation of the market as such and the exploitation of the monopoly power gradually leads to monopoly profits, exorbitant profits which directly affects the consumer welfare. So, these are absolutely prohibited under the competition law; and excessive pricing may be one of the main reason of the abuse of or considered as one of the main category of abuse of dominant position.

(Refer Slide Time: 16:07)

It has an effect on the interstate trade as well. So, there must be effect on trade between member states, implies that impact on cross border economies. And now in a globalized world this can, not only happen within a single economy or a single market, single geographical market it can happen in many geographical markets, many parts of the world, because they are integrated; now the world is integrated with international trade. So, this relevant geographical market definition is very relevant for considering the dominant position.

(Refer Slide Time: 16:45)

Section 2(r) defines what is the relevant market? So, the relevant market means the market which may be determined by the commission with reference to the relevant product market or to the relevant geographic market. It is not with regard to the whole market, but where that particular product has a dominant position or whether such a firm is using its power to have an absolutely dominant position in a particular market.

(Refer Slide Time: 17:10)

So, this relevant market we have already talked about, there can be a product market or geographical market. So, the product market comprises of the products, services which are regarded as interchangeable or substitutable in nature. That is the product market. And the geographical market is the relevant geographical market, the area in which the concerned undertaking are involved in the supply and demand of the products and services. So, geographic market is very specific in nature and in cases there is interchangeable products are available.

(Refer Slide Time: 17:42)

It is simply not the physical territory, but the only territory. The conditions of competition are severely affected by the activities of this dominant firm in this geographical market. So, the complete India may not be geographical market, but it can be a group of states or a region can be taken into consideration for this particular relevant market consideration of relevant market. So, uniformity of composition must be present in the relevant geographical market for consideration of abuse of dominant position.

(Refer Slide Time: 18:18)

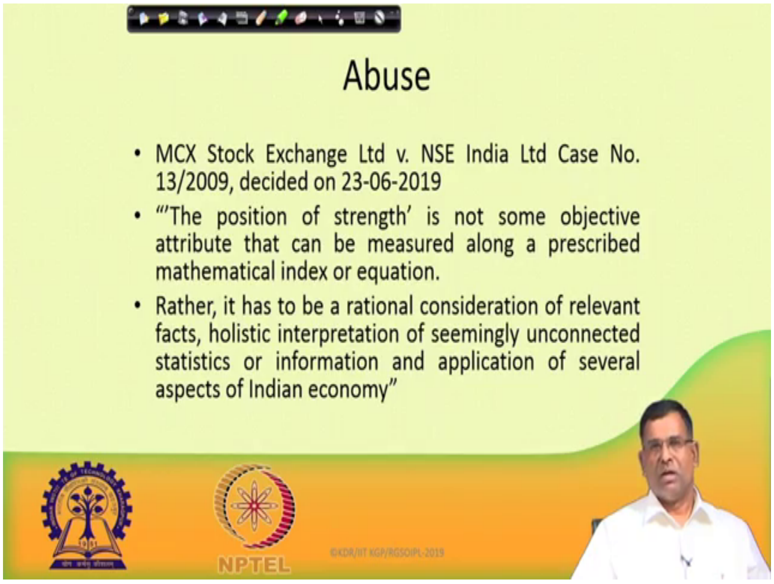
So, the relevant market considerations are mentioned under Section 19(6). These are the factors which the Competition Commission of India is going to take into consideration: regulatory barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport cost, the language, the consumer preferences, the need for secure regular supplies.

These kind of factors will be taken into consideration for considering whether it is a relevant market or not. Then the physical characteristics and end use of goods are also one of the criteria for considering the relevant factor under Section 19(6) and the prices are definitely one of the important factor.

(Refer Slide Time: 19:08)

And Section 19(7) also enlists some of the factors to be considered for relevant product market. These are the physical characteristics and end use of products; then prices of goods or services; then consumer preferences, exclusion of in-house production; then existence of specialized producers; then classification of industrial product. These are relevant for consideration of the abuse of dominant position.

(Refer Slide Time: 19:31)



So what do you mean by abuse in the strength? *MCX Stock Exchange Limited versus NSE India Limited* In this particular case it was decided very recently that the position of strength in the market is not some objective attribute that can be measured along with the prescribed mathematical index or equation. So, it is not a straight jacket formula rather it has to be a rational consideration of the relevant facts mentioned under Sections 19.

And also a holistic interpretation of statistics, information, application of several aspects on the Indian economy is to be taken into consideration for the determination of dominant position and the abuse of dominant position.

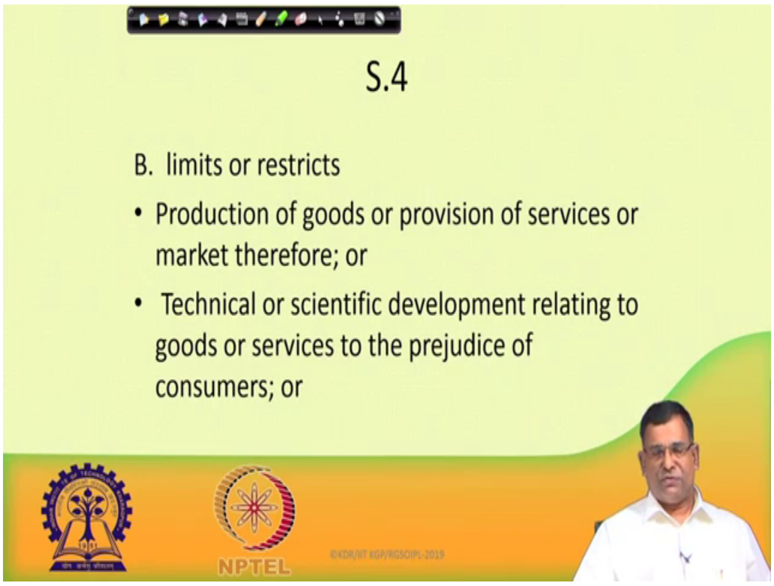
(Refer Slide Time: 20:25)

If independent competitive forces are prevailing in the market, then you can say that the competitive forces are available in the market or exist in the market being evidence of non-abuse of dominant position. If there is no competitive force in the market, it shows there is a dominance in the market, that means, the competitive process is absolutely absent from the market. It is an evidence of dominant position by an enterprise in the market.

(Refer Slide Time: 21:01)

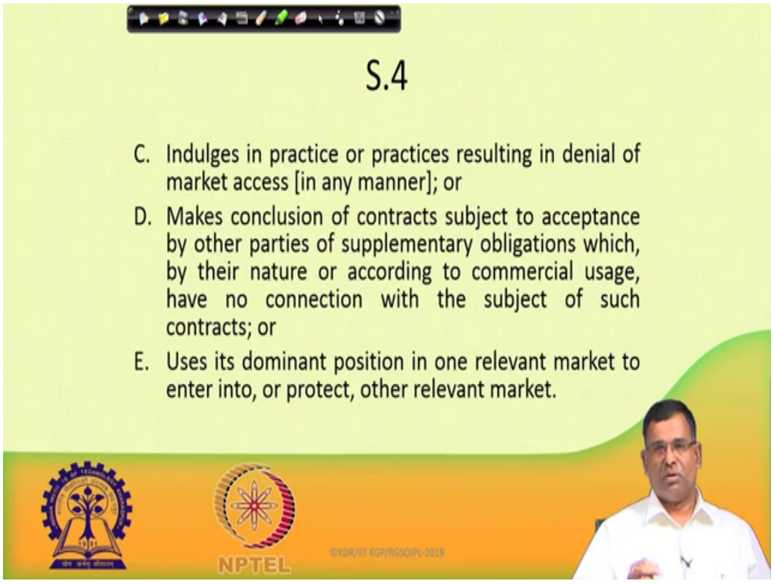
So, how it is going to affect consumers or the markets in favour? So, if the enterprise has a higher degree of strength and then there will be lot of pressures on the competitors as well as on the consumers. It is absolutely a loss to the consumers and the competitors will be eliminated from the market. And it may create an environment, a market situation or an environment which would severely affect, distort the market conditions and the competition in the market.

(Refer Slide Time: 21:38)



So, Section 4 of the Indian Competition Act provides certain limitations or restrictions. And these are the type of abuse of dominance; that means, the production, limiting the production of goods or services and markets, then preventing technical or scientific development relating to goods or services.

(Refer Slide Time: 22:05)



And you are preventing some kind of benefits to the consumers, then indulging in practices in the access, denying the market access and then prevent entering into contracts with the competitors, constraint of trade, restraint of trade and the control of relevant market and geographical market.

(Refer Slide Time: 22:35)

The group is mentioned in Section 4 of the Competition Act. It is two or more enterprises directly or indirectly, in a position to exercise 26 percent of the more of voting rights or able to appoint more than 50 percent of the members on the board of directors of the other enterprises to control the management in the affairs of the other enterprises.

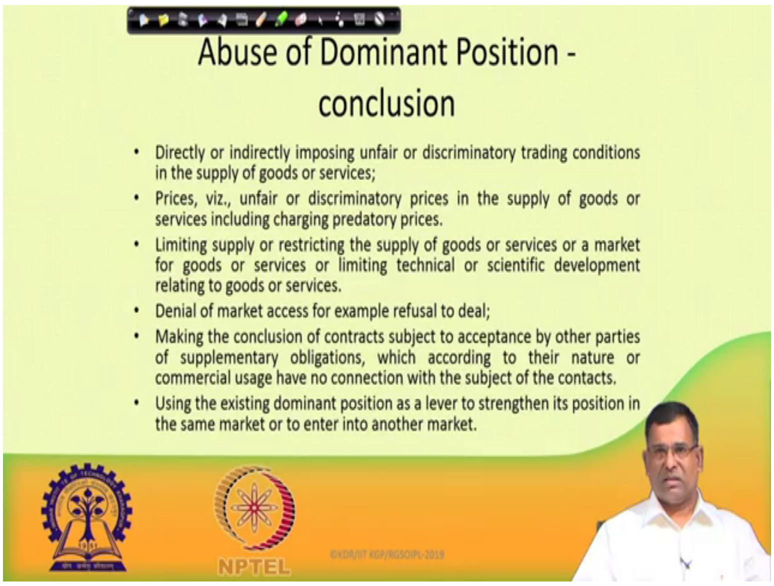
(Refer Slide Time: 23:03)

So, next we will discuss about these combinations. If you summarize the factors to determine the dominant position, it is definitely the market share, size and resource of the enterprises, then economic power of the enterprise, allocation of resources, larger allocation of resources, dependence of consumers on the enterprise. All these are the factors should be taken into consideration for the dominant factor.

(Refer Slide Time: 23:27)

And some of the other factors are the market structure and size of the market, the source of dominant position, the social factors, the social cost. There is a social cost attached with all dominant positions and those who are operating in the market.

(Refer Slide Time: 23:49)



So, as a conclusion we can say that, the dominant position directly or indirectly imposes unfair or discriminant trading condition, discriminatory conditions on the supply of goods or services. Then secondly, they impose prices, unfair prices or discriminatory prices on the supply of goods or services including even predatory prices; that means, the prices which are lower than the cost of production; then limiting supply supply of goods and services to the market; and also preventing the technical or scientific development relating to that particular goods or services.

Then fourthly you can see the denial of market access i.e. a refusal to deal with the other companies; even though there are prescriptions like the *standard essential patents* to deal with this kind of situations. And then making the conclusion of contracts, subject to the acceptability of the market dominant power is also considered as the abuse of dominant power; then using the existing dominant position to enter into another market. So, in toto you can see that all these activities are considered to be prohibitive in nature in a market and that is why it is known as the abuse of dominant position. And abuse of dominant position are prohibitive under the competition law.

Thank you.