COMPETITION LAW IN NEW ECONOMY

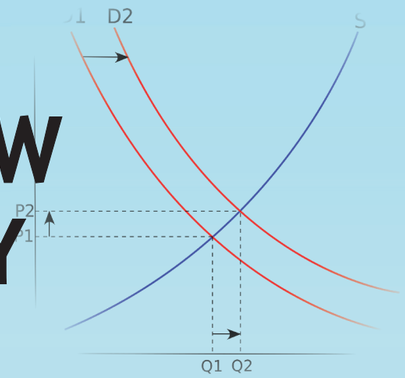
JAGANNATH UNIVERSITY
AWARDS & ACHIEVEMENTS

JAGANNATH UNIVERSITY
State Highway 22, Bhadurgarh-Jhajjar Road,
Bahadurgarh, Haryana-124507
Tel. : 01276699700

9 789381 771532
₹625

COMPETITION LAW IN NEW ECONOMY • Raj Kumar • H. L. Verma

COMPETITION LAW IN NEW ECONOMY



Forward by
Prof. H.L. Verma

Edited by
Dr. Raj Kumar

JAGANNATH UNIVERSITY
State Highway 22, Bhadurgarh-Jhajjar Road,
Bahadurgarh, Haryana-124507
Tel. : 01276699700

COMPETITION LAW IN NEW ECONOMY

COMPETITION LAW IN NEW ECONOMY

EDITOR

DR. RAJ KUMAR

Head, Department of Law
Jagan Nath University, Bahadurgarh, Haryana

JAGAN NATH UNIVERSITY

State Highway 22, Jhajjar Road
Bahadurgarh, Haryana

COMPETITION LAW IN NEW ECONOMY
Dr. Raj Kumar

ISBN: 978-93-81771-53-2

First Edition: 2016

Price: ₹ 625.00

Published by
JAGAN NATH UNIVERSITY
State Highway 22, Jhajjar Road
Bahadurgarh, Haryana
Phone: 01276 699 700

Printed at:
SAVERA PUBLISHING HOUSE
4754, Akarshan Bhawan
23, Ansari Road, Darya Ganj
New Delhi-110 002
Ph.: +91-11-23276862, 43551008

Typeset at:
PP Computer, West Vinod Nagar, Delhi

Foreword

It gives me pleasure to write the foreword for the Book on 'Competition Law in New Economy'. This book is based on the proceedings of the National Seminar organized by the University on this subject on April 23, 2016. The select papers on different topics relating to the theme, contributed by academicians representing various reputed institutions have been included in the book. The book is an attempt to publish papers relating to new competition regime, its scope, ambit and various dimensions in the present era of globalization. Competition law has grown at an incredible rate in recent years in response to the vast changes in economic scenario that have taken place around the world. In this era of globalization, there are various laws which are not only of national importance but rather they require international perspective. The Competition Law is one of such laws and this legislation gained importance in India, when at the advent 21st of century economic globalization was at its full momentum. Introduction of the Competition Act, 2002 was a key step towards India facing competition both from within the country and from international players. The objective of the Act, as stated in the preamble, is basically to provide for economic development of the country and for this purpose to establish a Commission which can prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets.

The laws and principles of the international domain have always influenced in developing the national laws. India has a very young competition regime and therefore India can learn from the experiences of more mature international regimes, mainly the EU and US. Indian authorities should examine the ideas and institutions that provide the legal framework for global competition law and how they operate in today's globalized world. US anti-trust law has always been at the center of the global governance picture, but India can also learn from EU competition law experience which is also rich and varied. This will help India to set up a strong and effective competition regime and will be of great value for future competition law development.

Every competition regime has its objectives that it seeks to achieve, some of which may be particularly linked to the peculiarities of the economy of the country. However, it has been widely agreed that the purpose of competition policy is to protect competition in order to maximize consumer welfare. Competition Law not only protects competition but also nourishes it with the aim of social welfare. Competition serves two purposes, firstly it helps in effective and efficient market outcomes and secondly, it helps consumers get a good deal. Competition leads organizations to compete resulting gains to customers by means of the lowest level of costs, innovation or by using their strengths and skills at maximum level. The increasing number of competition regimes in the world itself proves its importance.

In a globalized economy, no developing country can survive without a strong competition regime. Trade has essentially become global in nature and markets no more operate only inside the national boundaries.

Multinational companies control many sectors while domestic players rely on these companies for sales or supplies. Therefore, developing countries are in a much more need of strong competition policy so that they can ensure that multinational companies do not abuse their market power. Developing countries also have to protect small producers against anti-competitive practices of big companies. In this way, all trade will gain full benefit of globalization. Competition regime also promotes transparency and enhances the attractiveness of a developing economy to foreign investment which in turn maximizes the benefit of such investment to the host country.

With this perspective, the Department of Law of Jagan Nath University organized National Seminar on "The Role of Competition Law in New Economy: Issues, Challenges and Opportunities" on April 23, 2016. The focus of the National Seminar was on newly emerging regime of Competition Law in India and the Seminar was conducted successfully with highly motivated participants. This book is in pursuance of this National Seminar and is being introduced to provide in-depth knowledge about the Competition Law in India. This valuable book will be very helpful and enlightening for academicians, scholars, students as well as practitioners, who will get in-depth knowledge of the subject in a very clear style. This book will significantly contribute to the existing literature on the subject and can be used as a path forward to suggest possibilities in the field of competition law. The Book covers well-researched papers on every possible aspect of competition law of India.

I congratulate Dr. Raj Kumar, and all other colleagues from Department of Law and Department of Management for successful conduct of the Seminar and for bringing out this Book.

I take opportunity to convey thanks on behalf of the University to all the authors who contributed papers for this book.

Prof. H.L. Verma
Vice Chancellor
Jagan Nath University, Haryana

Preface

Department of Law, Jagan Nath University, Bahadurgarh organized a National Seminar on "The Role of Competition Law in New Economy: Issues, Challenges and Opportunities" on April 23, 2016. The Seminar was a successful event and saw participation of academicians, students, scholars and practitioners from all parts of India. The University is thankful to the Competition Commission of India for nominating its Deputy Director (Law), Mr. K.K. as a Resource Person and Chief Guest for the inaugural function at Seminar. We are thankful to Dr. Somdutt Bhardwaj, Raffles University, Neemrana, Alma Mater of University Aberdeen, Scotland, for accepting our invitation as Guest of Honour. We are also thankful to Sh. Manish Gupta, Chancellor of the University for gracing the occasion and Prof. H.L. Verma, Vice Chancellor for motivating us to organize the Seminar at such a large level. We are grateful to all the subject experts including Dr. Pramod Malik and Dr. Kritika form BPSMV, Khanpur, Dr. Surender from Central University Punjab, Dr. Reeta Garg, Amity Law School Delhi, Prof. S. B. Mishra, BITS Pilani, for gracing the occasion and for accepting the role to act as Chair and Co-Chairpersons in different sessions.

This Book on "Competition Law in New Economy" is outcome of the Seminar and consists of select papers contributed by the experts. The Book contains Articles on broad topics including Abuse of Dominant Position, Cartelization, Competition Law and IPR, Combinations and CCI. We are thankful to every participant and contributor of the paper. The papers contributed on Abuse of dominant position include papers of - Tesu Gupta, Jagan Nath University, Haryan, Neha Prajapati and Pooja Awasthi, Amity Law School, Jaipur, Ranjana Dubey, Amity Law School, Noida, who have written on Abuse of Dominance and Competition Law in broad-spectrum. Arunima Prasad and Sunidhi Gupta gave emphasis on E-Commerce and Abuse of Dominance. Atreyi Das from Gujarat National Law University elaborated the situation when refusal to deal becomes an abuse of dominant position. Gopa Chandra Mandal from University of Calcutta has written on Issues and Approaches for developing countries whereas M.A. Saleem Ahmed critically analysed the situation in Indian Context. Isha Saluja, Jagan Nath University, Haryana presented a study on Predatory Pricing in India and its effect on retailers. Joyeeta Banerjee and Rajdeep Banerjee, Advocates tried to remove the confusion which perdures to perplex all.

The papers contributed on Competition Law and CCI includes the papers of Preeti Mechan from Gujrat National Law University, who has critically analysed the CCI approach and quantum of penalty. Anita Kurana from Jagran School of Law has written on how the CCI evolved. N. Nisha Devi from Tamil

Nadu has written on International Anti enforcement and European Union. Rekha Rani, ILR, Faridabad explained the role of CCI to curb negative aspect of competition. Pradeep Kumar from JJT University has written on challenges in the path of competition. Vagavi Prakash, Kumar Shantanu Jakhar, Jagan Nath University Haryana presented their general paper on Competition Law whereas Dr. Aqueeda Khan, Monad University Hapur explained issues and challenges relating to it. Dr. Brajesh Kumar Singh, Amity University Gurgaon explained the role of Competition Law in New Economy.

The papers contributed on IPR and Competition Law included the contributions of Dr. Manish Yadav and Prof. G.S. Rajpurohit who have written on interface between IPR and Competition Law. Abhishek Sharma form Gujrat National Law University explained the 3D in relation to trade mark. Dr. Reeta Garg, Amity Law School Delhi who acted as a Co-Chair and also presented a paper on IPR and Competition Law: A Balanced Equilibrium. Himani Sagar from VIPS College, Arindhya Tiwari from Galgotias University, Priyanka Dhar from Amity University, Noida and Bharat Jumrani from Gujarat National Law University explained the relationship of Competition and IP Law.

The papers contributed on Cartels include writings of Archana S. Dhawan, Divya Kathuria from Raffles University, Neemrana, Jiten Mishra from Jagan Nath University Haryana, Deepshikha Chauhan and Nikhil Rajput from CPJ College, Matthew Adefi Olong from Nigeria.

Rupal Marwah, Amity Law School of GGSIP University has written on emerging specific issue in Indian perspective of Indian Civil Aviation Industry and Hon. Fola Ajayi and Matthew Olong, Nigeria has written on E-Commerce and Competition Law.

In last, we are thankful to the faculty members Deepak Singh, Isha Saluja, Ritu Sharma, Harminder Singh, Atul Arora, Rajesh Mehra, Vagavi Prakash and students of the University for their help in bringing out this book in present form. In the entire book, contains 36 papers giving a wide coverage to subject of the Competition Law in New Economy. The book will be highly useful to the general readers, the researchers and the practitioners having interest in the subject.

Editor

Contents

CHAPTER

1

Interface Between IPR and Competition Law With Reference to TRIPS Agreement

Dr. Manish Yadav* **and Prof. (Dr.) G.S. Rajpurohit****

Introduction

> "*The test of a first-rate intelligence is the ability to hold two seemingly opposed ideas in mind at the same time and still retain the ability to function*."
>
> – *F. Scott Fitzgerald*

Intellectual Property laws or more commonly referred to as I.P laws have been established as the legal protection of information to promote innovations and inventions with grant of rights of exclusion. Quite contrary to that, competition law has taken a course or evolved towards allowing free competition and prevention of conglomerate monopolies to promote efficiency thereby preventing market distortions.

The analysis of intellectual property as a "property right" has been an important feature of the modern debate over the establishment of legal protection of information.[1] The need to institute a property rights system in order to enhance inventiveness has always been a contentious issue in the organization of economic activity. For others, finally, intellectual property rights is a "trivial cost" to society as "an exclusive privilege is absolutely necessary in order that what is sown may be reaped", because an inventor "who has no hope that he shall reap will not take the trouble to sow."[2]

Objectives

Indeed, one can distinguish between two types of innovation: stand-alone innovation, which refers to the situation where the IP right will not be used as an input to another innovation and cumulative innovation, which refers to the situation where successive innovations build upon earlier innovations.

It is widely accepted that cumulative innovation substantially increases social value. As Newton once wrote, "(i)f I have seen further it is by standing on ye shoulders of Giants". Public authorities recognize this reality by establishing innovation clusters, such as the Silicon Valley in the United States, which provide the possibility for information exchange and the development of research synergies.[3]

They may have the interest of doing so only if the cumulative innovation may be in a position to compete with them in the market of the second-generation product or in the market of the first-generation product, covered by the intellectual property right. This will indirectly affect consumers as, in the absence of cumulative

* Assistant Professor (Law) at Amity Law School Centre-II, Amity University, Noida (U.P.).
** Head of Department, Centre for Post Graduate Legal studies, Jagannath University, Jaipur.

innovation, these will not benefit from new products and services. However, one should also take into account that in the case of a refusal to license, the IP right holders incur the risk that their rivals may develop a competing technology, which will provide alternatives to the first-generation innovation. The initial design of intellectual property rights will also affect the bargaining position of the parties to the licensing agreement.

Intellectual Property rights holders will have the interest to deter dynamic innovation that could render obsolete their technological standard and therefore distort the dynamic innovation competition between technological standards.[4] It is, however, clear that these anti-competitive effects can only be produced if the IP holder has a monopoly power in the market covered by the IP rights.

This issue is of importance as the main objective of granting IP rights is to confer to the IP holder monopoly power. The aim pursued by competition law is nevertheless not to eliminate monopoly power but simply to constraint its use. The duties of the IP holder will therefore depend on the broad or wide definition of what constitutes a monopoly power.

The objective of the study shall be to analyze the various facets of intellectual property and the rights vested in them, the emergence of anti-commons due to grant of such rights and on the other hand study the significance of competition laws with a special reference to open-resource economies and the emergence of commons due to them.

Intellectual Property and Competition Law: Possible Areas of Conflict

> "*Competition is always a good thing. It forces us to do our best. A monopoly renders people complacent and satisfied with mediocrity*."
>
> *Nancy Pearcey*

The difficult trade-off between the long-term effects of IP rights on incentives to innovate and their short-term effects on output and prices will be an important issue in the interface between competition law and intellectual property. Indeed, in theory, intellectual property law focuses more on the long-term effects, while competition law's focal point has traditionally been primarily on the short-term effects of a business practice on consumer welfare.

A broad intellectual property protection may nevertheless harm consumers in the long run if this will have the effect to restrict cumulative innovation. This possibility raises two issues: the importance of cumulative innovation to economic welfare and the relation between innovation and market structure as a competitive structure may not generate more innovation than a more concentrated one.

Indeed, one can distinguish between two types of innovation: stand-alone innovation, which refers to the situation where the IP right will not be used as an input to another innovation and cumulative innovation, which refers to the situation where successive innovations build upon earlier innovations. It is widely accepted that cumulative innovation substantially increases social value.

Cumulative innovation may take three different varieties: either the second innovation could not be invented without the first, either the first innovation reduces the cost of achieving the second, or the first innovation accelerates the development of the second by providing new research tools.[5] The social value of the innovation process is, in this case, unequally distributed between the first and the second innovator. It will therefore be important to find the right incentive mechanism in order to ensure that earlier innovators are compensated adequately for establishing the foundations for later innovators, while also making sure that cumulative innovators still have an incentive to innovate. The original design of intellectual property rights should take into account the need to compensate both the initial and the subsequent innovators.

It is, however, practically impossible to consider *ex ante* all the possibilities of cumulative innovation in designing the initial intellectual property right as, by definition, cumulative innovations have not yet been produced. Confronted with the demands of subsequent innovators to use the first-generation innovation, the

IP holders face a strategic choice: either they will encourage cumulative innovation either they will refuse to license their inventions and therefore block innovation.

They may have the interest of doing so only if the cumulative innovation may be in a position to compete with them in the market of the second-generation product or in the market of the first-generation product, covered by the intellectual property right. This will indirectly affect consumers as, in the absence of cumulative innovation, these will not benefit from new products and services. However, one should also take into account that in the case of a refusal to license, the IP right holders incur the risk that their rivals may develop a competing technology, which will provide alternatives to the first-generation innovation. The initial design of intellectual property rights will also affect the bargaining position of the parties to the licensing agreement.

Usually the IP right owner will not have the interest to refuse to license. There is an important literature explaining that, in high technology sectors, competitors usually share information by publishing their research and do not systematically have recourse to intellectual property protection in order to appropriate part of the social value created by cumulative innovation.[6] In publishing the results of their research, the initial innovators weaken their bargaining position in the licensing negotiation process. By the same token they increase the potential reward of the cumulative innovators by maintaining their incentives to innovate *ex ante*.

It is, however, clear that these anti-competitive effects can only be produced if the IP holder has a monopoly power in the market covered by the IP rights. This issue is of importance as the main objective of granting IP rights is to confer to the IP holder monopoly power. The aim pursued by competition law is nevertheless not to eliminate monopoly power but simply to constraint its use. The duties of the IP holder will therefore depend on the broad or wide definition of what constitutes a monopoly power.

It is true that IPR protection has received a great deal of attention in the technologically advanced, contemporary world due to various reasons. Competition law too is gaining a strong foothold in the gamut of laws that affect this technology-driven world. In fact IPR and competition can be viewed as two sides of the same coin. They share common objectives that are achieved through different means.

From the competition point of view, IPR may be viewed as a means to reduce competition since the IPR gives the holder of the right, an exclusive monopoly while hindering others from offering the product in the market. Also IPR may be used as a weapon to restrict competition between licensees of a particular product. Furthermore, it may be stated that competition law and IP law share the same economic objectives. If the two laws can be interpreted in the background of a common objective, forcible conflicts between these two laws can be avoided.

There is broad agreement that the two systems of law are complementary in their effort to promote innovation and consumer welfare. Both disciplines promote dynamic efficiency: that is, a system of property rights and market rules that create appropriate incentives for invention, innovation and the risks involved in R&D.[7] Competition law recognizes the critical role that IPR plays in driving innovation and so values these rights.

Competition law also plays a vital role in a liberalized economy. Its importance can be inferred from the fact that as of 2010, more than 100 countries have enacted competition laws.[8] Due to the increasingly important role played by intellectual property in the world economy, measures against the misuse of IPR have become particularly relevant in the economic policy of many countries. In fact as Martin Khor puts it, a trade-off may exist between achieving static efficiency through competition and achieving long-term efficiency through growth and innovation.[9] The market dominance of the monopoly holder may seem to be anti-competitive, but it is a part of intellectual property protection.

There is no harm in dominance of market power as long as it is not abusive. It may be considered as an abusive action when a dominant company refuses or refrains from licensing its IP to competitors at a reasonable price.[10] The application of competition law to intellectual property cases can be regarded as one of the most

complicated and critical fields of competition policy. In the past, competition and intellectual property were mostly considered contradictory. The general perception was that there are inherent tensions between IPR and competition. This was mainly because competition policy and IPR have historically evolved as two systems of law, separate and distinct. The traditional role of competition law has been to promote efficiency in the market and thereby to prevent market distortions. However, it is widely admitted that both fields of law are aimed at promoting dynamic competition in the market. However, it is still controversial whether competition law intervenes and in fact restrains the use of IPR.

It is a well-accepted norm that healthy competition in the market cannot be compromised at the cost of consumer interests, constant innovation and discouragement of competition. With the advent of new technologies in many areas, the abuse of IPR, such as blocking patents, patent pools, buyback agreements and inter-operability issues now require greater and careful research on the interface between intellectual property and competition law.

In the recent past, competition authorities and courts have prohibited certain activities of intellectual property owners which are lawful under the intellectual property legislations, but contravened some of the provisions of competition law. Intellectual property rights create monopolies, while competition law battles monopolies.[15] This is the general perception and how these two streams balance each other is the moot question.[16]

The tension between competition policy and IPR is not new and has been a bone of contention ever since the Statute of Monopolies, 1624 was enacted in England.[17] It prohibited monopolies, but permitted 'patent monopolies.'[18] Intellectual property rights protect and incentivize innovation along with a monopoly right over the invention for a limited period of time. On the other hand, competition law protects and prevents unfair competition in the market.

The aim of the competition policy in a country is to ensure fair competition in the market by way of regulatory mechanisms. It is not intended to create restrictions or constraints that may be detrimental to the growth of the society. Companies can monopolize their technologies for a limited period of time, but they cannot maintain a monopoly over the market. Intellectual property protection *per se* is not abusive and ironically is only serving its legitimate purpose, namely, to create incentive for further innovation, when it dominates the market. However, when companies refrain from licensing their intellectual property to competitors, they undermine the basic tenets of competition law as well as the spirit of intellectual property protection.

The Integration of Competition Law Concerns in Intellectual Property Law

Intellectual property has developed its own mechanisms in order to set limits on abusive patent exploitation of intellectual property rights. I will examine the issue of patents as these are the stronger IP rights in the sense that they give the possibility to the IP owner to exclude others from the use of the IP right. Copyright law only protects from copying (duplication, adaptation, distribution and public performance) and is subject to important exceptions and defences, such as the fair use doctrine.

"Inadvertent" re-creation of the copyright work is also not actionable. "Inadvertent" infringements of patents are, on the contrary, actionable. More generally, patents involve a stronger exclusionary right, while copyright may be conceptualized as a governance regime.[11]

Different instruments restrict the patentee's rights once they have been granted. According to the exhaustion doctrine, the rights of the patent holder are "exhausted" after first sale by the right-owner or his consent therefore limiting the rights of the patentee. However, this doctrine relates to the free circulation of the goods embodying the patent right and does not solve the main issue covered by this paper, the possibility of the patent-holder to block cumulative innovation.

On the important reasons why IP and Competition law and policy are seemingly at loggerheads is due to the fundamentally different perspectives on the relationship between property, IP and Innovation vis-à-vis

Competition and innovation. The underlying utilitarian principle behind granted IP rights is because of market failure in differentiation. Similarly, the cause of dynamic efficiency is the underlying economic policy basis for Competition policy.

Trips Agreement and Flexibilities for Developing Countries

Article 8:2 of the TRIPS Agreement states:

"Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

However, this provision has not been interpreted by any panel of the WTO dispute settlement. While certain conditions like what amounts to "appropriate" are flexible, such measures taken must be "consistent with the provisions" of the TRIPS Agreement. This provision primarily allows non-violation and measures that may be taken under Article 40 with reference to practices that IP right holders resort to in imposing "unreasonably restrain trade or adversely affect the international transfer of technology." The concept of "abuse of intellectual property rights by right holders" is particularly not clear.

Some have questioned the concept of abuse underlying IP in the sense that if IP do not provide a positive right to exclude but only a negative right, how it would have the capability of causing abuse?[12] It is important to note that such a view is quite narrow looking to the possibility of IP holder choosing to harm competition by exercising his rights in several different ways.[13]

In the context of Principles laid down in Article 8, a WTO panel has come to a conclusion that

> "These principles reflect the fact that the TRIPS Agreement does not generally provide for the grant of positive rights to exploit or use certain subject matter, but rather provides for the grant of negative rights to prevent certain acts. This fundamental feature of intellectual property protection inherently grants Members freedom to pursue legitimate public policy objectives since many measures to attain those public policy objectives lie outside the scope of intellectual property rights and do not require an exception under the TRIPS Agreement."[14]

Article 40 is largely based on comity, where a member whose feels that an IP holder that is national or domiciliary of another member is suspected of having violated competition law. However, nothing more than a consultation is required by the provisions of this section. In most cases, members are free to adopt measures consistent with TRIPS to remedy the abuses of IP.

However, it is interesting to note that whether TRIPS allows members to have a structural presumption (per se rule) in cases of violation of competition law and policy is debtable in the light of Article 40:2 which states that "Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market."

The concept of "licensing practices or conditions that may in particular cases" is more likely to be interpreted as a rule of reason requiring competition authorities to assess pro-competitive benefits versus anticompetitive ones, rather than a structural presumption for or against all practices.

TRIPS does not provide an exhaustive list of practices, however, it is important to note that grantback conditions, conditions preventing challenges to validity and coercive package licensing are identified as the type of practices that may be abusive. In this context it is important to note that Article 40 gives a wide latitude to members to introduce take any measure consistent with TRIPS. Since there is a moratorium on non-violation complaints (Article 64:2), many practices may form part of the standard antitrust analysis as applied to IP. Moreover, Article 31 allows compulsory licence as a remedy for violations of IP.

To understand the difficulties in applying competition law and intellectual property law, it is essential to look into the systems of various countries, their practices and provisions as they deal with competition and intellectual property. While developed countries like the US, adopted legislations on competition much earlier and have been pursuing a new agenda, newly-open economies like Indiaare still experimenting with the new legislations.

Previously, patent protection and licensing activities were carried out under the strict surveillance of competition law and patents were considered monopolies. Later in the 1970s, a new series of anti-trust laws emerged as a result of proper economic analysis of intellectual property protection by scholars like Posner.[15] These laws recognized that not all IPRs are monopolies but acknowledged that some may be, in certain circumstances.

The increased protection along with increased incentives for R&D investments produced larger cumulative innovation in high technology intensive sectors like software. Some of the huge companies capitalized on this enhanced IPR protection scenario and utilized it for individual market leadership.

Difference in The Nature of Market Intervention Between IP and Competition Law

Competition law intervenes at several levels in IP protected markets for remedying anticompetitive agreements, abuse of dominance and for regulating combinations. However, the nature of intervention is significantly different. The provisions in patent law are more aligned with public interest, which are based on structural conditions. The pro-competitive effects are not in question in an analysis under patent law. The controller is only required to comply with formal conditions and not to assess issues involving lawful exercise of market power. Hence provisions in patent law are more in public interest.

However, any assessment under competition law would require evaluation of relevant markets and an assessment of the degree of market power held by the IP holder. Here the pro-competitive benefits of certain conditions on licences may be held as valid. It will be interesting to see how this interface develops in India owing to elaborate provisions in the Patents Act that deal with situations of abuse that may also fall fowl of competition law.

In HT Media v. Super Cassattes India Ltd. the High Court of Delhi has held that the CCI can look into violations of section 4 for abuse of dominance. However, once the CCI came to any finding which is adverse to T-Series, the CCI shall give a week's time for T-Series to approach the appropriate forum under the Copyright Act for grant of a relief. In this case, the CCI[16] has come to finding that opposite party is in contravention of the provisions of section 4(2)(a)(i) of the Act by imposing unfair condition of MCC on private FM radio stations.

There was also a cease and desist order issued in favor of the complainant. The Commission further directed to suitably modify the unfair condition of MCC imposed on private FM stations in India in its existing agreements within 3 months of the date of receipt of this order. Penalties were also imposed.

It may be interesting to note that since the time duration for applying for a compulsory licence under the patent law is three years, could the CCI intervene to prevent any immediate abuse on the part of the patent holder? This is not very clear from any current practice in the Indian jurisdiction.

Information and Communications Technology (ICT)

The Info-tech industry is currently into a lot of litigation involving violation of competition law across the world. The problem is acute in cases of standards-essential patents (SEPs). Standards are set by standard setting organizations (SSOs) across the globe. These technical standards are encumbered by patents. Hence SSOs seek a Fair, Reasonable and Non-discriminatory (FRAND) licensing commitment from patent holders. However, they do not determine the FRAND terms and leaves it to individual parties i.e. the patent holdersand the licensed manufactures to negotiate. Hence, while standards are meant for collective public use, patent are private exclusive rights.

Standards implementers have an interest in getting the FRAND licence at a reasonable price so as to avoid royalty staking. However, patent holders may end up suing manufacturers for patent infringement of SEPs. A pertinent question is whether or not injunctive relief must be granted for cases involving SEPs. Most jurisdiction have denied injunctive relief by emphasizing that when monetary damages are sufficient, there is no irreparable harm that is caused to the patent holder.[17] However, in India, Ericsson has been able to obtain a consent order in which the court has determined interim royalties until the conclusion of the trail.[18]

Non-compliance of such an order could lead the invocation of injunctive relief. Since validity can be an issue in cases involving SEPs,it is important to maintain restraint in granting injunctive relief. In fact, the European Union Competition Commission has held that:[19]

"Seeking injunctions before courts is generally a legitimate remedy for patent holders in case of patent infringements. However, the seeking of an injunction based on SEPs may constitute an abuse of a dominant position if a SEP holder has given a voluntary commitment to license its SEPs on FRAND terms and where the company against which an injunction is sought is willing to enter into a licence agreement on such FRAND terms. Since injunctions generally involve a prohibition of the product infringing the patent being sold, seeking SEP-based injunctions against a willing licensee could risk excluding products from the market. Such a threat can therefore distort licensing negotiations and lead to anticompetitive licensing terms that the licensee of the SEP would not have accepted absent the seeking of the injunction. Such an anticompetitive outcome would be detrimental to innovation and could harm consumers."

In India, Micromax and Intex have approached the CCI complaining that Ericcson's conduct in discriminating manufacturers in terms of differential royalties amounted to abuse of dominance since the royalty rates were not based on actuals but on final price of the end product. The CCI has initiated investigations against Ericcson after finding a prima-facie case. However, the question of seeking injunctive relief and its relationship with abuse of dominance has not been tested. Both intellectual property rights and competition law have co-existed separately and peacefully since a number of years. It was later understood that competition law can provide a boost to IPR since the market would be unpredictable, less complacent, more innovative and grow faster due to the impact of competition law. A plethora of cases as held by the ECJ elaborated on the fact that the real concern that competition law has with IPR is not with the existence of IPR but with its exercise.

There are theories that imply usage of competition laws in IPR issues.

(i) Potential abuse of monopoly with respect to pricing, especially in developing countries where effective substitutes to IPR protected products may not be readily available.

(ii) With regard to business strategies and dominant abuse of IPRs, competition law provides a cushion in the form of anti competitive agreements. Section 3 of the Competition Act, 2002 deals with anti competitive agreements like horizontal agreements (agreements to limit production/supply, fix prices, bid rigging, allocate specific markets) vertical agreements (tie-in arrangements, exclusive supply/distribution arrangement, resale price maintenance, refusal to deal). Cartels are further restricted under the domain of anti competitive agreements. Cartels are agreements between enterprises, persons, a government department and association of persons not to compete on price, product, services or customers.

Further, abuse of dominant position is dealt under Section 4 of the said Act. Such abuse is prominent by predatory pricing, limiting production of the goods, creating barriers to entry of such goods, denying market access, gaining advantage in another market by using dominant position in the present market.

It is pertinent to note that the Competition Act, 2002 incorporates a blanket exception for IPRs under Section 3(5) based on the principle that IPRs deserve to be isolated and protected the essential element is innovation. If the Act interferes in technological or artistic or intellectual innovation, the resultant product would not reflect the novelty that it intends to provide. Hence, the Act merely does not permit unreasonable actions or methods from taking

place under the pretext of protecting one's IPR. To conclude, the Competition Act guards those IPR licensing, or other supply/distribution agreements which is governed by or for IPR products or services.

What is appalling is that the Act does not mention exhaustion, compulsory licensing or parallel importation. Also, an IPR holder would definitely resort to a complaint under Section 4 since his rights are curtailed under Section 3. Abuse of dominant position would albeit provide a much narrower scope as compared to proving an anti competitive arrangement, but nevertheless, all IPRs have the potential of raising an issue in competition policy perspective. Hence, this bar in fact, gives more power to the IPR holder and there is no consideration of public interest or licensees or assignees.

In the case of Dr. Vallal Peruman v. Godfrey Phillips (India) Ltd. (MRTP Commission 1994) and Manju Bharadwaj v. Zee Telefilms Ltd. (MRTP Commission 1996) it was held that the view that unfair trade practices could be triggered by the misuse, manipulation, distortion, contrivance or embellishment of ideas, it would amount to trade mark misuse and the IPR holder would expose himself to an action.

In India, the IPR laws like the Patent Act or Copyright Act or Trade Marks Act have over riding powers over the Competition Act in matters related to any abuse of IPR. If an anti-competitive result arises from the exercise of the rights by the patent holder, the Patent Amendment Act (2005) provides for issue of licenses to stop such anticompetitive activity. It is abysmal that the role of Competition Commission of India is nil in this respect. Instead, an amalgamation of the two Acts can be made, where tie-in arrangements, prohibiting or revoking license in case of any infringed competing technology, patent pooling, royalty payment, measures to be taken after the patent has expired, and so on. Competition Law needs to override the IPR Acts when it comes to handling any market abuse of the later.

Interface in Various Jurisdictions

United States

The role of IPR in competition law is not widely dealt under the United States antitrust legislation. However, with advancements in both competition law and Intellectual property law, there have been long debates regarding the immunity to be granted to IPR in the ambit of antitrust laws. The traditional view pertaining to IPR saw IP laws as key to monopolies, which were contrary to the Anti-trust practices.[20]

However, with emerging jurisprudence in the field of IPR, there has been an inclination towards the view that IPRs allow consumers exercise the freedom to substitute products and technologies with other products and technologies available in the market. The Department of Justice and other authorities have analyzed the contentious issue very closely and have inferred that presence of IPR does not necessarily amounts to abuse of dominant position or creation of monopolies.[21]

In the furtherance of the same, a framework was established upon deliberations and discussions by various agencies and authorities and consequently resulted in the formulation of an antitrust "safety zone".[22]It pertains to the regulation of licensing agreements under IP laws for providing certainty and boost up competition in the market. The framework and guidelines related to the safety zones enumerate that no restrictions will be imposed on IP licensing agreement in case the following situation arises:[23]

(a) If the arrangements and restraints under IP laws are not prima facie anti-competitive i.e. leading to predatory pricing, tying-in-arrangements, reduction of output, controlling the market or increasing prices; and

(b) If the total account of each relevant market affected by the restraint imposed by the licensor and licensees together is not more than 20 percent; and/or

(c) If, apart from the parties relating to the licensing agreement, there are four more specialized entities that are independently controlled and pose incentive to research and development which proves to be a close substitute to the R&D activities of the parties to the licensing agreement.

Further, the Department of Justice and Federal trade Commission have narrowed down the licensing agreements under IP and assignments that would be subject to liability under antitrust law:[24]

(a) Conditional refusals to license which cause competitive harm;

(b) Tying arrangements (if the seller has market power in the tying product; the arrangement has an adverse effect on competition in the relevant market for the tied product; and the efficiency justifications for the arrangement do not outweigh the anticompetitive effects); and

(c) Cross licensing and patent pooling agreements where the arrangements result in price fixing, coordinated output restrictions among competitors or foreclosure of innovation.

Europe

The interface between IPR and competition law is dealt in Article 81 of the Treaty of European Commission.[25] The relationship between licensing in IPR and competition law is enumerated by EC in detail. The journey can be traced as a shift from a liberal approach to more intervening approach. EC has adopted a more economical and market-centric view, which is reflected in the TIBER of 2004, coupled with guidelines of technology transfer.[26] Article 82 of the EC also plays a crucial role in case of abuse of dominant position concerning agreements under IPRs.[27]

EC has broadly issued 2 block exemptions that explicitly provide immunity to IPRs from the conduct rule concerning anti-competitive agreements. However, this does not mean that the immunity extends to conduct rule concerning abuse of dominant position too.[28]

The 1st block exemption is the "specialization agreement" that addresses the IPR was issued in year-2000.[29] It deals with the exemption of provisions of use and assignment of IPR that are expressly mentioned in the specialization agreement subject to compliance of various condition mentioned therein. Some of them are:

(a) Necessity of use of Intellectual Property Rights and assignment for the implementation of the specialization agreement;[30]

(b) The combined market share of the participating undertakings should be less than 20% of the relevant market[31]; and

(c) The specialization agreement must not directly or indirectly have the object of: (a) fixing prices when selling the product to third parties; (b) limiting output or sales; or (c) allocating markets or customers.[32]

The second block exemption, which addresses IPRs expressly, is the "technology transfers" block exemption that was issued in 2004.[33]It pertains and regulates the exemption of patents, know-how and copyright assignments and licensing agreements from the perspective of the conduct rule of anti-competitive agreements, subject to conditions and limitations underlined therein. Some of these are:

(a) In case of agreement between the competitors, the combined share of the relevant market accounted for the parties must not exceed more than 20%.[34]

(b) The share of the relevant markets individually accounted for by each of the parties must not exceed 30% in case of agreement between the non-competitors.[35]

(c) It bars inclusion of agreements containing severely anti-competitive restraints.[36]

Conclusion

> "*The only means of strengthening one's intellect is to make up one's mind about nothing, to let the mind be a thorough fare for all thoughts*."
>
> — *John Keats*

It can undoubtedly be inferred now that both IP and competition law have complementary goals. Both are working towards achieving the ultimate objective of promoting innovation and protection of consumer & economic welfare. IP furthers innovation which consequently results in promotion of competition in the market. Over the time, direct goals of these two domains of law have been sufficiently reconciled for attaining the optimum middle path.

IP confers rights to the property holder to enjoy the returns of the disclosure, while competition law is required to deal with IPR in a manner of not absolutely curtailing it rather reconciling it with the goals of competition law. Competition law should impose regulation on IPR only to the extent of interference by holder of IPR in the domain of competition law. There is a need to strike an optimum balance between the policies of IPR and competition law. This will facilitate the long term relationship between the two along with fulfilling the goal of innovation and economic welfare.

However, there are certain inferences that need to be taken into consideration while reconciling the IP law and competition law. IPR confers exclusive rights on the proprietor and hence, it must be regulated with regard to the following points.

Firstly, since the jurisprudence pertaining to effect of IPR on competition law is restricted only to the jurisprudence from U.S., ECJ and sparsely from other jurisdictions; hence, its activities relating to acquisition of ownership under IPR for strengthening monopolies should be seriously discouraged.

Secondly, IPR law must be regulated only in the sphere where it causes adverse effect on the competition to prevent unnecessary interference in the IP laws.

Thirdly, IPR companies must be regulated efficiently to prevent concentration of market power in the hand of few to prevent the potential threat of cartels and abuse of dominant position.

CCI must be given ample power and jurisdiction to scrutinize distortion of competition and refusal to deal by the industries and firms in the market.

Fifthly, excessive pricing and refusal to deal unnecessary on frivolous grounds should be made subject to CCI scrutiny to facilitate smooth functioning of the market.

The detailed analysis of both the streams- IPRs and competition law direct us to the conclusion that both have overlapping issues which can't be dealt in isolation. Despite both are in essence poles apart, however, their goals and objectives are converging than conflicting as understood in general parlance. Despite the fact that there are intricacies and sensitive issues, both the streams have managed to reconcile and strike a middle path in order to ensure the fulfillment of the ultimate objective of common good and protection of consumer welfare.

Thus, at this initial stage of competition law in India, the emerging jurisprudence in India and abroad allay down sufficient framework for development of competition law and regulatory scheme for IPR. The emerging jurisprudence had effectuated the inclusion of gradual changes in both the laws thereby getting prepared to tackle new challenges and plethora of new cases & disputes. Also, it is equally important from the perspective of a developing nation like India to understand the sensitive and crucial aspects of the contentious issue of tussle between IPR and its effect on competition law. The framework is set inappropriately to handle any interference with economic growth. However, a true understanding and application of laws and reasons behind the precedents would help in ensuring the smooth function of both the domains and specific needs of the Indian market.

Suggestions

(1) The concept of the abuse of IPR is not defined in any legislation in India. Hence, the understanding of it must not be restricted to the narrow scope of case laws of other countries like the US and EU.

(2) The definition of 'abuse of IPRs' ought to be 'unjustifiable use of the IPRs causing damage to the interest of the consumers and the society at large.'

(3) Using licensing as a strategy to expand IPR and to restrict or eliminate competition for improper benefits also must also be considered as 'abuse of IPRs.'

(4) The acquisition of IPR with the purpose of strengthening monopoly power in the market should be regulated properly with clear technology transfer guidelines in India.

(5) Merger guidelines should be properly implemented to avoid concentration of undertakings in IPR rich companies.

(6) Unilateral refusal of licences or refusal to deal by parties who have violated standards ought to be made subject to the scrutiny of the CCI. In the case of tying in relevant markets, due consideration should be given to factors such as purpose of selling, the interrelation between tying and the tied product, transaction practice and its effect on competition in the market.

(7) Excessive pricing or high prices not related to any objective criteria is the essence of exploitation and fair price ought to be ensured in IPR protected products through competition policies.

(8) Pricing in developing and developed countries should be based on consumer capacity to pay and not on discriminatory prices which are violative of competition law.

(9) Different licence fees for different markets are *per se* not in violation of competition law. Hence, the pricing policy of a dominant firm should be based on the economic balance of consumers rather than being inherently exploitative in nature.

(10) Refusal to license on unreasonable and unjustifiable grounds should be dealt strongly by the CCI and ought to be held anti-competitive.

(11) Super dominance of the market *per se* does not violate competition provisions. However, the means and methods used to reach such dominance should be examined and different licensing tactics to retain such dominance should be made anti-competitive and be considered the abuse of such dominant position. The exhaustion principle should be strongly applied in technology areas, so that the IP holders may not be able to impose unreasonable conditions on the purchaser after selling the product.

(12) Tying arrangements are restrictive practices in the market and should be strictly dealt with under competition provisions.

(13) The Indian Competition Act, 2002 does not include high prices as an abuse of dominant position. Section 4 of the Competition Act therefore needs to be amended to include high prices as a criterion as well.

In conclusion, it can be observed that the relationship between competition and intellectual property rights with its intricacies and ironies is here to stay. It is amply clear that these two streams of law are bound to converge and cannot be expected to stay as water tight compartments exclusive of each other. With increased trade and stronger economic ties between nations, it is absolutely imperative that countries strengthen their legislative systems in order that they are well prepared to handle any impending crisis that may require them to choose between either streams of law without compromising on individual or public good as the case may be. It is important that laws be made foolproof in order to ensure greatest good for the largest number while at the same time assuring ample protection and encouragement to an individual's creativity and innovation. The winds of change are set to bring with them a new set of challenges with regard to conflicts in overlapping zones of competition law and IPR and it is important, particularly for developing nations like India who are at the threshold of cutting edge technology to protect their innovations and be able to handle the onslaught of economic policies in the name of healthy competition.

References

1. S.N.S. Cheung, *Property Rights and Invention*, 8 Res. L. & Econ. 5, 6 (1986).
2. J. Bentham, The Works of Jeremy Bentham, Ed. J. Bowring 71 (1843) quoted in N.S. Cheung, Property Rights and Invention.
3. For an analysis of the Silicon Valley model in product system development, see M Aoki, Toward A Comparative Institutional Analysis (The MIT Press, 2001).
4. D.W. Carlton & R.H. Gertner, Intellectual Property, Antitrust and Strategic Behavior (2002).
5. S. Scrotchmer, *Standing on the Shoulders of Giants: Protecting Cumulative Innovators*, ed. S Scrotchmer, Innovation and Incentives (MIT Press, 2005).
6. O. Bar-Gil & G. Parchomovsky, The Value of Giving Away Secrets (2003).
7. Varney Christine A, *Promoting innovation through patent and anti-trust law and policy*, (US Department of Justice, 2010).
8. Taimoon Stewart, Competition Law in Action (2012).
9. Khor Martin, Intellectual Property, Competition and Development (2012).
10. Kobak James B. Jr, Antitrust Treatment of Refusals to License Intellectual Property: Unilateral Refusal to License Intellectual Property and The Antitrust Laws(2011).
11. H.E. Smith, Intellectual Property as Property: Delineating Entitlements in Information (2007).
12. Nuno Pires De Carvalho, *The TRIPS Regime of Patent Rights*, KLUWER INTERNATIONAL (2010).
13. Lemley Mark A., *A New Balance between IP and Antitrust* (April 1, 2007).
14. In EC—*Trademarks and Geographical Indications* in explaining Article 8:1.
15. Posner R, Antitrust Law: An Economic Perspective (University of Chicago Press, 1976).
16. http://www.cci.gov.in/May2011/OrderOfCommission/27/C-2011-40.pdf.
17. Shamnad Basheer**,** *FRAND-ly Injunctions from India: Has Ex Parte Become the "Standard"?* (2014) **.**
18. Rupali Samuel, *Breaking News!! DHC fixes interim royalty rates, last date of trial in Ericsson/Micromax FRAND case*(2014).
19. http://europa.eu/rapid/press-release_IP-14-490_en.htm.
20. US Department of Justice and the Federal Trade Commission, *"Antitrust enforcement and intellectual property rights: Promoting innovation and competition"* (2007).
21. *Illinois Tool Works Inc*. v. *Independent Ink, Inc.*, 547 U.S. 28 (2006).
22. US Department of Justice and the Federal Trade Commission, *"Antitrust Guidelines for the Licensing of Intellectual Property"*(April 1995).
23. US Department of Justice and the Federal Trade Commission, *"Antitrust Guidelines for the Licensing of Intellectual Property"*(April 1995)
24. *Illinois Tool Works Inc*. v. *Independent Ink, Inc.*, 547 U.S. 28 (2006).
25. Article 81, European Union, Treaty Establishing The European Community.
26. A. Jones & B. Suffrin, EC Competition Law: Text, Cases And Materials (2008).
27. *Ibid.*
28. Article 82 of the EC Treaty prohibits an abuse by one or more undertakings of a dominant position within the common market or a substantial part of it pertaining to the extent to which it may affect trade within Member States.
29. Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.
30. Article 1(2), Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.

31. Article 4, Commission Regulation (EC) No 2658/2000 of 29 November 2000 on the application of Article 81(3) of the Treaty to categories of specialization agreements.
32. *Ibid*, Article 5.
33. Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements.
34. *Ibid*, Article 3(1).
35. *Id*, Article 3(2).
36. *Id*, Article 4.

❑❑❑

CHAPTER

2

Cartels and Competition Law

Archna S. Dhawan* and Divya Kathuria**

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary. – Adam Smith

How are Cartels Defined?

A. In USA

The Sherman Antitrust Act of 1890 has been the first measure passed by the U.S. Congress to prevent the artificial rise of prices by restriction of trade or supply. As per Section 1 of Sherman Act, every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[1]

A cartel is an association of companies or sections of companies having common interests, designed to prevent extreme or unfair competition and to allocate markets, and perhaps also to exchange scientific or technical knowledge or patent rights and to standardize products, with competition regulated but not eliminate by substituting competition in quality, efficiency, and service for price cutting.[2] An international cartel arrangement, which provides for a worldwide division of a market, constitutes a per se violation of Section 1 of the Sherman Act.[3] An American corporation violates the Act by entering into agreements with English and French companies to (1) allocate world trade territories among themselves; (2) fix prices on products of one sold in the territory of the others; (3) cooperate to protect each other's markets and eliminate outside competition; and (4) participate in cartels to restrict imports to and exports from the United States.[4] However, since American antitrust laws do not regulate the competitive conditions of other countries' economies, antitrust damage cannot be recovered where they are based solely on the alleged cartelization of the Japanese market.[5]

* Research Scholar, School of Law, Raffles University, Neemrana.
** Student of B.A.LL.B., VIII Semester, School of Law, Raffles University, Neemrana.

B. Treaty on the Functioning of the European Union,

Article 101 of the functioning of the European Union Treaty seeks to curb cartels and other agreements that may be capable of distorting free competition in the European Union's internal economic market. It states:-

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   – any agreement or category of agreements between undertakings,
   – any decision or category of decisions by associations of undertakings,
   – any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

To violate TFEU Article 101, undertakings must then have formed an agreement, developed a "concerted practice", or, within an association, taken a decision. Like US antitrust, this just means all the same thing[6] and any "undertaking" is regulated, and this concept embraces *de facto* economic units, or enterprises, regardless of whether they are a single corporation, or a group of multiple companies linked through ownership or contract.[7] The principle underlying this provision is that all the economic operators in a market must frame their policies independently to ensure a free and fair competition. Their purpose is to increase prices by removing or reducing competition and as a result they directly affect the purchasers of the goods or services, whether they are public or private businesses or individuals. Cartels also have a damaging effect on the wider economy as they remove the incentive for businesses to operate efficiently and to innovate.

Also, the term 'agreement' has been given a broad definition. The definition adopted by the Commission was laid down in *Bayer AG v. Commission*[8], and is worthy of mention:

> '*the existence of the subjective element that characterises the very concept of the agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market*'.'

C. In India,

> *Competition Act, 2002 in India gives an inclusive definition of Cartels and as per its Section 2(c),*

"Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services. Cartel is a formal or informal agreement among number of firms in an industry to restrict competition. These agreements may provide for setting minimum prices, setting limits on output or capacity, restrictions on non-price competition, division of markets between firms either geographically or in terms of type of product, or agreed measures to restrict entry to the industry to create a monopoly in a given industry. Usually cartels involve an agreement between business men not to compete with one another and they can occur in any industry and can involve goods or services at the manufacturing, distribution or retail level. In this process, industries form combinations of this type to control sales and prices.

Before the present Act came in force, the MRTP Act empowered the Central Government to set up an authority, called the Monopolistic an Restrictive Trade Practices Commission) MRTPC, which has investigative, advisory and adjudicative functions, to oversee the implementation of the MRTP Act. The MRTPC could investigate into any restrictive trade practice, on a complaint from any trade or consumer associations or upon a reference made by the Central or State Government, or upon the application made by the Director General of Investigation and Registration (DG (IR)) – which is the investigative wing of the MRTPC, or on *suo moto* basis.[9] Complaints regarding restrictive trade practices from affected parties have to be referred to the DG (IR) for conducting preliminary investigation as per section 11 and 36C of the MRTP Act. The DG (IR), after completion of the preliminary investigation and as a result of its findings, submits an application to the MRTPC for an enquiry. Restrictive trade practices are generally those practices that have an effect on prevention, distortion and restriction of competition (most of these are now include under the scope of Sec. 3 of the Act.). For example, a practice, which tends to obstruct the flow of capital or resources into the line of production, manipulation of prices and flow of supply in the market, which may have an effect of unjustified cost or restriction in choice for the consumers, is regarded as a Restrictive Trade Practice.

One example of a RTP was a cartel. As held in Union of India & Others vs. Hindustan Development Corporation,[10] 'a cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity'. Under the MRTP Act, a cartel is categorised as an RTP, which has been defined as 'a trade practice which has or may have the effect of preventing, distorting or restricting competition.'[11] In Haridas Exports,[12] the Supreme Court noted that 'a cartel is formed, inter cilia, with a view that the members of a cartel do not wage a price war and they sell at an agreed or uniform price.'

Dealing with the definition of Cartels as per various laws, it can be posed that key factors required to establish the existence of a cartel namely (i) fixing of prices, (ii) agreement by way of concerted action suggesting conspiracy, and (iii) intent to gain monopoly or restrict/eliminate competition. A strong competition law compliance program is a key to preventing cartel behaviour within a business houses or enterprises.[13] An economic study of cartels and their operations make it clear that generally cartels are formed by the industrial undertakings in the same line of business. The basic characteristic of cartel is that the combining enterprises concentrate on production according to the limits of output fixed by the cartel keeping in view the market conditions and to restrain or regulate the distribution of output for maintaining returns or the selling price of certain commodities by restrictive trade or marketing practices. Such trade combinations are used to be challenged in the courts on the ground that they are unlawful conspiracies as these agreements between firms have the potential of restricting competition. Business Houses encourage cartels because there are numerous advantages but law discourages cartels as they are presumed to be against public interest and consumers.

Cartel Theory

There is no doubt to the fact that cartel agreements harm consumers' as well as societal interests. But, they are still formed because of the hidden interests of the entrepreneurs. Enterprises or associations (horizontally

related) decide to collude in order to maximize their gains by putting at stake the consumer welfare usually, by making output and price decisions leaving the consumer with no choice but, to buy the products at the prices fixed only by the cartel or accept the market situation created by it thus, benefiting all the parties to the cartel by way of demoting competition to the maximum extent they can.

These may have various negative impacts on the consumers mainly by rising prices which reduce the elasticity of demand of the single member or parties to the cartel., restricted output as members may also agree on limiting the output and may carve up the market as parties may collectively decide to break up market into regions or territories and not compete in each other's territory thus, adversely affecting the competition in all the markets.

Also, it is an acknowledged fact that it is very difficult to trace cartels because there are informal agreements and the records of it can't be found anywhere. Identifying and breaking up cartels is an important part of the competition policy in most countries, although proving the existence of a cartel is rarely easy, as firms are usually not so careless as to put collusion agreements on paper.[14]

In *theory*, a *cartel* operates at the same volume of production and price as it would if its productive resources were being run by a monopolist by coordinating their activities in a manner that they behave, like divisions of one single enterprise, and not as a competing business which make independent decisions on quantity and price.

There is a need to know why cartels are formed and what factors lead to the formation of cartels, or say, facilitate the cartels. By analysing the theory, it can simply be put that cartels are formed by the associations to increase their profits without spending a penny on their production but, by manipulating the market forces in their favour by way of illegal agreements.

The factors that facilitate cartel formation can be analysed by going into the cartel theory. According to Walker (2006), and other popular theory on cartel formation, certain conditions will enforce the possibility of cartel formation in a market. The presence of these conditions can therefore be used to estimate the level of competition in that market, and also the lack of competition, a possible cartel formation.[15]

Also, the prevailing level of competition in the market will be significant in dealing with the probability of its forming cartels. The more the number of firms, the difficult it becomes to come on a consensus and to form illegal agreement. Undoubtedly, it is easier to create and preserve an anti-competitive association of few firms rather than many, so this is another reason why markets with few companies might be more attracted to colluding than others.[16]

The factor that is helpful in easy cartelisation is the homogeneity of a product. If the products are homogenous in nature, they are perfectly substitutable and thus market players have all incentives to collude rather than compete.[17] These factors have also been recognised by the CCI in FICCI-Multiplex Association of India.[18]

Another very important factor is that the expected gain of the illegal activity has to outweigh the gain of the legal activity to encourage the wrong doer to engage into illegal activity. The illegal cartel activity always is carried out with a vision to have an expected gain, where one will deduct the probability of being caught and the punishment from being caught, and then compare it to the gain of legal activity or say, before forming a cartel the associations would definitely ponder over the price that they'll have to pay if they are caught and the expected profits and if the expected profits are less than the penalty they have to pay, they will never go for the cartel formation which means that how deterrent the law to curb cartels is will mainly determine probability of cartel formation.

Now, when we have discussed upon the factors promoting cartels theoretically, it is pertinent to know how different laws all over the globe curb these factors from emerging to facilitate the formation of cartels and how effective they have been.

How are Cartels being Dealt?

Though the definition given by all the abovementioned laws is almost alike and means the same in gist. However, it is a universal fact that making of law is just not enough; it'll be fruitful only if it is implemented properly. So there is a dire need to study how these cartels are being tackled by the concerned authorities and how far reaching effect the law of cartels has.

EU

Detecting and enforcing actions against the organizations involved in cartel formation is one of main priorities for enforcement of European Commission within community area and Competition and Markets Authority within UK. There is no doubt to the fact that the members of cartels go to great extents to conceal and stifle evidence of their illegal activity: for instance, in Gas Insulated Switchgear,[19] participants in the cartel used codes to conceal their companies' names and encryption software to protect the secrecy of emails and telephone conversations; made use of free email providers and the anonymous mailboxes made available by them; sent messages as password protected documents: the passwords were regularly changed; systematically destroyed emails; downloaded attachments on to memory sticks rather than on to their computers; and made use of mobile telephones provided by a member of the cartel that contained encryption options.[20] *It must be noted that the Commission earnestly investigates in the cases related to cartels and tries to discover the methods used by cartels to hide their existence and ensures to keep a check in future on such methods as it s evident from the conduct of Commission while dealing with various cases.*

Competition authorities are at a disadvantage where members of cartels resort to these secretive practices, and that therefore they may have to prove the existence of a cartel by relying on inferences from circumstantial evidence.[21]

In infamous Vitamins case[22] the EU Commission imposed huge fines on eight undertakings totalling €855.23 million (reduced to €790.50 million on appeal) of this amount, Roche was fined €462 million for its participation in each of the 12 different vitamin cartels; the next largest fine was on BASF, of €296.16 million[23]; Aventis was fined €114.4 million, but it paid only €5.04 million as it had blown the whistle on most of the cartels. The action by Commission on this cartel was so strict that it was investigated not only under EU law but, the Commission's decision also followed fines in the US on the major participants of US$862 million and in Canada of Canadian $84.5 million[24]; fines of Australian $26 million were imposed on Roche, BASF and Aventis Animal Nutrition under the Australian Trade Practices Act 1974 on 28 February 2001.[25] Senior executives of Roche and BASF also had to serve terms of imprisonment in the US for their roles in this cartel.[26] Fines were also imposed in South Korea.[27] There have also been a series of actions for damages arising from the vitamins cartel.[28]

In *Aalborg Portland A/S v. Commission of the European Communities*,[29] the European Union carried out intense investigations in cement producers in European market and trade associations and statement of objections drawing a basic distinction between two types of objectionable practices was adopted, namely prices at the international level and national level. The EU held that the cement undertakings infringed the provisions of Article 81 (1) of the EC Treaty (now Art. 101 TFEU) as it participated by way of an agreement in a design to ensure non transhipment of cement to home markets and to regulate cement transfers from one country to another and participated in that agreement to exchange the price information. The Court discussed how important the economic analysis of the situation was to detect the cement cartel case. The economic analysis proved crucial when there was not sufficient documentary evidence to prove the existence of a cartel activity.

In one more instance of 2002, the German Federal Cartel Office (FCO) unearthed a hard-core cartel in the cement industry. According to the FCO, German cement market was divided by numerous cement producers amongst themselves and they agreed and decided on sales quotas and fixed prices since the beginning of

1990's. The German Court finally in the 2009 judgment relating to cement cartel fined the cement producers. It is of great significance to note the econometric evidence was presented in the court and a unique method was adopted by the Court to calculate the fine which further included 'determination of a basic amount' and 'calculation of additional proceedings'.[30] This assessment of fine was done by a group of economic experts appointed by the court.[31] After going through such instances and judgments, there is no way of denying the fact that economic analysis of the situation has proved to play a crucial role in tackling the cartel-menace or say, one method adopted by the authorities to catch the cartels and determine their penalty has been its thorough economic analysis.

The penalties for companies that breach of the competition rules can be very severe. For cartel infringements, the largest fine imposed on a single company is over €896 million; the largest fine imposed on all members of a single cartel is over €1,3 billion.[32]

- **Leniency Programme:** No doubt that the other tools adopted by the Commission to tackle cartels have proved quite efficient but, the success of leniency policy is unmatchable. What the leniency policy does is that it offers companies involved in any cartel, total immunity from fines or reduce their fines (which would otherwise be imposed on them) which report of any cartel by themselves and also help in finding the evidence or may be handover the evidence to the commission. In all, this policy has had a prominent role in fighting the cartels. It also benefits the Commission, allowing it not only to pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement. The leniency policy also has a very deterrent effect on cartel formation and it destabilizes the operation of existing cartels as it seeds distrust and suspicion among cartel members.[33]

To obtain the immunity from fine, it is necessary for company that participated in the cartel must be the first one to inform commission about the existence of the cartel and along with it provide the necessary information to discover the cartel and in case if commission had the information of any such cartel, it can come forward to handover the proper evidence to catch the cartel and is also obligated further to assist the commission in order to take steps for finding evidence related to that cartel.

The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%. The Commission considers that any statement submitted to it within the context of its leniency policy forms part of the Commission's file and may therefore not be disclosed or used for any other purpose than the Commission's own cartel proceedings.[34]

This policy does not just help in catching the existing cartels but, it has created a fear in the mind of the companies who would even think of forming the cartels and thus, the risk of cartel formation for the companies or associations has increased to a very large extent. Also, it helps in adducing evidence easily which is otherwise the most difficult task in cartel cases.

The commission has not just worked hard to frame this policy but, has been successful in implementing it as well. This policy these days has proved to be one of the best methods to fight the cartels emerging in the economy and in future too hopes to deal with them at its best. In fact the studies have been conducted which concluded that the leniency policy influenced the fine mechanism directly and proportionally and the leniency notice has a strong destabilizing effect on the duration of the cartels.. The leniency notice is widely applied, and around half the undertakings involved in cartels find the exemption from fine more attractive than taking the risk of being reported and the leniency policy is highly effective in destroying the cartelist's confidence in maintaining the initial agreement intact.[35]

India

In Builders Association of India[36] (Cement Cartel case), the Commission came to the conclusion that a group of cement manufacturers under the umbrella organisation of the Cement Manufacturers Association had indulged in cartelisation, in contravention of Section 3(3) of the Act. Since the cement industry was

not properly controlled in 1989, and the subsequent consolidation of cement manufacturers during 2001-02, the cement industry has been commonly featured as an oligopolistic market, operating through an anti-competitive collusion. Since 1991, attempts are being made to hold liable cement manufacturers for collusive price setting under the MRTP Act. However, these efforts could barely taste success in any of its steps undertaken.

In 2012, the DG through investigations found *and observed* that there has been a significant rise in cement prices over the time period, and such price increases were not just because of natural reasons but various additional factors, such as rise in cost of raw materials. Commission heavily relied on circumstantial evidence and concluded that market forces alone did not determine price and notably, prices were moving "in the same manner and same direction" in accordance with the regular meetings held by members of the CMA. Consequently, the Commission imposed a stupendous cumulative fine of Rs. 6,300 crore on the parties.

However, the decision in *All India Tyre Dealers' Federation* (hereinafter "the *Tyre case*") was stark contrast to cement cartel case, the Commission found that since the tyre manufacturing market is highly concentrated and oligopolistic in nature (thereby making it ordinary for each party to know what the other is doing) meetings held by the manufacturers did not amount to cartelisation under Section 3(3) of the Act. This however created perplexity in the market as to what would amount to cartelisation and what not.

The investigation wing of the CCI recently found Apollo Tyres, MRF, CEAT, JK Tyres and Birla Tyres guilty of cartelisation after investigation the complaint filed by Ministry of Corporate Affairs. 'These five companies under the aegis of the Association of Tyres Manufacturers Association (ATMA) have from 2011-12 to 2013-14 indirectly determined the price of tyres in the market,' said the report of the director-general's office of the CCI's investigation wing. However, a final decision will be in the hands of CCI after an oral hearing on fine and penalties which it will impose on these companies.[37]

Generally, in cases where the existence of cartel has been established, determination of the fine is next step which is set according to the gravity and the duration of a cartel. Therefore, impact of the cartel activity plays an important role in determining the fine. It is in this context that the economic analysis plays a pivotal role in assessing the impact of a cartel.

• Leniency Policy

Leniency programme is a type of whistle-blower protection, i.e. an official system of offering lenient treatment to a cartel member who reports to the Commission about the cartel. Competition authorities have framed various leniency programmes to encourage and incentivize various actors connected with the commission of such competition infringements to come forward and disclose such anticompetitive agreements and assist the competition authorities in lieu of immunity or lenient treatment. Leniency programme is a protection to those who come forward and submit information honestly, who would otherwise have to face stringent action by the Commission if existence of a cartel is detected by the Commission on its own.[38]

Section 46 of the Act provides for such leniency provisions which states:

"The Commission may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations:

Provided that lesser penalty shall not be imposed by the Commission in cases where the report of investigation directed under Section 26 has been received before making of such disclosure.

Provided further that lesser penalty shall be imposed by the Commission only in respect of a producer, seller, distributor, trader or service provider included in the cartel, who has made the full, true and vital disclosures under this section.

Provided also that lesser penalty shall not be imposed by the Commission if the person making the disclosure does not continue to cooperate with the Commission till the completion of the proceedings before the Commission.

Provided also that the Commission may, if it is satisfied that such producer, seller, distributor, trader or service provider included in the cartel had in the course of proceedings,—

(a) not complied with the condition on which the lesser penalty was imposed by the Commission; or (b) had given false evidence; or (c) the disclosure made is not vital, and thereupon such producer, seller, distributor, trader or service provider may be tried for the offence with respect to which the lesser penalty was imposed and shall also be liable to the imposition of penalty to which such person has been liable, had lesser penalty not been imposed."

To implement this programme, the Commission has made Competition Commission of India (Lesser Penalty) Regulations, 2009.

Though the procedure for leniency policy is quite intact, no notable cases have been reported under this policy which implies that the implementation of the rules and laws are not proper and have many lacunae which need to be corrected.

What India lacks: Comparing with EU Commission

India is a new comer in the field of competition law but, promoting competition has always been amongst its agenda. The MRTP Act before Competition Act curbed only the manipulative trade practices while the domain covered by Competition Act is much wider. And, consequently, it also lacks experience in tackling the cartels.

First of all, the trend observed in cases of cartels is that the CCI imposes a hefty penalty on the companies involved in cartelization and in appeal, the COMPAT reduces the penalty. As discussed earlier as well, imposing heavy penalties is the foremost condition to stop cartelization as if the penalty imposed is less deterrent or say, lesser than the profit they earn through making cartels, it will rather encourage them to make cartels instead of discouraging. This is one of the main lacunae we are facing to restrain cartels in our economy. The COMPAT recently reduced the fine imposed by CCI on Gulf Corporation to just 10% of the original penalty that is, from 29 crores to 2.9 crores only. Another company UPL's penalty was reduced from around 253 crores to 62 crores. Though these cases were not related to cartels but, this is clearly evident of COMPAT's conduct in dealing with the cases.

The COMPAT judges are the retired judges of the Supreme Court or the High Court and are habitual of adjudicating cases the way they do in the Courts in India like keeping the principle of Natural Justice in mind and interpret competition law as they interpret other laws. For instance, in Cement Cartel case (discussed above) in which the CCI imposed a considerable fine of ₹ 6300 crore and the COMPAT on 11 December, 2015, set aside the matter on the ground of violation of principle that 'only one who hears can decide', and has directed the CCI to hear the matter afresh. The COMPAT while allowing the appeals, directed the CCI to hear the cement manufacturers and pass fresh orders after following just and fair procedure within a period of 3 months from receipt of COMPAT order. The parties are also entitled to refund of the 10% penalty deposited during the hearing of the case.

How can a tribunal posed with such a great responsibility to protect the economy of the country be lenient with the ones who have been so evidently down upon to play with the rights of the consumers? It is high time to realise that Competition law is not the law like any other law, it is the law to protect basic structure of our economy that is, Competition. It would not be wrong to say that it is ***"Economics in action."*** Instead, it is more economics and less law. But, it is quite unfortunate that the retired judges in the COMPAT are the interpreter of laws, not of the economy which can only be dealt with by the economics experts.

When we compare the same with EU, the situation is opposite as the implementation of law is even more stringent than the laws. There is a proper criteria laid down for imposing fines for the associations caught involved in cartel formation. For instance, for increase of fines, in cartel cases the fine will be increased by a one-time amount equivalent to 15-25% of the value of one year's sales as an additional deterrent which bites essentially in the case of short cartels and is designed to deter from even trying out a cartel. The fine is limited to 10% of the overall annual turnover of the company. The 10% limit may be based on the turnover of the group to which the company belongs if the parent of that group exercised decisive influence over the operations of the subsidiary during the infringement period.[39] In 2015, the fines worth € 364 531 000 was imposed, in 2014 € 1689 497 000 was imposed by EU Commission and son on.[40] The Commission has fined:

- fourteen international groups of air freight forwarding companies €169 million for fixing prices and other trading conditions (2012).
- three producers of washing powder over €315 million for price fixing (2011).
- six liquid crystal display panel producers over €648 million for price fixing (2010).
- eleven air cargo carriers over €799 million for price fixing (2010).
- two gas energy incumbents over €1 billion for market sharing (2009).
- car glass producers over €1.3 billion (2008).
- four members of a lift and escalator cartel over €990 million for bid rigging, fixing prices and allocating projects to each other, sharing markets and exchanging commercially important and confidential information (2007).[41]

This data shows how stringent and strict policies have been followed to control the cartels in the market which however is lacking in India or say, the policies are not being properly followed by the COMPAT. It is important to realise for the COMPAT that all laws may not be decided on the common law principles like that of natural justice. Such penal policies in the statute need to be followed and interpreted as strictly as possible.

Another lacuna is in the implementation of the leniency policy. While in EU the policy has done tremendously well, it is still not functioning near satisfactory level in India.

A recent study on the effectiveness of this policy in EU revealed that at micro level, the cartel duration, the value of relevant sales, and the market shares proved to be the main influencers of the fine. Concerning the geographic scope, the leniency policy proved to be very effective in collecting important pieces of information, which would have otherwise needed large amounts of resources allocated by the Commission to gather the necessary incriminating evidence. As for the deterrence analysis, around half of the companies involved in this study applied for leniency, and out of the total around 85 per cent of the companies benefited from a reduction of fine. This shows that the leniency policy influenced the fine mechanism directly and proportionally. And this study has shown that in more than 90 per cent of the already formed cartels there is at least one whistle blower. The conclusion, the leniency notice is widely applied, and around half the undertakings involved in cartels find the exemption from fine more attractive than taking the risk of being reported. The leniency policy is highly effective in destroying the cartelist's confidence in maintaining the initial agreement intact. The positive effects of an effective leniency policy were also noticed at the EC's level. Due to an increasing detection rate caused by the enforcement of the leniency notice, the resources of the Commission canalized towards the identification of cartel agreements and gathering the necessary incriminating evidence are significantly reduced.[42] The aforementioned revelations by the study definitely prove that the policy has had a great impact in curbing cartels for European Union market. And, unfortunately or say, due to our own misdemeanour, there is not even a single case of cartel in India which has been solved by leniency policy and no company till now has reported of any cartel in its knowledge. One reason for its failure may be that the fines imposed after getting caught are not hefty enough to deter the companies and

they are comfortable in paying the fines imposed by the authorities which might be quite lesser than the profit they earn through cartel formation. CCI Chairman, Ashok Chawla said that 'it is right time that we reach out to people and encourage them to come out with information on more cartels.' But showing the unwillingness of market players to come forward for sharing the information and taking benefit under the programme he further said that no one has used this beneficial programme so far to tackle 'pernicious practice of cartelization.'[43]

Conclusion and Suggestions

As stated, "Competition Law is Economics in Action", it is important to understand that this law is not the ordinary law and therefore, can not be done justice with by the retired judges of the Supreme Court or High Courts. So, the COMPAT needs a panel of economists instead of retired judges to decide the cases for the economy which are based on rule of reason and per-se rule instead of rules of natural justice or other principles of law. The economists will keep in mind that only the strict implementation of statutes and guidelines can pave the way for a economy based on fair competition. It is suggested to change the composition of COMPAT and replace the retired judges with a panel of sound economists who can analyse the economic situation of competition in any dispute that comes before them.

It is an undeniable fact that though the illegal operations like that of cartels or any violations under Competition Law are operated in the name of company but, are actually the minds of the persons employed in the company. The violations have increased to such an extent that we need to go till the root of the problem and when we reach till the roots; we find the persons employed in the company enjoying the benefit of their illegal gains. So, in order to control this, it has become important to lift up the corporate veil, identify the persons involved in the violations of law and make them personally liable either by fine or imprisonment.

References

(Endnotes)

1. http://www.stern.nyu.edu/networks/ShermanClaytonFTC_Acts.pdf.
2. United States v National Lea Co., 332 US 319.
3. United States v Bayer Co., (DC NY) 135 F Supp. 65.
4. Timken Roller Bearing Co. v United States, 341 US 593. (over rules in part on other grounds by Copperweld Corp. v Independent Tube Corp., 467 US 752.
5. Matsushita Elec. Indus Co. v Zenith Radio Corp., 475 US 574.
6. *Van Landewyck* (1980) [1], per AG Reisch.
7. *Viho BV v Commission* (1995) Case C-73/95, [1995] ECR I-5457.
8. 2004 E.C.R. I-23.
9. Section 10 and 37 of the MRTP Act, 196.
10. 1994 CTJ 270 (SC) (MRTP).
11. Section 2(o) of the MRTP Act, 1969.
12. Haridas Exports v. All India Float Glass Manufacturers Association, AIR 2002 SC 2728.
13. See, Murphy J. & Kolasky w., The Role of Anti Cartel Compliance Programs in Preventing Cartel Behavior, Antitrust, Vol. 26, No. 2, Spring 2012, American Bar Association, http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/Spring12-MurphyCThe%20Role%20of%20Anticartel%20Compliance%20Programs%20In%20Preventing%20Cartel%20Behavi.pdf (accessed on 20-3-2016).

14. Khemani, R.S.; Shapiro, D.M. (1993). "Glossary of Industrial Organisation Economics and Competition Law" (PDF). OECD. pp. 18–19.
15. pure.au.dk/portal-asb-student/files/53793518/Bachelor.docx, 'Cartel Theory, Formation and Stability: Are there Cartel agreements that benefit society', Helene Caroline Hansen**,** University of Aarhus Business and Social Sciences Department of Economics and Business.
16. Ibid.
17. All India Tyre Dealers' Federation v. Tyre Manufacturers; 2013 Comp LR 0092 (CCI).
18. FICCI-Multiplex Association of India v. United Producers/Distributors Forum 2011 Comp LR 0079 (CCI).
19. Commission decision of 24 January 2007, substantially upheld on appeal Cases T- 117/07 etc Areva v Commission [2011] ECR II- 000, [2011] 4 CMLR 1421.
20. Commission decision of 24 January 2007**,** paras 170–176.
21. See eg Cases C- 204/00 P etc Aalborg Portland A/S v Commission [2004] ECR I- 123, [2005] 4 CMLR 241, paras 55–57; Case T–113/07 Toshida v Commission [2011] II–000, paras 78–84.
22. OJ [2003] L 6/1, [2003] 4 CMLR 1030.
23. BASF's fine was reduced on appeal to €236.84 million, Case T- 15/02 BASF AG v Commission [2006] ECR II-497, [2006] 5 CMLR 27.
24. OJ [2003] L 6/1, [2003] 4 CMLR 1030, paras 155–157 and see Canadian Competition Bureau News Release, 22 September 1999.
25. Australian Competition & Consumer Commission v Roche Vitamins Australia Pty Ltd [2001] FCA 150; see also ACCC Media Release MR 37/01, 1 March 2001.
26. Department of Justice Press Release, 5 May 2000, www.justice.gov/atr/public, (accessed on 13-2-2014).
27. Press Release of 25 April 2003, available at www.ft c.go.kr. , (accessed on 13-2-2014).
28. See eg in the US Empagran SA v Hoffmann- La Roche Ltd 315 F 3d 338 (DC Cir 2003) (see ch 12, 'The Alcoa and Hartford Fire Insurance cases', pp 491–493); in the UK see Provimi Ltd v Aventis Animal Nutrition SA [2003] EWHC 961; Case No 1028/5/7/04 BCL Old Co Ltd v Aventis (which was settled out of court), order of the CAT of 7 April 2005; Devenish v Sanofi -Aventis [2007] EWHC 2394, [2008] UKCLR 28, upheld on appeal Devenish Nutrition Ltd v Sanofi - Aventis SA (France) [2008] EWCA Civ 1086, [2008] UKCLR 783; Case Nos 1098/5/7/08 etc BCL Old Co Ltd v BASF SE [2008] CAT 24, [2008] CompAR 210, reversed on appeal BCL Old Co Ltd v BASF SE [2009] EWCA Civ 434, [2009] UKCLR 789 (the claims were found to have been brought out of time); the CAT refused to extend time: [2009] CAT 29, [2010] CompAR 1, upheld on appeal [2010] EWCA Civ 1258; the case is on appeal to the Supreme Court, and is due to be heard in June 2012.
29. (C-204/00 P); [2004], ECR I-123.
30. For further details, See 'Cement Cartelisation in India and Europe', pp. 68-70, available at http://cci.gov.in/images/media/ResearchReports/NidhiInte rns160311.pdf, (accessed on 6-11- 2013).
31. For further details see, An Analysis Of The Indian Cement Cartel Vis-À-Vis The European Cement Cartelisation, Case Study 04, September 2013, CUTS Institute for Regulation & Competition, http://circ.in/pdf/Case_Study_04.pdf (accessed on 12-3-2-16).
32. http://ec.europa.eu/competition/antitrust/legislation/fines.html last accessed on 15.03.2016.
33. http://ec.europa.eu/competition/cartels/leniency/leniency.html last accessed on 12.03.2016.
34. Ibid.
35. "Cartels in Eu: Study on The Effectiveness of Leniency Policy", Oana DOMINTE, Daniela ŞERBAN, and Alina Mihaela DIMA; http://www.managementmarketing.ro/pdf/articole/324.pdf last accessed on 12.03.2016.

36. Builders Association of India v. Cement Manufacturers' Association and Others, Order passed by Competition Commission of India on 20.06.2012, available at http://www.cci.gov.in/May2011/OrderOfCommission/292011.pdf, as accessed on March 15, 2016.
37. The preliminary report has not been made public but was examined by *Business Standard*, Five tyre firms operated as cartel, finds CCI probe, http://www.rediff.com/business/report/five-tyre-firms-operated-as-cartel-finds-cci-probe/20160305.htm (accessed on 13-3-2016).
38. http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/Leniency.pdf last accessed on 23.03.2016.
39. Fines for breaking EU Competition Law, http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf last accessed on 2.03.2016.
40. Fines imposed (not adjusted for Court judgments) - period 2012 - 2016 , http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.
41. file:///C:/Downloads/KD3211988ENC_002.pdf.
42. "Cartels in Eu: Study on The Effectiveness of Leniency Policy"; Oana DOMINTE, Daniela ŞERBAN, Alina Mihaela DIMA; http://www.managementmarketing.ro/pdf/articole/324.pdf last accessed on 12.03.2016.
43. See, CCI announces leniency for those giving information on cartels, Business Standard, dated 24-7-2012, http://www.business-standard.com/article/economy-policy/cci-announces-leniency-for-those-giving-information-on-cartels-112072403008_1.html (accessed on 7-1-2014).

❑❑❑

CHAPTER

3

Anti-Competitive Agreement- A Comparative Analysis

Dr. Somdutt Bharwaj* **and Vinayak Gaur****

"People of Same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against public, or in some contrivance to raise prices."

— Adam Smith

Today, the world is facing the cut throat competition and to being remain in the competition, every country has pushed their economy liberalised. The vigorous Competition plays a significant role in innovation, effective market, and consumer interest and productivity growth in the economy.[1]

After attaining the Independence in 1947, India had adopted and followed policies that comprised of Command-and-Control laws, regulation and executive orders.[2] Then India enacted the first Competition Law that was Monopolies and restrictive Trade Act, 1969 which restrict the monopoly in the market however, after India became the member of World Trade Organisation, later the drastic change was noticed in the Indian foreign trade policies which had been highly restrictive earlier. In 1990, The Government of India took step to integrate the Indian economy with global economy for the overall economy development of the Country. It was noticed that the patronage of MRTP Act, 1969 was inadequate for fostering the Competition in the market and eliminating the Anti-competitive practices in the national level as well as international level so there was need to enact the new Competition law for our country. In 1999, the Government of India appointed the high level committee on competition policy[3] and law (The Raghavan Committee) for advice on the competition law after that the MRTP Act, 1969 was metamorphosed into the new Competition Act, 2002.[4]

The Competition Commission of India has been established under the Act[5] by a Government Notification dated 14th October 2003. The Commission consists of a Chairperson and not less than ten other members to be appointed by the Central Government.[6]

The Competition Act, 2002 provides for multiple goals as the Preamble of the Act aims to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure the freedom of trade carried on by other participants in the markets in India.

Anti-Competitive Agreement

Anti-competitive agreements are those agreements that have negatively or adversely affect on the process of competition in the market because it causes appreciable adverse effect on the competition which can be

* Assistant Professor, School of Law, Raffles University, Rajasthan.
** LL.B. 5 Year Program (VIII Semester), School of Law, Raffles University, Rajasthan.

horizontal and vertical agreement. In other words anti-competitive agreements are the agreements between enterprises or persons in respect production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition. According to OECD/World Bank Glossary that anticompetitive practices are wide range practices of business where firms and groups engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without providing goods and service at a lower cost or higher quality.[7]

Even, during the time of Chanakya (Kautilya), Prime Minister of Mauryan King Chandra Gupta's Indian empire in 400 BC, in his monumental treatise Arthashastra displayed the lack of trust in traders. As Chankaya was aware of trades' propensity to form cartels in order to fix prices and make excessive profits, he prescribed heavy fines to discourage such offences with a view to protect consumers.[8]

Basically it violates the basic right of citizen which is provided by the Indian Constitution to consumer that is "Right to Choose" where consumer has right to choose a product among various product available in competitive market because as India is welfare state where sovereignty is with citizen because they made the constitution and gave it to themselves.[9]

Section 3 of Competition Act, 2002 provides prohibition of anti-competitive agreements which prohibits any agreement between enterprises or persons in respect production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. There two types of Anti Competition agreement.

(a) Horizontal Agreement

(b) Vertical Agreement

Horizontal Agreements are those agreements between two or more enterprises that are at the same stage of the production chain and in the same market constitute the horizontal variety. These types of agreement are presumed to be illegal because they cannot serve any useful or pro–competitive purpose. So because of this reason horizontal agreement placed into Per se rule category instead of Rule of Reason category because they leads to unreasonable restrictions of competition and therefore presumed to have an appreciable adverse effect on competition.[10] The various types of horizontal agreement are:-

- Agreements regarding prices. These include all agreements that directly or indirectly fix the purchase or sale price.
- Agreements regarding quantities. These include agreements aimed at limiting or controlling production, supply, markets, technical development, investment or provision of services.
- Agreements regarding bids (collusive bidding or bid rigging). These include tenders submitted as a result of any joint activity or agreement.
- Agreements regarding market sharing. These include agreements for sharing of markets or sources of production or provision of services by way of allocation of geographical area of market or type of goods or services or number of customers in the market or any other similar way.

Vertical agreements are those agreements between undertakings operating at different levels of the production and are not be subjected to the rigours of competition law because they are the essential feature of the commercial life and in one sense a substitute for vertical integration. Vertical agreement exerts mixed effects on the Competitive process and has to be judged on the basis of the reasonableness of the restraint and due to this they placed in Rule of Reason category where they analysed properly by the Competition Authorities and if they found that it distorting or preventing competition then these types of agreement are illegal under Competition Law. The various types of Vertical agreement are:–

- Tie – in arrangement;
- Exclusive supply agreement;

- Exclusive distribution agreement;
- Refusal to deal;
- Resale price maintenance.

Exception

The Competition Act, 2002 exempt the intellectual property rights from its patronage for the encouragement of new innovation of human mind and interests of creativity and impose such reasonable conditions as may be necessary for the purposes of protecting any of his rights which have been or may be conferred upon him under the following intellectual property right statutes;

- The Copyright Act, 1957;
- The Patents Act, 1970;
- The Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999;
- The Geographical Indications of Goods (Registration and Protection) Act, 1999;
- The Designs Act, 2000;
- The Semi-conductor Integrated Circuits Layout-Design Act, 2000.

The term agreement has been described in Section 2(b)[11] which adopts a broad definition which offering the Competition Commission of India a degree of ease in prosecuting anti-competitive behaviour like Cartelisation.

The Section 2(c) of Competition Act, 2002[12] describes about the cartel where group of people made the *agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services which adversely affect the competition in the market.*

According to European Commission "Cartel is defined as : Arrangement(s) between competing firms designed to limit or eliminate competition between them, with the aim of increasing prices and profits of the participating companies and without producing any objective countervailing benefits. In practice, this is generally done by fixing prices, limiting output, sharing markets, allocating customers or territories, bid rigging or a combination of these specific types of restriction. Cartels are harmful to consumers and society as a whole due to the fact that the participating companies charge higher prices (and earn higher profits) than in a competitive market."[13]

Lord Denning in the case of RRTA v. W.H.Smith and Sons Ltd[14] states that

"People who combine together to keep up prices do not shout it from the housetops. They keep it quiet. They make their own arrangements in the cellar where no one can see. They will not put anything into writing nor even into words. A nod or wink will do. Parliament as well is aware of this. So it included not only an 'agreement' properly so called, but any 'arrangement', however informal"

In India, Cartels have been alleged in various sectors namely in steel, tyres, trucking, cement and also in overseas cartels in soda ash, bulk vitamins, petrol which leads to raise the price or reduce the consumers choice. The 1998 OECD Recommendation declares that "Cartels are the most serious and gross competition infringements and supreme evil of antitrust".[15]

Various provisions of Competition Act, 2002 regarding Anti-Competitive Agreement:

Section 19 of the Act[16] provides power to Competition Commission of India to inquire into the alleged contravention of the provision of the Competition Act either on Suo Moto or on the receipt of the information given by any person, consumer and association or on a reference made to it by the Central as well as State Government. Section 19 of the Act generally provides power to CCI to check whether the agreements have appreciable adverse effect

on the Competition in the Indian relevant market or not and if it appears to CCI that it has AAEC than it will direct the Director General for further investigation under Section 26(1) of the Act.

Under the Act, the Director General, in discharge of his duties, has been vested with powers as are in a Civil Court which inter-alia includes; namely –

(a) Summoning and enforcing the attendance of any person and examining him on oath;

(b) Requiring the discovery and production of documents;

(c) Receiving evidence on affidavits; and

(d) Issuing commissions for the examination of witnesses or documents.

The Director General including any person investigating under his authority is also having powers as are vested in the 'Inspector' in terms of Section 240 & 240 A of the Companies Act, 1956. These powers inter-alia include –

(i) Production of documents and evidence in the custody of body corporate/other bodies corporate, and

(ii) Search of place or places and seizure of documents with the approval of the First Class Magistrate having jurisdiction, when there is reasonable ground to believe that books, papers or documents may be destroyed, mutilated, altered, fallacious or concealed.

The 'effect doctrine'[17] and Section 32 of the Act[18] extends the jurisdiction of Competition Commission of India which also covers the agreements referred to in Section 3, which has been entered into outside India and any party to such agreement, who is outside India. The CCI shall have power to inquire into such agreement if such agreement has or likely to have appreciable adverse affect on the competition of Indian relevant market.

The CCI also has power to grant relief if it is satisfied that an act is contravening to Section 3 of the Act[19] which has been committed, continuous to be committed or about to be committed, the Commission can temporarily restraint the party for carrying such act till the conclusion of the inquiry and further orders.

Section 27 of the Act provides power to Competition Commission of India, if it found that the agreement has appreciable adverse effect on the competition of Indian relevant market, to impose the penalty upto:-

Three times its profit for each year that the prohibited agreement has been in effect; or

10% of its turnover for each year that the prohibited agreement has been in effect, whichever is higher.

Further in case of In Re, Indian Foundation of Transport research and training[20] the CCI held that the primary objectives behind imposition of penalties and fines are to impose penalties on infringing undertaking that shows the grave of the infringement and to ensure that the treat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them. Even, in case of Shri Shamsher Kataria v. Honda Siel Car India Ltd. & ors[21] wherein CCI imposed a staggering penalty on 14 automobiles company which were guilty of anti competitive practices in violation of Section 3(4) and 4 of Competition Act, 2002.

Leniency Policy

The Competition Act, 2002 provides lesser penalty under Section 46 of the Act for where CCI has power to impose lesser penalty if the producer, distributor, seller and service provider included in the cartel which is alleged to have violation of Section 3 of the Act, themselves come to CCI and disclose all the information regarding to cartel.

In 2009, the CCI has drafted a the Competition Commission of India (Lesser Penalty) Regulations, 2009 under its power granted by Section 64 of the Act which provide the framework in which the commission can lower the punishment than statutorily provided in case of cartel membership.

Following is the summary of the Competition Act, 2002 provisions of lesser penalty under Section 46 of the Competition Act, 2002:

(i) Commission has the power to impose lesser penalty to a cartel member (producer, seller, distributor, trader or service provider).

(ii) Any member of cartel is eligible for leniency treatment.

(iii) Such cartel member should have made full and true disclosure of alleged violations and such disclosure is vital.

(iv) The leniency to a cartel member is contingent upon such member continuing to cooperate with the Commission till the completion of the proceedings before the Commission.

(v) Leniency not available after the report of the DG (Director General) has been received by the Commission.

(vi) Leniency can be revoked if the cartel member during the course of the proceedings had failed to comply with the condition on which lesser penalty was imposed, given false evidence or the disclosure made was not vital.

European Union Competition Law

EU competition policy rests on so many closely related pillars, all of which serve to bring the benefits of effective competition to the consumer and at the same time to enhance the competitiveness of European industry. The most important pillar is vigorous enforcement of the antitrust rules which prohibit undertakings from engaging in unjustified restrictive agreements or practices and from abusing dominant positions they hold on the market. This activity focuses increasingly on preventing the most serious forms of anticompetitive behaviour by market players, such as price-fixing or market-sharing cartels, from disrupting effective competition.[22]

The evolution of Anti- Cartel enforcement can be seen in recent years where the European Commission began to impose heavier fines in a number of landmark cases by detecting and punishing the "hardcore" cartels, increasing the number and intensity of its investigation and imposing record fines.[23]

Article 101 of the Treaty on the Functioning of the European Union (TFEU), prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (anti-competitive agreements). The most flagrant example of illegal conduct of violation of Article 101 is the creation of cartel between competitors which may include price-fixing or market-sharing cartels. Anti-competitive agreements are prohibited regardless of whether they are concluded between companies that operate at the same level of the supply chain (horizontal agreements) or at different levels (vertical agreements).

The Regulation 1/2003[24] empowers the European Commission extensive investigatory powers, which include the possibility to conduct inspections not only on the firm's premises but also on the homes of firm's managers and employees with the help of Competition Directorate General. The National Competition Authorities (NCA's) are the domestic agencies which deal with cartels in the individual countries which make up the European Union.

The Directorate General for Competition of the European Commission enforces EU competition law in co-operation with the National Competition Authorities across member states. It can:–

(a) Investigate businesses and industries.

(b) Start court proceedings against member businesses and member states • investigate business sectors.

(c) Fine businesses that are acting uncompetitive.

(d) Give its opinion on proposed mergers that have an effect within a number of member states.

The EU also has bilateral cooperation agreement with other countries like Canada, Japan, Korea and USA which helps European Commission to get information and evidence located outside the EU territory. Even the EU has also agreed to cooperate with other Competition regulators like OECD members countries and other international organisation which deals with the competition issues.[25]

The EU Competition law imposes fines on the firm only whereas some National laws in some European Countries do allow for the imposition of criminal penalties on the Firms managers as well. The Regulation 1/2003 provides that the fine may not exceeds 10 percent of the firm's turnover and it must be fixed with the regard to the seriousness and duration of the infringement of the Competition law.[26]

In September 2006, The EU Competition Commission published new Guidelines on its fining policy.[27] According to the new guidelines; the Commission will use a two-step procedure to set fines. As a first step, the basic amount of the fine will be set. To do so, the Commission will:

(1) Determine an initial variable amount of the fine as a percentage (in cartel cases, this will typically be 30%) of the firm's relevant market turnover;

(2) Multiply it by the number of years the infringement has taken place;

(3) Add a fixed component of the fine which equals 15-25% of the annual turnover.

As a second step, the basic amount of fine thus obtained might be modified taking into account aggravating or mitigating circumstances.

Dawn Raids

Some companies forming a anti competitive agreements are aware of the unlawfulness of their action so they hide their activities in such a manner that it is very difficult for the Competition Authorities of compiling adequate and relevant evidence so the Dawn Raids is the effective measure to collect all the direct evidences like documents and agreements for the satisfaction required by the law.

Article 24 of the Regulation 1/2003 authorises the EC to conduct all the necessary inspection to detect any agreement, decision and concerted practices which is prohibited under the Article 101 of the TFEU[28]

Leniency Policy

The EU introduced the first Leniency Policy in 1996 where it provides that the fine will be totally or partially reduced if the member of cartel informed the European Commission regarding the participation of Cartel . The Commission had decided certain criteria regarding the reduction of fines that are:-

(a) (50-100%) will be reduced if the member of the cartel informed the EC before the investigation procedure.

(b) (50-75%) will be reduced if the cooperation by the member of cartel is done after the investigation.

(c) (10-50%) will be reduced if the member of the cartel cooperates with the EC during investigation without any objections.

Later the leniency policy, 1996 was inadequate due some reasons then in 2002, the EC adopted a new Leniency Policy 2002 which provides transparency and certainty where it grants full immunity from the fines to the member of the cartel who gives information to EC firstly and it provides partial immunity from the fines who informed the EC secondly.[29] Then the Leniency Policy, 2002 was again revised in 2006 by the EU authorities.

The various provision of EU Competition Act and various regulation provides confidential clause under leniency program where the information and document given by the member of the cartel will kept secretly and confidential where it will not disclose to anyone. The Article 4 of the Regulation No. 1049/2001[30] provides exceptions to the Article 15(3) of the TFEU[31] under which the Commission has power to not disclose the document and information provided by the Cartel member for leniency.

Further, in case of In re Methionine[32] it was held that the confidentiality of the document and information should be protected under the law enforcement investigatory privilege.

USA Anti-Trust Laws

The basic laws of the USA Antitrust law which prohibits the Anti-Competitive Agreements are:

The Sherman Act

Section 1 of the Sherman Act[33] prohibits every contract, combination, or in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nation. The Sherman Act provides civil remedies and criminal penalties for the infringement of the antitrust laws. The Act applicable when there is inter-state commerce or agreement which causes restraint of trade.

The Clayton Act

It is the supplement of the Sherman Act where it prohibits certain kinds of the commercial practices which adversely affect competition in the market. This act provides private rights to redress the civil remedy under Sherman Act. It also empowers the Courts to enjoin the Anti-competitive conduct before it actually causes harm.

The Robinson-Patman Act

It is the Act which specifically prohibits the business practices like price fixing and price discrimination. It is the supplement of the both Sherman Act and Clayton Act.

The Federal Trade Commission Act

It is the grants power to FTC to enforce the Sherman Act, Clayton Act and Robinson-Patman Act where Section 5 of this Act to investigate the matter related to anti-competitive agreements which causes restraint of trade in the market.

In case of Standard Oil Co. of New Jersey v. United States[34] it was held that the original doctrine was that the all contracts in restraint of trade were illegal because it causes injury to the public and prevent competition in the market but later, Court also held that there must be some reasonableness while looking into the contract because every contract may cause restraint of trade.

In Northern Securities Co. v. United States[35] it was held by the US Supreme Court that the nature of the competition is to increase the commerce so the Sherman Act prohibits those agreements whose direct effect is to prevent the competition and restrict the trade and commerce.

Later in Nash v. United States[36] it was held that the only those contracts and combination will be illegal which , by reason of intent or the inherent nature of the contemplated Acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade.

The U.S. Department of Justice (DOJ) Antitrust Division, State Attorney and private parties plays a significant role in enforcement of antitrust laws in USA to detect the contract which restraint of trade in the market.

The Section 1 of the Sherman Act, 1890 imposes fines and penalties to the members of the anticompetitive agreements which causes restraint of trade in the US relevant market.

(a) The corporation may be fined up to US$100 million; or twice the gain from the illegal conduct or twice the loss to the victims (15 U.S.C. §1; 18 U.S.C. §3571(d)).

(b) The individual may be fined up to fines up to US$1 million; and prison sentences up to 10 years.

Leniency Policy

The USA has adopted two type of Leniency policy that are Corporate leniency policy (amnesty programme) and individual leniency policy under which the leniency is provided to corporation and individual who are indulge in the cartel and provide information and document to the Commission. The reason for separate leniency policy is that in the United States, if individual found guilty of antitrust law, are punishable with imprisonment. Basically the first leniency policy was adopted in 1978 but due to ineffective and lack of transparency so later on in 1993,[37] the leniency programme was revised which enlarged the scope of amnesty. Later in 2008, the Division issued substantial clarification and public guidance to make leniency programme more transparent.[38] The amnesty can be provided to corporate before the investigation begins, provided that the corporation is not a ring leader of the cartel and is the first one to give vital information regarding cartel. Further it is also granted after the investigation begins and provided that it is the first one to give information of cartel. In addition to that, the corporate directors, officers and employees are automatically granted amnesty once the corporation is granted the same.[39] The parties have to fulfil certain condition for qualifying for immunity that are:-

Type A immunity

- The US Department of Justice Antitrust Division has not received information about the cartel from any other source.
- The applicant takes prompt and effective action to terminate its involvement in the cartel.
- The applicant reports its wrongdoing with "candour and completeness" and provides full, continuing and complete cooperation.
- Confession is truly a corporate act and not made up of isolated confessions of individual executives or officials.
- Where possible, restitution is made to injured parties.
- The applicant did not coerce another party to participate in, and was not leader or originator of, the cartel.

Type B immunity:

If an undertaking does not meet all six Type A conditions, the applicant (whether before or after an investigation has begun) will receive leniency if all of the following conditions are met:

- The applicant is first to qualify for amnesty in relation to the cartel.
- The Antitrust Division does not have evidence against the applicant that is likely to result in a sustainable conviction.
- The applicant takes prompt and effective action to terminate its involvement in the cartel when it is discovered.
- The applicant reports the cartel with candour and completeness and provides full, continuing and complete co-operation.
- Confession is truly a corporate act and not made up of isolated confessions of individual executives or officials.
- Where possible, restitution is made to injured parties.
- The granting of leniency would not be unfair to others, considering the nature of the cartel, and the applicant's role and timing in it (that is, the Antitrust Division retains a degree of discretion for granting leniency).

The DOJ believes ongoing confidentiality is a critical element of leniency or amnesty programs around the globe:

"Confidentiality is one of the hallmarks of leniency programs, and a lack of confidentiality is a major disincentive for leniency applications. Many leading members of the private antitrust bar who represent leniency applicants have advised that the Division's promise of confidentiality is a critical, and in some cases determinative, factor that companies rely upon in making the decision to self-report pursuant to the Division's leniency program."[40]

So this above judgement clearly shows that there should be confidentiality in the leniency programme so that the more member of the cartel comes forward and provides information of cartel which causes restraint of trade in US relevant market.

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), provides further incentives for cooperation. Under ACPERA, the company will be liable to victims of the conspiracy only for compensatory "single" (not triple) damages, and will be liable for such damages only with respect to its own sales as opposed to joint and several liability for treble damages based on sales for the entire conspiracy if a company also cooperates with plaintiffs in civil actions for damages against other members of the cartel.

UK Competition Laws

In the UK, Chapter I of the UK Competition Act 1998 provides for a similar prohibition on anti-competitive agreements which have an actual or potential effect on trade within the UK (or any part of it).

In the UK, the CMA has jurisdiction to enforce both UK and EU competition law (the CMA replaced the Office of Fair Trading (OFT) as the primary enforcement body for UK competition law on 1 April 2014).[41] Within their respective industry sectors, the UK utility regulators (including Ofcom, Ofwat, Ofgem, etc.) have concurrent power with the CMA to enforce UK and EU competition law.

Competition law of UK cast a criminal liability on an individual who enter into an agreement between competitors to rig bids, fix prices, share markets or customers, or limit production or supply. The conviction for the cartel offences carries with it a maximum penalty of five years imprisonment and or an unlimited fine. Even CMA has also power to impose significant fines on businesses which found to bein breach of competition law (up to 10 per cent of worldwide aggregate group turnover under UK competition law).

The CMA vested with powers to conduct investigations at business (and, in certain circumstances, domestic) premises and to take copies of documentation, electronic files, e-mails, and, in certain cases, to seize original documents. These powers can also be used to inspect the premises of a business which is not under suspicion but which may have evidence which is relevant to an investigation into another business, such as a customer, competitor or supplier. These "dawn raids" can occur without notice. In addition, the CMA has powers to interview individuals who are connected to the businesses under investigation. Such compulsory interviews can be required with minimal notice during a dawn raid.

Observations and Suggestions

The basic objective of the every country's competition law is to protect the basic right of the consumers and enhance the competition is the relevant market for the overall development of the economy. The motive of the Competition Act, 2002 was also to promote competition in the Indian relevant market but till now the Competition Act, 2002 is not that much effective because of so many reasons which are:–

1. The overall economy of the economic management of India has been revised towards greater market orientation where lots of economic reforms measures have been undertaken by the Government as a facilitator but it has not implemented because the distortion remain in the policies which further leads to anti competitive practices. Therefore, while framing polices or implementing them, there is a need

to make some impediment which need to be properly articulated, acknowledged and properly tested so that it minimize the adverse impact on the functioning of the market and creates market process. So, there should be adoption of National Competition Policy that would provide certain guiding principles to formulate policies and practise and which enhance the competition in the market in India as stated in the mid-term appraisal of the 9th Five-Year Plan (1997-2002). Para 66 of Chapter 32 "Direction of Reforms" of the document mentions:

"There is an urgent need for articulating a National Competition Policy (NCP) in India. The NCP should fully reflect the national resolve to accelerate economic growth, improve both the quality of life of the people of the country and the national image and self-respect…The competition policy should aim to bring about a spirit and culture of competition among enterprises and economic entities to maximise economic efficiency and to protect and promote consumers' interest and society's welfare and improve our international competitiveness."

Further Government should evolve a system of Competition audit/assessment which could be applied to all existing and future policies. There should be establishment of National Competition Policy Council for the guidance of implementation of the National Competition Policy in the Country.

2. The certain provisions of the Competition Act, 2002 weaken the independence and autonomy of CCI which includes the grant of fund to CCI by Government its own discretion due to which the fund available to CCI is inadequate and CCI is not able to perform its basic functions (as compare to other jurisdictions like EU, USA and UK where Competition Authorities have enough fund to perform their basic functions). Further, Government can supersede the CCI on the ground of public interest and CCI is also subjected to direction of Government regarding the question of policy. So the Parliament should approve the budget for the CCI instead of Government while using its discretion and supervise the CCI functions which lead to more effectiveness. Further the power of the Government to supersede the CCI should be removed. The direction provided by the Government to CCI should be qualified by including enabling provision for a wide consultation process where Government should be required to place in the public domain the comments received from the CCI and provide reason for the issues of the directives.
3. The Act recognises that the bundle of rights that are subsumed in intellectual property rights should not be disturbed in the interest of creativity and innovative power of the human mind so it exempts the intellectual property rights from its patronage so that they can be protected from any kind of exploitation but the Act is silent to describe about the reasonability of these rights which can be anti competitive and violation of basic right of Consumers i.e., "Right to Choice" neither it describes about the remedies, if unreasonable conditions accompany IPR licences which limit competition. So IPR laws such as the Patent Act or Copyright Act or Trade Marks Registration Act have over riding powers over the Competition Act in matters related to IPR abuses. Competition law is a useful tool to discipline licensing agreements that restrain marketing and product development, and consequently have an anti-competitive effect. Accordingly, competition law in several countries cover abuse of IPRs. Competition law is best suited to decide whether there is an adverse effect on competition from the use of IPRs. Even the WTO TRIPS agreement which empowers member countries to take necessary actions if intellectual property rights (IPRs) are abused to give effect to anti- competitive practices. However, the new competition law of India gives a weak treatment to IPR abuses. Instead, the Patents Act (amended in 2005 to ensure the domestic law complies with international obligations) overrides the competition law in matters of IPR abuses. So the Competition Act, 2002 should describe the indicative list of unreasonable conditions and also specify the remedies against the abuse of IPRs. The Act should lay down the criteria under which such exemptions will be granted and it must be publicly notified. Even the competition policy and law could be beneficial to the poor is by mitigating the adverse effect of strong IP regime while using the compulsory licensing provisions.

4. The provisions of Competition Act, 2002 are nearby same to EU, USA and UK Competition Law and India has also adopted some provisions from these developed Countries laws but in India, the provisions of Competition Law is not able to perform well because of less develop economy where markets are generally more fragile as concentration levels are higher, dominant position is more prevalent, entry barrier is more higher (regulatory restrictions, capital scarcity, etc). A World Trade Organization (WTO) report[42] observes:

   "*There are reasons to believe that developing economies tend to be more vulnerable to anti-competitive practices than developed countries. The reasons include: high 'natural' entry barriers due to inadequate business infrastructure, including distribution channels, and (sometimes) intrusive regulatory regimes; asymmetries of information in both product and credit markets; and a greater proportion of local (non-tradeable) markets. Thus it may be particularly important to protect, consumers in developing countries against cartels, monopoly abuses, and the creation of new monopolies through mergers. Bid rigging in public procurement markets (i.e. collusive tendering) is also pervasive in many developing economies, and merits vigorous enforcement initiatives*."

5. The provisions of the Competition Act, 2002 is nearby same as EU, USA and UK have but still not that much effective as compare to these country laws for example in EU, most of the cartel cases is solved by the leniency program. Even in India, the Competition Act contains the provision regarding leniency scheme but the Competition Authorities do not take out the spirit of the same so due this there is no proper implementation of the leniency scheme. There is need to change the leniency scheme under the Act so that cartel can be easily detected.

6. The relevant market is one most important concept of competition law which plays significant role in the initial stage of the investigation related to anti-competitive agreement but due to less skilled, expertise and less experienced members of the Competition Authorities the determination of relevant can't be possible and it takes so many time to detect the anti-competitive practise which causes AAEC on Indian relevant market so there is need to appoint well skilled and expertise economist people who have good knowledge regarding the economics because Competition Law is all about economics only.

7. The Competition Act implicitly recognises the overlap between the functions of sectoral regulators and the CCI in competition matters. Accordingly, the Act and the draft amendment bill provide for a sectoral regulator to make a reference to the CCI on such matters. Unfortunately, such reference is voluntary in nature i.e. purely at the discretion of the sectoral regulator which makes it ineffective because there is no incentives by the regulators to refer the matter to the CCI in the first place itself due to the voluntary discretion so it creates conflicts between competition authorities and the sectoral regulators and lead to inconsistent decisions and forum shopping. So the consultation between sector regulators and competition authority should be mandatory where regulators take advice from the CCI regarding competition matter as well as CCI take advice from the regulators regarding the issues that have implications for the regulated industry so that there can be better coordination among them. Further CCI should actively participate in the discussion regarding the competition related issues before sectoral regulators. Government should establish a concurrency party between the CCI and sectoral regulators, so that both of them can perform better and ensure good competition in market. The Common Appellate Tribunal should be established which solves the conflict between both of them.

8. The competition authorities should be well skilled, experienced and expertise in the collection of evidence against the anti competitive practices but in India there is nothing like that as in cement cartelisation case[43] where CCI imposed Rs 6,317 crore penalty on 11 cement manufacturer company but later the Appellate Authority for the Competition Commission of India set aside the order of the CCI because of lack of evidences against the 11 manufacturer companies. Even, in case of Shailesh Kumar v. Tata Chemical[44] where CCI closed the case because of lack of evidence provided by the DG.

9. The Competition Authorities do not have proper economics tools that are used are used for determining the entry barriers, which may include determining the economics of scale, extent of product differentiation, extent to capital requirement and predatory behaviour.
10. There is no proper implementation of penalty provision of the Act because as in other jurisdictions like U.S.A, EU and UK where commission charged the person up to 10% for indulging in any anti-competitive practice even after leniency scheme still they charged but in our country there is nothing like that the Competition authorities only charged upto 2-3% for anti competitive practices so there is need for the proper implementation of the penalty provisions of the Act.
11. The market distortions are also prevail at the State level because the Government at State level either themselves follow the anti-competitive practices or by their policies encourages such practices due to which the lack of healthy competition and fair-trading in the marketplace adversely affects the economy and state finances so there is need to do strong advocacy to rationalise the role of State Government. State Government should make Competition assessment of their policies and practices by which they promote competition and effective regulation for the protection of consumer interest. Further there should be State Competition Policy Council for the proper implementation of National Competition Policy at the State level.
12. Due to huge size of the Country and the prevalent of anti-competitive practice at the local level so there is need establish local agencies like State Competition and Regulatory Agencies (SCORA) to resolve the market abuse and regulatory failure of symmetric nature and perform a active role in promoting fair practices.
13. In today's world, with the advancement in technology the information related to cartel can be stored electronically. In some jurisdiction powers exists where Competition authorities can listen the telephonic conversation, maintain surveillance but all these can be done if there is proper staff, access to individuals, with the necessary skills so CCI should adopt these kinds of practices while doing investigation for detecting cartel.
14. The rule of Competition Appellate Tribunal should be changed where economist and Competition law Advocate should be the Chairperson and Judge as a member only to see that natural justice is followed so this will give effect to Competition law as well as Competition policy.
15. In jurisdiction like EU where Competition Authority provides consultancy programmes where if any person make agreement and if it is observed that it is anti competitive than he can consult to Commission where commission will analyse the agreement and provide sufficient measure to make it valid agreement but in India there is no provision of Competition Act, 2002 which provide power to CCI to provide these kind of programmes so CCI should adopt these kind of consultancy programs to minimise the anti competitive practice.

References

(Endnotes)

1. A World Class Competition Regime Department of Trade and Industry Presented to Parliament by the Secretary of State for Trade and Industry by Command of Her Majesty July 200.
2. Dr. Chakravarty, S., 'MRTP Act metamorphoses into Competition Act' pg no. 5.
3. Dr. Alok Ray, "Globalisation and Competition: The Role of a Professional", March 2007 The Chartered Accountant, 1452.
4. Ramappa T., *Competition Law in India Policy, Issues and Development*(12th, , New York, Oxford University Press 2006).
5. The Competition Act, 2002, No. 12 of 2003 $7.
6. *Ibid*, at $9.
7. Glossary of Industrial Organization on Economics and Competition Law *(World Bank/OECD)".*

8. Ancient Indian book on Kautilya's Arthashastra and Economic Governance.
9. N. Nagendra Rao & co. V. State of A.P. 1994 AIR 2663, 1994 SCC (6) 205.
10. Dr. Chakravarty, S., 'MRTP Act metamorphoses into Competition Act'.
11. "Agreement" includes any arrangement or understanding or action in concert,-(i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.
12. Cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.
13. European Commission, DG Competition, Glossary of Terms used in EU Competition Policy.
14. Section 43(1) of RTP Act, 1976 of UK.
15. Hard Core Cartels – Third Report on the Implementation of the 1998 Recommendation –OECD.
16. Section 19 (1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

    (a) receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

    (b) a reference made to it by the Central Government or a State Government or a statutory authority. (2) Without prejudice to the provisions contained in sub-section (1), the powers and functions of the Commission shall include the powers and functions specified in sub-sections (3) to (7).

    (3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:— (a) creation of barriers to new entrants in the market; (b) driving existing competitors out of the market; (c) foreclosure of competition by hindering entry into the market; (d) accrual of benefits to consumers; (e) improvements in production or distribution of goods or provision of services; (f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.
17. The Effects Doctrine is applicable only when the action taken outside the Country has 'direct, substantial, and reasonably foreseeable' effects or appreciable adverse effect within the Country.
18. The Commission shall, notwithstanding that,— (a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire 56[in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act] into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India 57[and pass such orders as it may deem fit in accordance with the provisions of this Act.]
19. Where during an inquiry, the Commission is satisfied that an act in contravention of sub-section (1) of section 3 or sub-section (1) of section 4 or section 6 has been committed and continues to be committed or that such act is about to be committed, the Commission may, by order, temporarily restrain any party from carrying on such act until the conclusion of such inquiry or until further orders, without giving notice to such party, where it deems it necessary.
20. In Re, Indian Foundation of Transport Research Training and Training and Shri Bal Malkait Singh , President All India Motor Transport Congress (AIMTC) and G P Singh, Spokesperson, AIMTC, Case no. 61 of 2012 decided on 16th February 2015.
21. Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors, Case No. 03 of 2011 (CCI, 25/10/2014).
22. XXXIInd Report on Competition Policy 2002 (Published in conjunction with the General Report on the Activities of the European Union — 2002).
23. Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives.
24. Council Regulation (EC) No 1/2003 of 16 December 2002.

25. Improving International Co-Operation in Cartel Investigations Contribution from the European Union, DAF/COMP/GF/WD(2012)53.
26. Report On assessing penalties for infringements of competition law.
27. The Commission revises its Guidelines for setting fines in antitrust cases by Hubert de BROCA, Directorate-General for Competition.
28. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty.
29. OJC Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03).
30. Regulation (EC) No 1049/2001 of The European Parliament and of The Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
31. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.

    General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure.

    Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.

    The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks.

    The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph.
32. In re Methionine Antitrust Litigation, MDL 1311, (N.D. Cal.).
33. Section 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
34. 221 US 1(1910).
35. 193 US 197(1904).
36. 229 US 373(1913).
37. (http://www.justice.gov/atr/public/guidelines/0091.pdf).
38. (http://www.usdoj.gov/atr/public/criminal/leniency.htm).
39. Koob.C and Antoine, O (2006). "Getting the Deal Through – Cartel Regulation 2006", Global Competition Review
40. See U.S. Dep't of Justice, Antitrust Division Manual, at III-102-09 (4th Ed. 2008). This program is "the primary engine of the government's anti-cartel enforcement." Br. of United States, Empagran, S.A. v. F. Hoffman-Laroche, Ltd., No. 01-7115, 2005 WL 388672, at *19 (D.C. Cir. Feb. 16, 2005).
41. CMA press notice, New competition authority to make markets work well for consumers, business and the economy, 1 April 2014.
42. WTO, Trade Policy Review – Report by the Secretariat: INDIA[2007], WTO Document No. WT/TPR/S/182. p. 96.
43. Builders Association of India v. Cement Manufacturers' Association and Others, Order passed by Competition Commission of India on 20.06.2012.
44. Competition Commission of India Case No. 66 of 2011.

❑❑❑

CHAPTER

4

Commercialization of Sports and Competition Law

Dr. Raj Kumar*

Introduction

Commercialized sport was one of the growth points of economy at the phase of industrial revolution in the late Victorian era.[1] A substantial rise in working-class spending power, growing urbanization, and a concentration of free time into Saturday afternoons all encouraged the marketing of spectator sports, and in response throughout Britain sport promoters and sport club executives enclosed grounds, erected stadia and charged gate money.[2] It was the way for keeping away from monotonous life. Sports economy came to be developed in the western world following the availability of increased leisure with the working class after World War II. Countries who predominantly played cricket, were left out of the advantages which a developing sports economy could offer largely because the Boards of Cricket in these countries lived off the patronage of the state and aristocracy and the game itself was played largely in erstwhile British Colonies who would be looking up to the Cricket Boards in Australia and England to take a lead. These Boards were content in imagining their supremacy in the game and looked openhandedly at the colonies playing game as best.

Technology being made use of in the west for increasing the revenue generating streams of a sporting event came to be applied fortuitously when a maverick TV broadcaster Kerry Packer in 1977 changed the format of the game to make it worthy of a telecast by limiting the duration of the event and making it fiercely competitive enabling the viewers to watch the event in the comfort of their homes, offices and bars.[3] With the unexpected victory of India in 1983 in the World Cup held in England, the vast population in India found for itself a sporting identity to be proud of which triggered an unprecedented adoption of the game across the nations where Indians were situated. The glory of India also rubbed the other erstwhile colonies like Pakistan, Sri Lanka, and Bangladesh as all these former colonies found an instrument to take on their former master through the game of Cricket. Boards of these countries had new found confidence to assert them in the apex International Council for Cricket on scheduling the matches and discovered new revenue streams to encash on the increased viewership through the broadcasting medium and sponsorships from corporate. To make the Cricket compete on TV viewership vis a vis Football, the English Board further formatted the game to a 3 hour duration with success. In yet another unexpected event, in the World Cup in 2007 in Canberra, India and Pakistan both got eliminated at the early stages of the tournament causing the losses to sponsors and advertising agencies as the viewership fell. A new model of the contest was needed in which teams from these cricket crazy countries continued to play along with the talented players of other countries on the lines

* Head, Department of Law, Jagan Nath University, Bahadurgarh, Haryana, Email: austereraj@gmail.com

of football league in Europe. BCCI came up with the launch of the Indian Premier League in 2008 and the event has been successfully held every year since then which has not only enriched BCCI but has benefitted players across the countries immensely and the corporate have lapped up the opportunity finding the league as a forum from which sporting economy has sprung in this part of the world. Similar initiatives among other sports like Hockey and Football have added on to the contribution of sports economy to the overall economy.[4]

The *doctrine of restraint of trade* is of early vintage in English law, with Dyer's Case (1414)[5] often identified as a founding precedent.[6] It has provided the base for an attempt by courts to reconcile the freedom to trade with the freedom to contract.[7] The doctrine holds that contractual limitations on parties' wider behavior are prima facie void unless justified as reasonable. A restraint is identified where the parties agree that one party will "restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses."[8] The concept of reasonableness introduces public policy discretion, and is judged by reference to both the perceived interests of the parties concerned and the interests of the public.[9] In the former respect, factors such as inequality of bargaining power or perceived unfairness to the restrained party have proved relevant to the assessment. While it is often invoked as an underlying aspect of UK competition policy, the importance of the doctrine should not be overstated. Indeed, it has been argued that by the early twentieth Century judicial constriction of the common law rules – attributed to a persistent commitment to the ideology of laissez-faire economics and the primacy of freedom of contract - had progressively "eviscerated their practical importance."[10] Even this was not the case; recent legislative developments would have had an important bearing. In decentralizing enforcement of EC competition law, Article 3 of EC Regulation 1/2003 provided a series of measures designed to ensure- to the extent possible- uniformity of application of EC competition law across the many Member States of the Union. This includes the injunction that national laws applicable to agreements that may have an effect on trade between Member States cannot be stricter than Article 81 EC.[11] The Regulation admits – exceptionally - that national laws that predominantly pursue an objective different from that of competition law may still be applied. The restraint of trade doctrine has been interpreted; however, as serving the same ends as competition law. In *Days Medical Aids Ltd. v. Pihsiang Machinery Manufacturing Co Ltd,* Langley J criticized the 'artificiality' of the common law doctrine before indicating that in terms of purpose it comprised "no more than earlier language for the restraint on competition at which Article 81 is aimed."[12] At least in the context of agreements governed by EC competition law, therefore, the public interest component of the common law rules has been deemed an ersatz economic efficiency criterion. The fundamental result is that the desire for uniform application has seen the common law rule to all intents and purposes expunged.[13] One might expect that the application of the doctrine to 'domestic-only' agreements will be corralled by an extension of such logic as to purpose, and that this common law forebear of statutory competition law will lose any lingering relevance.

A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[14] The need to define the relevant market is for the purposes of Article 102, the appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anti-competitive behavior (…), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined.[15]

The competition laws of many OECD countries contain a concept of single firm exploitation of market power or use of improper means of attaining or retaining market power.[16] These concepts are variously called "abuse of dominant position" or "monopolization" or "misuse of market power," or some similar term. Competition laws may also contain a related concept, called "joint dominance" in some jurisdictions, which involves multiple firms but which is a distinct concept from firms acting pursuant to an "agreement."

Short of outright regulation, abuse of dominance or monopolization is the rule of last resort for a complete system of competition law. Cartels and anticompetitive agreements can be broken up, prohibited, and punished through criminal, injunctive, private damage, and administrative fine remedies. Mergers and acquisitions can be prevented, or when necessary dissolved. However, if all else fails, or if the processes of economic transition result in a single firm with significant market power, competition law has only two choices: tolerate that power, with all the harm to society that it entails, or attempt to take effective steps against it when the power is being abused.[17]

The Commission's order was considered to be a timely move to curtail the practices adopted by BCCI by virtue of it being the sole regulator in the cricketing arena. The Commission had imposed penalty of 6% of the average annual revenue for past three years. However, the Commission's order had failed to address the issues pertaining to significant violations under Section 3 of the Act and the nature of several agreements entered between BCCI and the bidders in relation to franchise, media and sponsorship rights which were alleged to have been an abuse of the dominant position in the relevant market. The main CCI order having failed to analyse the anti-competitive effects created in the market by entering into such perpetual or long-term agreements on an exclusive basis had formed the basis for the challenge to the said CCI order leading to appeal before COMPAT and it looked into the procedural loopholes and the Commission's failure to comply with the principles of natural justice.

Relevant Market

"Relevant market" means the market which 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;[18] "Relevant geographic market" means a market comprising 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;[19] "Relevant product market" means a market comprising 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.[20]

Definition of the relevant market involves the description of the context in which certain economically harmful conduct could take place. The process, therefore, of defining a market and a relevant market, is of the first moment, meaning thereby that any assessment of the conduct of a market player can only follow and not precede the definition. The process begins by assuming provisionally that certain anti-competitive conduct exists in the market. It then proceeds to define through a series of questions, the boundaries of the smallest market, in which such conduct could be sustained. After the contours of the smallest market are defined and drawn, the actual conduct in question is subjected to an analysis, to determine if it has or could have an anticompetitive effect.

Delineation of "relevant market" is central to effective enforcement of competition laws. For the Competition Authority, such delineation clarifies the space within which he/she needs to adjudicate on competition cases. It is indeed the first step in the analysis of conduct on the part of the market players concerned.[21]

The concept of dominant player is yet not clear in the eyes of law as we saw in precedents. Where in one circumstance CCI grants the status of dominant player in the market but in another case it does not. Having dominant position is not the only criteria but such position shall also have an appreciable adverse effect on the market. Then for determining the adverse effect we shall first understand the concept of relevant market. They are divided in two categories:

- Relevant Geographical market.

  Relevant Product Market.

There is requirement of a huge market share but the amount of market share has not been decided. This depends upon the size of the market. The lacuna of the legislation can be seen that a wide range of power has been bestowed to CCI but the jurisdiction still remains unclear. Whereas if we talk about US, UK, EU one can very clearly see that they are quite clear with the connection between anti-trust law and sports activity. The anti-trust law of these countries prohibits the activities which are detrimental to it. The sports law in India is very feeble. For cricket we started with league matches recently in 2008 but we had it for hockey since long. Still we lack competence in making legislation for commercializing sports. We have granted de facto status to the BCCI. The absolute autonomy is increasing the number of frauds which are being reported such as the one where the family member of BCCI chairperson was the owner of the IPL team. This can also result in match fixing and hence result in bigger frauds in future.

The research questions that were put forth by the researcher have hence been proved. The above stated cases and the recent judgment of CCI have clearly proved that BCCI is an enterprise within the meaning of this act.[22] It also has dominant position in the relevant market. BCCI have de facto status. BCCI is also a regulator and controller of the game. The relevant market for this purpose has been determined by CCI considering important factors like availability and access to infrastructure, control over players which contribute to the success of a league all being made available only through BCCI.

Considering the short comings in the broadcasting scheme of the legislation it can be summed up as The sports broadcasting signals Act, 2007 was enforced to provide access to the largest number of listeners and viewers, on a free to air basis, of sporting events of national importance through mandatory sharing of sports broadcasting signals with Prasar Bharati and for matters connected therewith or incidental thereto.[23]

The establishment of modern sports also closely correlates with the high point of European imperial dominance. The first international cricket match was played in 1877, the Olympics were reinstated in 1894, and governing bodies for soccer, cricket and tennis were set up in 1904, 1909 and 1913 respectively. The global governance of sports was drawn upon imperial lines, and major sporting leagues and tournaments representing (mostly British) imperial elite networks. Sports grew in stature and symbolism, having a profound impact on public life.[24] Since its formative years sport has had a commercial component to its operation. As early as 590 BC Greek athletes were financially rewarded for an Olympic victory (Harris, 1964). However, in no previous time period have we have seen the type of growth in the commercialization of sport that we have seen in the last two decades. Today, sport is big business and big businesses are heavily involved in sport. Athletes in the major spectator sports are marketable commodities, sports teams are traded on the stock market, sponsorship rights at major events can cost millions of dollars, network television stations pay large fees to broadcast games, and the merchandising and licensing of sporting goods is a major multi- national business. These trends are not just restricted to professional athletes and events, many of them are equally applicable to the so-called amateur sports.[25]

Even denial of stadiums, player restraint and sports merchandising can raise competition issues. Similarly bid rigging and collusion among bidders like formation of cartels can come under the scanner of competition law as creation of barrier for new entrant, driving out existing competitors; long term foreclosure is specific violation of competition act. In India, sports like cricket, hockey, football, tennis and badminton etc. are being played at International level. Players are internationally recognized and appreciated. Indian viewers population standing today over a billion, of whom the majority are ardent supporters of sports, it makes for a lucrative business proposition to be involved with the multi-million dollar industry. Sports have been considered as premium content. Exclusive rights are owned by broadcaster or pay TV retailer. These exclusive rights are concentrated in the hands of one few players in the market. In sports broadcasting live sports events are preferred over recordings and hence sports pose challenges and will attract competition scrutiny as exclusive rights tend to be in the hands of incumbent operators.

As the sole agency to control the organization of cricket India, the BCCI is undoubtedly a monopolist provider of cricket-viewing services for the people of India and, hence, an enterprise in a 'dominant position' under the Competition Act. The BCCI has been 'selling' broadcasting rights to its 'exclusive partners' for a long time.

Firstly, how these 'exclusive partners' were selected is shrouded in mystery. The compliance with the Competition Act is now mandatory for selection of any exclusive 'agent' or partner for any business purpose, i.e., it has to be done by competitive bidding process in a fair and transparent manner.

Secondly, even if one overlooks this selection process of the BCCI, the concentration of rights in a few agents seriously hampers the prospects of fair play and serious competition issues arise.[26] The broadcast rights for IPL were sold exclusively to WSG-Sony Entertainment combine for 10 years reportedly for $1.03 billion. Although grant of exclusive broadcasting and telecasting rights is a common commercial practice in the sport industry, it is important to consider the impact of such long-term agreements on competition in this market.[27]

Indian Premier League (IPL)

The IPL was involved in the process of granting franchisee rights to the previous 8 teams and later for two teams of Pune and Kocchi.[28] As per the media reports there was an agreement between the IPL and the bidders and they advised bidders regarding amount of bid for a particular team. As per the media the Chief of the IPL was also instrumental in favoring his near and dear for the bid and his favored ones worked as his proxy for cornering the proceeds. Support provided by the official of the IPL significantly distorts competition in the relevant market. It is also alleged that the IPL conducted bids for the television rights, website, sponsorship, catering services, transportation, event management etc. without adhering to the norms of fair tendering and restricting the market for the new entrants and foreclosing the market for the existing competitors. As per the definition under section 4 of the Act,[29] it is the power to operate independently of competitive forces prevailing in the relevant market,[30] and there is no competitor of the IPL in twenty-20 format of cricket. Informant alleges that in the relevant market of economic activities of the biddings and tenders for organizing twenty 20 cricket matches, IPL is the dominant player. The IPL has abused its dominant position as it was the only agency for organizing twenty-20 cricket matches in the relevant market of franchisee of teams, transportation, sponsorship, sporting equipment's, uniforms, catering, event management etc. The IPL has abused its dominant position by favoring few and foreclosing the market for other competitors. It has violated section 4 of the Act. It was also stated that UK brand consultancy has valued IPL at Rs.18, 500 crores in 2010 as the IPL is one of the most successful events from the point of view of the viewership.[31]

Growth of Commercialization

In some ways paralleling the increased commercialization of sport[32] has been the emergence of academic interest in the business and management of sport. Much of the work in this area has been concerned directly or indirectly with issues of effectiveness and efficiency and has the implicit or explicit aim of improving managerial practice and the functioning of organizations. From this perspective, sports goods and services are commodities which, like other goods and services, are subject to market forces. The managers of sport organizations are presented as purveyors of rationality and the management of a sport organization is considered to be a socially valuable technical function that is carried out in the general interest of athletes, employers, sponsors, and spectators alike. However, such approaches do little to challenge the virtue of commercialization and the managerial actions that have portrayed this process as a socially desirable and unproblematic practice. Also, they do little to demonstrate the negative side of this drive towards rationality, or to present new and challenging ways of thinking about the business side of sport. Rather, such uncritical views are actually concerned with the preservation of established privileges and priorities such as maintaining hierarchical control and generating profit. The commercial trends that are occurring in sport are far too

important and wide ranging to be accepted unquestioningly and it is here that I would like to think there is a role for the sport sociologist; to challenge some of these practices. While the organizational and managerial changes we have seen take place as sport has increasingly become a form of commercial activity can be enabling and beneficial for sport and sports people, they can also be constraining and, as such, should be the subject of more critical analysis than occurs at present. In research, I look critically at the use of marketing in voluntary sport organizations. I focus specifically on these organizations not because they are exemplars of marketing practice, but because as governments in many countries have reduced funding for amateur sport, marketing has been presented as the solution to financial problems. I offer critique of this practice and show that while there are certainly benefits to the effective marketing of sport there are also a number of concerns which emerge about its use.[33]

While the organizational and managerial changes we have seen take place as sport has increasingly become a form of commercial activity can be enabling and beneficial for sport and sports people, they can also be constraining and, as such, should be the subject of more critical analysis than occurs at present. In the world of "amateur sports", the concepts and practices of marketing have become centrally important. In the discourse which is promoted by government bureaucrats, professional sport administrators and politicians, the voluntary sport organization is about much more than the development of athletes. Rather, it is about selling sport to potential and existing customers. This requires informing these individuals and collectivities about what is on offer and, in the process, articulating and shaping needs,[34] i.e. marketing the sport. In large part the increased interest in marketing has been the result of a reduction in state funding for amateur sport organizations which have had to turn to the private sector for the shortfalls they are experiencing.[35] The growth in importance of marketing is evidenced by the number of organizations that now employ in-house marketing personnel or hold contracts with external marketing agencies. It is also evidenced by the increased amount of corporate support given to sport (more than $3.5 billion per year in North America- albeit a significant proportion on professional sport), the growth of sport marketing as a sub-disciplinary area in sport studies, and the emergence of organizations such as the Sport Marketing Council in Canada and the Institute for Sport Sponsorship in the UK.

Marketing as a managerial activity occurs primarily at two levels in voluntary sport organizations:

- The first of these involves the marketing of a particular sport to potential participants, usually young children who may take up the sport.
- The second involves the marketing of the organization's properties such as its name or logo, events it may hold or the athletes who are its members, in order to obtain corporate sponsorship.

With the advent of technology even mobile application rights, official website rights and ticketing arrangements can be under the scanner of competition law as they might lead to exclusivity issues. Due to technological advancements cable communication, subscription channels and pay per view. It has changed the ways in which consumer access broadcasting content as it is increasingly available over internet and on wireless portable devices. Hence technological innovation has increased competition concerns worldwide but to different degrees. As there is a huge viewership of sports event as FIFA, World Cup, IPL, Olympics Games, Commonwealth and recently Formula one racing there is increased opportunity for competition.[36]

The law aims to promote healthy competition. It bans anticompetitive agreements between firms such as agreements to fix prices or to carve up markets, and it makes it illegal for businesses to abuse a dominant market position.

The corollary can be established between Section 3 of the Competition Act, 2002 and the European law relating to Antitrust, viz. Articles 81 and 82 of the Treaty of Rome (Now Art 101 and 102 of the TFEU).[37]

United Kingdom

The mechanism used in the European Community to control the abuse of a dominant position is under Article 82.[38] The provision is aimed at eliminating abusive conduct by prohibiting any abuse by one or more undertakings of a dominant position in a market in so far as it affects trade between Member States. It forms part of the competition provisions established by the Treaty of Rome in 1957, along with Articles 81 and 83–9 EC. Article 82 is the subject of this study, with discussion of the other provisions included only where relevant. Article 82 says that any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) Limiting production, markets or technical development to the prejudice of consumers;

(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 82(2) has not been interpreted as an exhaustive enumeration, but as a list of examples. This emerges from the wording 'in particular' of Article 82(2) as well as case law, Article 82 does not distinguish between exploitative and exclusionary abuse. Yet, it is a generally accepted distinction, although some abuses can be both. The meaning of the concepts of dominance and abuse emerge from the case law and practice of the Commission and the Community Courts, as Article 82 is a framework provision and the central terms 'dominance' and 'abuse' are inherently vague. Neither the concept of abuse nor that of dominance is defined in the EC Treaty. The Commission has not sought to publish general secondary legislation or substantive guidance, although it did publish enforcement priorities in December 2008. The *Travaux préparatoires*[39] to the Treaty were deliberately never published, although they can be accessed in the Florence archives. In any event, the Community Courts rarely focus on the intent of the drafters of the EC Treaty.

The concept of abuse is not explicitly defined in the EC Treaty. Such a definition could have had a limiting effect on its interpretation, because every decision or judgment would have to fit within the definition. Instead, the interpretation of Article 82 has been developed through case law, which has allowed the concept of abuse to develop to fit the contours of a particular decision and new learning to be integrated into the case law in an ever changing economy. This allows the analysis of the provision to be updated, as interpretations that seemed adequate years ago may no longer be suitable. However, the lack of substantive guidance as to what does and does not constitute an abuse has led to an *ad hoc* process, swayed by the specific facts that come before the authorities or the courts. It is hard to see a single unifying theory underpinning the interpretation of Article 82. The law of Article 82 is the result of the cases brought before the Community Courts.

This has led to some legal uncertainty resulting from the way in which the provision is being applied in practice and the way in which the legal framework is written. This uncertainty, especially with regard to the 'specialty responsibility' of dominant undertakings, may result in dominant firms competing less aggressively. However, formalistic rules, as to what does and does not constitute an abuse in the market, are not helpful or desirable either. It may not be appropriate to rely on case law decided decades ago in today's markets which are oft en characterized by very rapid technological changes, creation and exploitation of intellectual property rights and high degree of technical complexity. In general, concepts like dominance and abuse cannot be

applied mechanically in today's economic environment and many of the traditional presumptions about what is harmful to competition do not hold in this context.

The Concept of Commercialization in Sports

The commercial trends that are occurring in sport are far too important and wide ranging to be accepted unquestioningly and it is here that there is a role for the sport sociologist; to challenge some of these practices. While the organizational and managerial changes we have seen take place as sport has increasingly become a form of commercial activity can be enabling and beneficial for sport and sports people, they can also be constraining and, as such, should be the subject of more critical analysis than occurs at present. The focus is specifically on these organizations not because they are exemplars of marketing practice, but because as governments in many countries have reduced funding for amateur sport, marketing has been presented as the solution to financial problems.

Approaches do little to challenge the virtue of commercialization and the managerial actions that have portrayed this process as a socially desirable and unproblematic practice. Also, they do little to demonstrate the negative side of this drive towards rationality, or to present new and challenging ways of thinking about the business side of sport. Rather, such uncritical views are actually concerned with the preservation of established privileges and priorities such as maintaining hierarchical control and generating profit.[40]

The marketing of a sport to increase participation is an intuitively appealing and logical function for a voluntary sport organization. It is also consistent with the directives of mainstream management gurus who see marketing as concerned with serving the interests of potential and actual consumers by satisfying their needs. The basic tenet, whether it being selling chocolate bars or sport, is that an increase in consumption leads to an increase in satisfaction. The basis of this premise is that an 'exchange relationship' takes place where, in our situation, the voluntary sport organization provides the opportunity for an individual to participate in the sport and then he or she, in turn, provides loyalty to the organization through competing for them, paying membership fees, being involved in social activities and so forth. The concept of an exchange relationship implies that each individual is free to select the option they want in a free and open marketplace. It does not take account of the fact that structures such as socioeconomic status, gender, race, and geographical location can constrain an individual's ability to respond to the marketing initiative. As Alvesson and Willmott (1996, p.120) suggest, it presents an image of common sense voluntarism, ignores the asymmetrical relations of power in marketing relationships, and "provides a deceptively simple easy-to-understand formulation of the complexities of human interaction and neglects to discuss how structures of domination and exploitation shape and mediate relationships."

While few would deny that it is the responsibility of those working in voluntary sport organizations to promote and publicize their sport and, that this can be to the benefit of both the organization and the participant, an excessive emphasis on marketing presents an image of the young athlete and potential athlete as commodities. For some organizations, they may be merely another membership fee to be added to the coffers or another name on the membership list which can be used to justify the funding of the sport by government agencies and corporate sponsors.

The law aims to promote healthy competition. It bans anticompetitive agreements between firms such as agreements to fix prices or to carve up markets, and it makes it illegal for businesses to abuse a dominant market position.[41]

Introduction of the Competition Act, 2002 (As amended in 2007) is of great significance to almost all sectors of industry within the country. "The act seeks, inter alia, to prevent practices having adverse effect on competition, promote and sustain competition in markets, protect the interests of consumers and to ensure

freedom of trade carried on by other participants in markets, in India, and for matters connected therewith."[42]

Section 3 of the Competition Act, 2002 prohibits agreements, practices and decisions that are anti-competitive. Section 3(1) being a general prohibition of an agreement in the supply of goods or services that causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) declares such agreements to be void while Section 3(3) deals with specific anti-competitive agreements.[43]

The term agreement, in Section 2(b), has been given a wide ambit, it requires two parties independent of each other, which even if not intending to the arrangement between them, are bound by legal proceeding.[44] Also any agreement entered into, in contravention of Section 3(1) is void.

In addition and as referred to above, an enterprise for the purposes of the Competition Act has been defined by Section 2(h),[45] which expressly includes a department of the government carrying on an economic activity in the supply of goods and services.

The law on the subject is almost settled in countries having a developed jurisprudence on competition issues in sport. The economic importance of sports has witnessed tremendous growth. As a result the Commission has dealt with increasing number of cases in the area of antitrust in relation to sports. It is clear in the Bosnan Ruling of CJEU the economic aspect of sports can be governed under EU Law.

In the world of "amateur sports", the concepts and practices of marketing have become centrally important. In the discourse which is promoted by government bureaucrats, professional sport administrators and politicians, the voluntary sport organization is about much more than the development of athletes. Rather, it is about selling sport to potential and existing customers. This requires informing these individuals and collectivities about what is on offer and, in the process, articulating and shaping needs (Morgan, 1992), i.e. marketing the sport. In large part the increased interest in marketing has been the result of a reduction in state funding for amateur sport organizations which have had to turn to the private sector for the shortfalls they are experiencing.[46] The growth in importance of marketing is evidenced by the number of organizations that now employ in-house marketing personnel or hold contracts with external marketing agencies. It is also evidenced by the increased amount of corporate support given to sport (more than $3.5 billion per year in North America - albeit a significant proportion on professional sport), the growth of sport marketing as a sub-disciplinary area in sport studies, and the emergence of organizations such as the Sport Marketing Council in Canada and the Institute for Sport Sponsorship in the UK.

Marketing as a managerial activity occurs primarily at two levels in voluntary sport organizations. The first of these involves the marketing of a particular sport to potential participants, usually young children who may take up the sport. The second involves the marketing of the organization's properties such as its name or logo, events it may hold or the athletes who are its members, in order to obtain corporate sponsorship.

United Kingdom

The development and diffusion of global sports has been true from the time of industrial modernization considered to be the take-off phase of modern sports, when rules and regulations were formalized, leagues set up, and a calendar of competitions drawn up. This went hand in hand with the industrialization process in Britain, since the labor demands of the industrial revolution produced changes in the patterns of work and leisure.

The United Kingdom approach in this area of competition law and policy differs from that of most of the members of the Organization for Economic Co-operation and Development (OECD) and of the European Union. The Fair Trading Act, 1973 empowers the authorities to investigate "monopoly situations" as defined in the legislation and to take action if the investigation reveals conduct or structural situations that operate or may be expected to operate against the public interest.

The authorities consist of the *Office of Fair Trading* (OFT) and its head, the *Director General of Foreign Trading* (DGFT), the *Monopolies and Mergers Commission* (MMC), and the Secretary of State for Trade and Industry. It is the function of the OFT to monitor markets and for the DGFT to decide whether a reference to the MMC is justified. The MMC is an independent tribunal which investigates and reports to the Secretary of State whether any matters uncovered operate against the public interest; if so, the MMC can make recommendations on how the adverse effects might be remedied. The Secretary of State who is the Minister with responsibility for competition policy decides what action, if any, shall be taken on an MMC report (which he must publish). The Secretary of State has extensive powers to impose remedies but usually he requests the DGFT to negotiate enforceable undertakings by the parties as to their future conduct.

The Competition Act, 1980 supplements the provisions of the Fair Trading Act, 1973. It allows the DGFT to refer to the MMC specific conduct that appears to him to amount to an anti-competitive practice. The MMC investigation is therefore narrower in scope than an investigation of a monopoly situation, but otherwise the two procedures are very similar.[47]

This administrative system contrasts with Article 86 of the Treaty of Rome, for example, which prohibits ab initio conduct which amounts to an abuse of a dominant position. While it may have less deterrent effect than a prohibition system (there are no financial penalties, no rights for private actions, and MMC reports do not give rise to precedents in the legal sense), it is a flexible system, applicable to a variety of situations and circumstances. After a review of the case for adopting a prohibition system similar to Article 86 and other possible reforms, the Government announced in April 1993 that it intended to retain the present system but to strengthen the DGFT's investigatory and enforcement powers in certain respects. It will shortly be issuing a consultation paper on how its proposals (and more substantial proposals to reform the law on restrictive agreements) might be implemented.

The Court of Justice in the Mecca Medina case held that the compatibility of sporting rules with competition law should be examined on a case to case basis. The Court of Justice provided further clarification concerning the application of EU competition law to sporting rules in *MOTOE case.* In this judgment the court confirmed that the commercial exploitation of sporting event is covered by EU Competition rules. For instance, In the EU, EC competition law is now applicable to economic activities generated by sport, particularly after the Mecca-Medina case (2004).[48]

Article 102 of the Treaty on the functioning of the EU (ex Article 86 EEC, ex Article 82 TEC) stipulates that "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States". Apart from the fact that this Article does not prohibit the obtaining of a dominant position, but only abuse thereof, it leaves several issues obscure, although they are now clarified by various standard Commission decisions and judgments of the Court of Justice.

First, domination of a given market cannot be defined solely on the basis of the market share held by an undertaking or of other quantitative elements, but must also be looked at in the light of its ability to exercise an appreciable influence on the functioning of the market and on the behavior of other firms. In its judgment of 14 February 1978 [Decision 72/21] in the case of "*United Brands Company v. Commission*" [Case 27/76] the Court upheld and enlarged the definition of the dominant position adopted by the Commission as early as its decision of 9 December 1971 [Decision 72/21] in the *"Continental Can Company"* case [Case 6-72]. It thus stated that the dominant position referred to in Article 86 (EEC, new Article 102 TFEU) "relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

The definition of the relevant market or of the market in question is also of great importance, as the more strictly that market is defined in time and space, the greater the likelihood that a dominant position can be identified in the common market. In its judgment of 13 February 1979 in the *"Hoffman-La Roche v. Commission"* case, the Court of Justice felt, in common with the Commission,[49] that each group of vitamins constitutes a separate market and that one product can belong to two separate markets if it can be used for several purposes.[50] The Court held that actual competition must be able to exist between products that belong to the relevant market, which presupposes an adequate degree of interchangeability or substitutability between such products. For the Commission, the assessment of demand substitution entails a determination of the range of products, which are viewed as substitutes by the consumer and their competition can thus affect the pricing of the parties' products. The Commission's notice on the relevant market is an analytical tool which makes it possible to calculate firm's market shares. As regards the concept of the distortion of trade between Member States, which is the same for Articles 101 and 102 of the TFEU (ex- Articles 81 and 82 TEC), the Commission and the Court of Justice agree that a concentration in which an undertaking occupies a dominant position in the common market or in a substantial part of it will always be of importance for trade between Member States. In its judgment of 13 July 1966 in the *"Grundig-Consten"* case the Court opined that the concept of damage to trade between Member States should be seen as a question of "whether the agreement is capable of constituting a threat... to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between States" [Joined cases 56 and 58/64]. It goes without saying that abuse of a dominant position is judged all the more harshly because it tends to compartmentalize the relevant market and make economic interpenetration more difficult. That was the case with British Leyland, which refused to issue type-approval certificates for left-hand-drive "Metro" vehicles in order to prevent the re-importation of such vehicles from other Member States.[51]

Lastly, as regards the concept of abuse of a dominant position, Article 102 TFEU is more explicit, as it stipulates that "abuse may in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage and (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations" which have no connection with such contracts. We note that the concept of abuse of a dominant position is similar to the concept of restriction or distortion of competition given by article 101.[52]

The Commission has adopted guidelines on its enforcement priorities in applying Article 82 (new Article 102 TFEU) rules to abusive exclusionary conduct by dominant undertakings.[53] Such conduct aims to exclude actual competitors from expanding or would-be competitors from entering a market, thereby potentially depriving customers of more choice, more innovative goods or services and/or lower prices. Generally speaking, an undertaking in a dominant position may abuse its power on the market in one of the following ways:

- by setting the prices on the dominated market, as in the case of Deutsche Telekom AG (DT) concerning the prices for access to its fixed telecommunications network ;[54]
- by imposing discriminatory commercial fees on service providers, as in the case of the *Aéroports de Paris* concerning ground handling, catering, cleaning and freight handling services;[55]
- by "tying" the products or services of the dominated market to other products or services (as in the case of Microsoft Corporation, which made the availability of the Windows client PC operating system conditional on the acquisition of the Windows Media Player software;[56]

- by imposing on its customers agreements for the exclusive purchase of products, such as the vitamins in the *Hoffmann-La Roche case* [57] or services (as in the case of the company operating Frankfurt airport);[58]
- by restricting competition from imports, as in the case of *Irish Sugar plc.*[59] or from generic products (as in the case of the anti-ulcer product, Losec, of AstraZeneca);[60]
- by attempting to eliminate competition by "predatory pricing", i.e. by selling below cost for a short period of time until the competitors are driven out of the market, as in the case of Deutsche Post AG concerning the market for business parcel services [61] and in the case of Wanadoo Interactive, a subsidiary of France Télécom, concerning access to the Internet by the general public.[62]

It is certain that the Commission and the Court regard it as an abuse where an undertaking in a dominant position strengthens that position by means of a concentration or of the elimination of competitors, with the result that competition, which continued in spite of the existence of the dominant position, is virtually eliminated as regards the products concerned in a substantial part of the common market. The Commission accordingly imposed heavy fines on: AKZO Chemie, which is the chemical division of the Dutch multinational group AKZO, for having abused its dominant position on the organic peroxides market by trying to eliminate a small competitor from the market by applying prolonged, selective price-cuts designed to damage its business;[63] and British Sugar plc. for implementing a series of abuses designed to eliminate a smaller competitor from the retail sugar market.[64] On July 24, 1991, the Commission imposed a record fine on *Tetra Pak*[65] for having deliberately attempted to eliminate its actual or potential competitors, in breach of Article 86 of the EEC Treaty.[66] On 24 March 2004, the Commission fined Microsoft Corporation EUR 497 million, because it used the near-monopoly position enjoyed by its Windows product on the market for PC operating systems to restrict competition on other software markets: work group server operating systems; and the market in media players.[67]

In the *"Hoffmann-La Roche"* case[68] the Court of Justice for the first time gave a general definition of abuse by stating that it is an "objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[69] In the *British Midland/Aer Lingus case*, the Commission showed its determination to proceed against any airline or any other holder of a dominant position which tries to stand in the way of the development or maintenance of competition.[70]

The *"United Brands Company"* judgment defines the scope of the concept of abuse by confirming the obligation for an undertaking in a dominant position to respect the principle of proportionality when it imposes restrictions on its resellers; even if in so doing it is pursuing legitimate objectives such as maintaining the quality of its products or protecting its commercial interests.[71] Such objectives cannot, a fortiori, be invoked when in reality their purpose is to eliminate competitors. Hence *Tetra Pak*, the largest Community producer in the milk carton industry, was censured for having obtained an exclusive license concerning technology for a method of sterilizing cartons for long shelf-life milk.[72] Technological prominence may even entail certain obligations for undertakings in a dominant position vis-à-vis their competitors. In 1984 the Commission obliged IBM to communicate systematically in good time to its competitors in the Community appropriate information on its interfaces in order to enable them to connect their products to its large medium-sized data-processing systems and to its network or systems interconnection system. On 3 July 2001, the Commission ordered IMS Health, the world leader in data collection on pharmaceutical sales and prescriptions, to license its "brick structure", which segmented Germany into sales zones or "bricks" and had become a national

standard in the German pharmaceutical industry, because refusal to grant a license constituted a prima facie abuse of a dominant position.[73] On 5 December 2001, the Commission decided that the Belgian postal service operator De Post/La Poste abused its dominant position by making a preferential tariff for its general letter mail service subject to acceptance of a supplementary contract covering a new business-to-business ('B2B') mail service.[74]

In the aforementioned judgment in the *Hoffmann-La Roche case*, the Court of Justice felt that the prohibitions listed in Article 86 (EEC, new Article 102 TFEU), in spite of that Article's necessarily vague wording, did not show the indeterminate and unforeseeable nature alleged by Roche. According to the Court an undertaking which dominates a market must take that fact into account and itself seek legal security under the European law. As the Court stressed in its judgment of 19 June 1978 in the *BP v. ABG case*, such a clearance would not, however, free the Commission from its obligations peculiar to the market, where the competitive position of operators is particularly threatened, to comply scrupulously with Article 86 of the EEC Treaty.[75] The Court thus confirmed that the purpose of Article 86 (Article 102 TFEU) is to preserve an effective competition structure in the common market, especially where it is jeopardized by the elimination of independent economic operators by an undertaking in a dominant position.

United States of America

In the US, broadcasting issues in popular sport are governed by the Sports Broadcasting Rights Act, 1961.[76] Competition issues relating to professional sport have arisen primarily under Section 1 of the Sherman Act. One of the most fundamental distinctions in the field of competition law and policy is the one between single-firm conduct and collective behavior. For example, the law in the United States differentiates between the two in Sections 1 and 2 of the Sherman Act, and the European Union follows a similar line in Articles 85 and 86 of the Treaty of Rome. In general, this distinction reflects the fact that the regulation of potentially anticompetitive behavior of single firms is a more delicate matter than the regulation of anticompetitive agreements among more than one entity. Individual firms, after all, always want to win in the competitive marketplace, and it is often difficult to distinguish aggressive competition, which is by definition desirable, from anticompetitive or abusive behavior that is properly condemned under competition laws.

Legal measures addressing monopolization or abuses of a dominant position, based as they are on real-world markets and complex factual data, must necessarily rest on more than the comforting simplicity of the classic economic model. No legal system would condemn only the classic single-firm monopolist, leaving the firm with 99 per cent of a market, or 90 per cent, absolutely free. However, the question of how much control over a market is too much -- or put more accurately, how much market power should be required before legal measures should be adopted -- is a difficult one, which has been answered somewhat differently in the United States and the European Union.[77] Legal systems must also-

- Select a methodology for defining markets,
- Deal in some way with other relevant factors that bear on the firm's ability to exercise market power, such as the ease (or difficulty) with which other firms might enter a market, the presence or absence of significant barriers to international trade, the speed of technological change, and the characteristics of other market participants such as fringe competitors and buyers, and
- Identify types of conduct that will be characterized as "abusive" or unlawful for a monopolist.

The literal wording of Section 1 of the Sherman Act condemns every agreement in restraint of trade. However, landmark decisions in *United States v. Addyston Pipe & Steel Co.* and *Standard Oil Co. v. United States*[78] established a non-literal reading of Section 1 as barring only "unreasonable" restraints. *Addyston Pipe* holds that restraints among competitors are reasonable only when "ancillary to the main and lawful

purpose of the contract and necessary [to protect] the covenantee in the [enjoyment of the legitimate fruits of the contract.]" Applying these principles to sports, the Supreme Court held in *National Collegiate Athletic Association v. Board of Regents*[79] that the organization of a sports league is a "lawful" contract, but a restraint is unreasonable if it is shown that, as a result of the restraint, prices are higher, output is lower, or output is unresponsive to consumer demand compared to what "would otherwise be." Courts have held that player restraints that affect stars and ordinary players alike are overbroad.

Restriction of Competition or Abuse of Dominance

American Jurisprudence reads "A corporation does not violate the Sherman Act by securing a dominant position as the result of the ability, ingenuity, intelligence and industry of those who direct its activities, such as by offering a better product and furnishing better customer service."

The Competition Act, 2002 defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in relevant market in India, which enables it to:

- Operate independently of competitive forces prevailing in relevant market; or
- Affect its competitors or consumers or relevant market in its favor.
- It is the ability of an enterprise to behave/act independently of the market forces that determines its dominant position. Dominance is not considered bad per se but its abuse is. Abuse is stated to occur when an enterprise or group of enterprises uses its dominant position in relevant market in exploitive manner.

South Africa

The Competition Commission of South Africa began its investigation of collusion and bid-rigging amid an outcry over the escalating costs of stadiums used for the 2010 FIFA World Cup hosted by South Africa where 15 companies agreed to pay a total of $147 million in fines in a fast track settlement to avoid prosecution for "rigged" projects in South Africa between 2006 and 2011, which include World Cup work. According to the South African Commission, the fast-track process revealed various ways that firms colluded to rig project bids, including submitting sham tenders to enable a fellow conspirator to win a bid and agreeing that whoever won a bid would pay the losing bidders a "loser's fee" to cover their costs of bidding. Subcontracting was also used to compensate losing bidders. "It is not the power to regulate a given sporting activity as such which might constitute an abuse but rather the way in which a given sporting organization exercises such power." Hence, bidding process should be transparent and fair. Repetitive purchases may increase the chance of collusion. Expanding the list of bidders will make it more difficult for bidders to collude. Collusion is more likely to arise where there are few competitors.

Denmark

The purpose of the Danish Competition Act is similar as the enactment of other countries having to promote competition and strengthening the efficiency of production and distribution of goods and services through the greatest possible transparency of competitive conditions and through measures against restraints of the freedom of trade and other harmful effects of anti-competitive practices. Decisions and agreements which may result in a dominant influence being exerted on the market concerned are subject to notification to the Competition Council (Section 5 of the Danish Competition Act). Action can be taken against such decisions if they entail or may entail harmful effects on competition and therefore on the efficiency of production and revenue (Section 11 & 12).[80]

The major sport undergoing such a commercial revolution is cricket. Cricket is very popular universally with some people even considering cricket at par with their religion. With the Indian population standing today over a billion, of whom the majority is ardent supporters of the Indian cricket team. Similarly, such issues have arisen in hockey where players who had signed up to play in various franchisees of the WSH – which is organized by the rival Indian Hockey Federation (FIH) – were deliberately not selected for the Indian national hockey team. Very recently, Indian Badminton league was organized and Indian players are not paid adequately in comparison with international players.

The world over, competition in sports is regulated like that in other sectors of the economy. For instance, Simon Rotenberg, a well-known US economist, in his paper The Baseball Players' Labor Market states that the "economics of professional sports leagues could be analyzed using the same economic framework as for any other industry.'[81]

Suggestions

In Indian perspective now India has a modern competition law, competition issues in sports cannot be allowed to be overlooked. No enterprise in the country is now permitted to indulge in any anti-competitive business practice prohibited by the Competition Act. Thus there must be clear separation between sports regulation and the commercialization of sport. No material step has been taken to term sports as event of National importance. The league matches shall not be a matter of National importance as it does not involve the participation of National team. There are various clubs owned by corporate houses or businessmen of various parts of the country. It also has regional sentiments since the player affiliates to various cities. This is the reason why there is always a conflict with respect to media rights given during IPL. Privatization has made everything out of reach from the common man to analyze this aspect easily. More technicalities are to be removed to make it clear the picture. There is requirement to amend the existing laws and bring it at par with the main objective of the statutes. We have precedent to developed countries in this regard as they have already faced the problem we are facing at present they have faced before an elongated time period.

References

(Endnotes)

1. The **Victorian era** of British history was the period of Queen Victoria's reign from 20 June 1837 until her death, on 22 January 1901. It was a long period of peace, prosperity, refined sensibilities and national self-confidence for Britain.[1] Some scholars date the beginning of the period in terms of sensibilities and political concerns to the passage of the Reform Act 1832.
2. The Peculiar Economics Of English Cricket Before 1914, Keith Standiford And Wray Vamplew, The International Journal Of History Of Sport, Vol.3, Issue 1986.
3. http://isidev.nic.in/pdf/DN1401.pdf visited on April 10, 2016 at 03:30 pm.
4. Section 2 (T) of Competition Act, 2002.
5. https://en.wikipedia.org/wiki/Dyer's_Case visited on April 08, 2016 at 12:30 pm.
6. See generally, Heydon, The Restraint of Trade Doctrine (London: Butterworths, 2nd ed, 1999); Trebilcock, The Common Law of Restraint of Trade: a Legal and Economics Analysis (Toronto: Carswell, 1986). Some authors cite a parallel focus of early legislation on monopolies in discussing the origins of British competition policy, including the Statute of Monopolies of 1624 which gave a remedy of triple damages and double legal costs to any person aggrieved by an unlawful monopoly – see, for example, Turner, 'The Need for an Effective Competition Policy' (1984) 6 European Intellectual Property Review 331.
7. AG of the Commonwealth of Australia v Adelaide SS Co [1913] AC 781, 795.
8. Per *Diplock LJ, Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, 180.

9. *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co. Ltd.* [1894] AC 535; *Mason v Provident Clothing & Supply Co*. [1913] AC 724. It should be note that the public interest in this context was rarely thought to be an important discrete category, but was generally considered to coincide with the interests of the parties.
10. Gerber, n 4 above, 208.
11. 3 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1, Article 3(2), Article 3(3).
12. [2004] EWHC 44 (Comm), para 254. Mr Justice Langley admitted that the conclusion may "come as something of a surprise to many practitioners" for its emphasis on the public policy aspect of the doctrine as opposed to the interests of the parties. For this reason, the judgment has been described by one commentator as "a remarkable recognition of the extent to which the doctrine has moved from being a matter of individual liberty and become one of economic regulation" – see Furse, Competition Law of the EC and UK (Oxford: Oxford University Press, 4th ed, 2004) 369.
13. Kammerling and Osman, Restrictive Covenants under Common and Competition Law (London: Sweet & Maxwell, 4th ed, 2004) 289.
14. Case 27/76, United Brands v Commission.
15. Case T-61/99 Adriatica di NavigazioneSpA v Commission, para 27.
16. AMERICAN BAR ASSOCIATION (1992). Antitrust Law Developments (Third). Section of Antitrust Law, ABA: Chicago.
17. *Ibid*.
18. Supra note 1.
19. *Ibid*., S. 2 (S).
20. *Id.,* 2 (T).
21. https://www.competitionpolicyinternational.com/wp-content/uploads/2016/03/Relevant-Market-Definition.pdf visited on March 14, 2016 at 04:00 pm.
22. The Competition Act, 2002.
23. http://www.lexuniverse.com/sports-law/india/The-Sports-Broadcasting-Law-in-India.html visited on April 04, 2016 at 01:30 pm.
24. Cricket And Globalization: Global Processes And The Imperial Game; Fahad Mustafa, Journal Of Global History, Vol.8, Issue 2, July 2013, Pp. 318-341.
25. 1997 International Committee For The Sociology Of Sport Conference In Oslo, Norway, June 30th, 1997.
26. The board sold five-year contracts to ESPN STAR Sports (1995-99) and Prasar Bharati (1999-2004). Thereafter, it sold the rights on a territorial basis and Nimbus Communications bought the rights for India for five years (2006-10), ESPN STAR Sports for overseas matches for four years (2005-08) and Zee Television for matches in neutral venues for five years (2006-11).
27. Article available at www.vaishlaw.com.
28. http://www.cci.gov.in/sites/default/files/612010D_0.pdf visited on April 12, 2016 at 05:35 pm.
29. The Competition Act, 2002.
30. Section 2(r) of the Competition Act, 2002. "Relevant market" means the market which 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.
31. Competition Appellate Tribunal Appeal No.17 of 2013 with I.A. No.26 of 2013, *The Board of Control for Cricket In India Vs. The Competition Commission of India and Mr. Surinder Singh Barmi.*
32. https://www.competitionpolicyinternational.com/sports-and-competition-law-in-india-the-need-for-a-third-umpire/ visited on April 11, 2016 at 04:00 pm

33. Studying The Commercialization Of Sport: The Need For Critical Analysis, Prof. Trevor Slack, De Montfort, University, Bedford, Uk.
34. Morgan, 1992.
35. Slack & Berrett, 1996.
36. Sports And Competition Law, IshaBhalla, Pg. 6.
37. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.398.6648&rep=rep1&type=pdf visited on April 15, 2016 at 07:15 pm.
38. http://www.cambridge.org/catalogue/catalogue.asp?isbn=9780521767149&ss=exc visited on April 17, 2016 at 06:25 pm.
39. https://en.wikipedia.org/wiki/Travaux_pr%C3%A9paratoires, The **travaux préparatoires** (French: "preparatory works", in the plural) are the official record of a negotiation. Sometimes published, the "travaux" are often useful in clarifying the intentions of a treaty or other instrument. This is reflected in Article 32 of the Vienna Convention on the Law of Treaties (VCLT).
40. http://basijcssc.ir/sites/default/files/The%20Commercialisation%20of%20Sport.pdf visited on March 11, 2016 at 08:00 pm.
41. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284428/oft911.pdf visited on March 07, 2016 at 07:00 pm.
42. Supra 32.
43. Sec 3 Of The Competition Act, 2002.
44. Sub Section (B) Of Section 2.
45. *Supra*, Sub Section (H).
46. Slack & Berrett, 1996.
47. http://www.bath.ac.uk/management/cri/pubpdf/Occasional_Papers/14_Parker.pdf visited on March 05, 2016 at 09:00 pm.
48. Case C-519/04 P, *Meca-Medina &Majcen V. Commission,* Judgment Of 18 July 2006 ("Meca-Medina").
49. Decision 76/642.
50. Case 85/76.
51. Case 226/84.
52. Section 15.3.
53. COM/2008/832.
54. Decision 2003/707.
55. *Ibid*, 98/513.
56. Decision 2007/53, Case Comp/C-3/37.792 And Case T-201/04
57. *Id*, 76/642.
58. *Id*, 98/190.
59. *Id*, 97/624.
60. *Id*, 2006/857, Case Comp/A.37.507/F3.
61. Decision 2001/354.
62. Comp/38.233.
63. Decision 85/609 And Case C-62/86.
64. *Ibid*, 88/518.

65. **Tetra Pak** is a multinational food packaging and processing company of Swedish origin with head offices in Lund, Sweden, and Lausanne, Switzerland. The company offers packaging, filling machines and processing for dairy, beverages, cheese, ice-cream and prepared food, including distribution tools like accumulators, cap applicators, conveyors, crate packers, film wrappers, line controllers and straw applicators. See also https://en.wikipedia.org/wiki/Tetra_Pak#cite_note-investing.businessweek-1.
66. Article 82 Tec, Article 102 Tfeu.
67. Case Comp/C-3/37.792.
68. Decision 76/642.
69. Case 85/76.
70. Decision 92/213.
71. Case 27/76.
72. Decision 88/501 And Case T-51/89.
73. *Ibid*, 2002/165
74. *Id*, 2002/180
75. Case 77/77.
76. *Ibid*.
77. Roughly speaking, the threshold for "dominance" in Europe is much lower than the threshold for "monopoly power" in the United States. In Europe, market shares in the area of 40 per cent would be troublesome, while in the United States (as is explained more fully in the text that follows), actual monopolization is not often found until market share reaches at least 60 per cent, if not more.
78. *United States V. Addyston Pipe & Steel Co. And Standard Oil Co. V. United States* 175 U.S. 211 (1899).
79. *National Collegiate Athletic Ass'n V. Board Of Regents* 468 U.S. 85 (1984).
80. Competition Issues Related To Sports, An Oecd Report (1997) Available At http://www.Oecd.Org/Dataoecd/34/49/1920279.Pdf visited on March 04, 2016 at 06:30 pm.
81. http://anon-ftp.iza.org/dp2175.pdf visited on March 11, 2016 at 08:10 pm.

❑❑❑

CHAPTER

5

Role of the Competition Commission in India: An Analysis

Dr. Parmod Malik*

Introduction

The main purpose of passing of any act is to provide transparency, accountability and justice. Same objective was also with the competition Act, 2002. This competition act was passed to provide, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.[1] By preventing anticompetitive practices and to promote and sustain competition in the market, this act tries to fulfill the transparency, accountability and justice to all even layman who don't know that he is also affected by the practices adopted by the firms. The Competition Act 2002 in India was enacted to address three kind of anticompetitive practices, namely anticompetitive agreements, abuse of dominant position and combinations in restraint of trade.[2]

Now the question arises whether the competition law has fulfilled the aim for which it was passed. The researcher tries to find out the answer after analyzing the competition act of India and the role of Competition commission of India during this period.

Historical Background

After independence, the constitution of India was enacted with the objective of fulfilling the dreams of social welfare state which includes Fundamental rights as well as Directive Principles of state policy. Articles 38 and 39 of the Constitution provide that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice – social, economic and political – shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing–

(a) that the ownership and control of material resources of the community are so distributed as best to sub-serve the common good; and

(b) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Article 39 of the Indian constitution provides that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.[3] For this the government of India had appointed the Monopolies Inquiry Commission committee in 1964 to investigate the extent and effect of the concentration of power in market and to suggest the necessary legislative and other measures. The report

* Asst. Professor, Department of Laws, BPS Women University, Khanpur Kalan, e-mail: parmodipr@gmail.com

found that most of the firms in the market are engaged in the restrictive practices. After that the planning commission of India has appointed another Hazari committee to review the operation of existence of the industrial system. This led to the enactment of the Monopolistic and Restrictive Trade Practices Act 1969.

In 1991, Government of India started economic reforms by way of Liberalization Privatization and Globalization (LPG), from controlled economy to economy dependent on free market based on the principle of laissez faire. MRTP commission was set up under MRTP act but it was found that MRTP act was not strong enough to deal with the challenges comes with the LPG. There was no provision for mergers and combinations. As the finance minister said-

"The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions."

After the LPG, the MRTP act was not strong enough to regulate the anti- competitive practices and abuse of dominant position by the MNCs. For this purpose High power committee was appointed under the chairmanship of Mr. S.V.S. Raghavan to review the relevancy of MRTP act. That's why Competition Act was passed.

The constitutionality of the composition of Competition Commission of India was challenged in the case of Braham Dutt vs. Union of India[4] which delayed the implementation of the act. At last competition Act 2002 comes into force fully in May 2009.

Anti competitive Practices under Competition Act 2002

The activities comprise:[5]

(a) Anti-competitive arrangements;

(b) Abuse of dominant position; and

(c) Mergers and acquisitions that have an appreciable adverse effect on competition in India.

Section 3 of the Competition Act states that any agreement which causes or is likely to cause an appreciable adverse effect on competition in India is deemed to be anti-competitive. It also prohibits that no enterprise or group of enterprises entered into any agreement with respect to "production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India."

The concept of agreement for the purpose of section 3 includes 'any arrangement or understanding or action in concert–

(i) whether or not such arrangement, understanding or action is formal or in writing;

(ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

Those agreements which would be considered to have an "appreciable adverse impact" would be those agreements which:

- Directly or indirectly determine sale or purchase prices;
- Limit or control production, supply, markets, technical development, investment or provision of services;
- Share the market or source of production or provision of services by allocation of inter alia geographical area of market, nature of goods or number of customers or any other similar way;
- Directly or indirectly result in bid rigging or collusive bidding.

All such agreements shall be treated as void. And Section 3 (5) specifically deals with the Intellectual Property Rights. It states that nothing contained in this section shall restrict—

(i) The right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under —
   (a) The Copyright Act, 1957;
   (b) The Patents Act, 1970;
   (c) The Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999;
   (d) The Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
   (e) The Designs Act, 2000 (16 of 2000);
   (f) The Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) The right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Section 4 prohibits any enterprise from abusing its dominant position.[6] The term 'dominant position' has been defined in the Act as 'a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate–

(i) independently of competitive forces prevailing in the relevant market; or
(ii) affects its competitors or consumers or the relevant market in its favour.

Such agreements would consequently be considered void. There is no presumption on dominance. A firm can grow as a large as it can or achieve as big as a market shares as it can.

Role of Competition Commission of India

The Act also provides for the establishment of the Competition Commission of India[7] which would function as a market regulator for preventing and regulating anti-competitive practices in the country, as well as a Competition Appellate Tribunal which is a quasi-judicial body established to hear and dispose of appeals against decision made by the CCI.

Section 18 of Competition Act has given the duty of the commission to eliminate the practices having adverse effect on the competition, promote and sustain competition and protect the interest of the consumer and ensure freedom of trade.

Powers of CCI in respect of the anti-competitive practices

I. To grant such interim order/relief during inquiry.
II. To award compensation.
III. To impose penalty on the guilty.
IV. To recommend thee division of undertaking.
V. To issue cease and desist order.

After **Braham Dutt case,**[8] the CCI has started working and after that CCI has done commendable job in implementing the provisions of CA in India.

In **Cement Cartel Case,**[9] CCI has issued an order finding that eleven cement companies and the cement manufacturing association had infringed the section 3 of the Indian competition Act, 2002 as the cement companies conspired together to reduce their cement supply in order to create shortage to increase their price. Therefore CCI has imposed a penalty of ₹ 60 Billion (0.5 % of the net profit of 2009-10 and 2010-11).The most important thing is that CCI has relies entirely on circumstantial evidence.

FICCI Multiplex Association of India vs. United Producers/ Distributors Forum,[10] CCI has imposed a fine of ₹ 1 lakh on 27 film producers for making cartels for not releasing film to get undue share from profits of multiplexes.

In **Shamsher Kataria vs. Honda Siel Cars India Ltd.,**[11] the CCI has directed the enterprises to discontinue such acts that amount to abuse. In this case dominant players were directed to cease/desist from indulging in activities in contravention of section 4 of CA.

In DLF case,[12] the CCI has imposed a penalty of ₹ 630 crores on DLF, a real estate **company for indulging in unfair practices and abuse of dominant position by the DLF.**

In Automobiles Case, the CCI has penalized 14 car manufacturing companies of amount of ₹ 2544.65 crores for anti-competitive practices. They were found to have abused **their dominant position in the market of the car parts.**

In **SRS Real Estate Limited,**[13] the CCI held that there is no infringement of section 4 and 8 of Competition act 2002, if there is more than one equal player in the same geographical area in same service sector.

In **Hawkins Cookers Limited vs. Murugan enterprises,**[14] in this case the plaintiff is using his dominant position in the market by controlling the ancillary and incidental market.

In **BCCI case,**[15] the CCI has imposed penalty of ₹ 522 million on BCCI for misusing its dominant position. It was found that IPL teams ownership agreements were unfair and discriminatory.

In **Airline case,**[16] the CCI has imposed affine of ₹ 258 crores on three airlines for cartelization in determining the fuel charges on air cargo.

In **Hiranandani case,** the exclusive agreements with one stem cell bank is declared void and fine has been imposed as practices is fall under anti competitive practices.

In **Bengal Chemist and Druggist Association case,**[17] The CCI imposed 18.38 crores on the Bengal Chemist and Druggist association who were engaged in directly or indirectly determining the sale price of drugs and controlling the supply of drugs.

In **Google case,**[18] the CCI has imposed ₹ 1 crore fine on Google for failure to supply information to the Directorate General for investigation.

Conclusion

From the above discussion, it is clear that the Competition Commission of India has worked according to the intent and objectives of Competition Act. The number of challenges for competition authorities are rising rapidly,[19] but it is proved by the above mentioned cases that CCI has fearless acted in the interest of the consumer and citizens of India. However it is very pertinent to note that the Competition Commission of India although exterritorial in nature, cannot go beyond the boundaries of law while carrying out its functions. Although Competition Act in India has not old but it is progressive a lot and has done commendable job for which it was enacted. As the Competition Commission of India is in the infant age, but the decision given by the Competition Commission of India related to section 3, 4 and 5 have much impact on Indian enterprises. As there is no settled jurisprudence of competition law till now, yet the Competition Commission of India is playing important role in evolving jurisprudence of Indian competition law. It is also important to note that it is only the CCI, which has power to impose highest financial penalty in India.

References

(Endnotes)

1. Preamble of the Competition Act 2002.
2. Singh Amit, Competition Law and Policy: Indian Context, Yojana August 2009, p.60.

3. Directive Principles of the State Policy are non-enforceable under Indian Constitution.
4. (2005) 2 SCC 431.
5. See Ramappa T., Competition Law in India-Policy, Issues and Development, Oxford University Press, 2nd Edn.
6. Dominant Per se is not bad but abuse of it is anti competitive in nature.
7. See Section 7 of Competition Act 2002.
8. Supra note 4.
9. Order dated 20-06-2012, see Rab Suzanne, Indian Cement Cartel: An International Comparative Analysis, National Law School Journal, Vol. 11(2013) for review of the case.
10. Order dated 25-5-2011.
11. Case no. 03 of 2011.
12. Order dated 03.01.2013.
13. Decided on 01.01.2011.
14. 2008(36) PTC 290 (Del).
15. Order dated February 8, 2013.
16. Order dated November 17, 2015.
17. Case no. 02 of 2012 and ref. case no. 01 of 2013.
18. Order dated January 27, 2014.
19. See www.CCI.gov.in visited on March 12, 2016.

❑❑❑

CHAPTER

6

Abuse of Dominance Position and Competition Law

Neha Prajapati and Pooja Awasthi*

Historical Background

In the field of the Competition law, India's first experiment with the legislation is to govern Monopolies and Restrictive trade Practice Act ("MRTP") which is influenced by the Directive Principle of the Constitution[1] that urged the government to ensure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.[2]

Competition is desirable in a free market. Where liberalization and privatization were activated in India in the early nineties, a realization was developed that the existing MRTP Act, 1969 was not running properly enough to solve the competition aspects of the Indian economy. In the starting of the globalization process, Indian enterprises started facing the problems regarding competition from domestic as well as global players.

Thereafter, need with regard to competition law arose which forced to restrict monopolies, to motivate companies to start, invest and grow, thereby promoting competition law and to prevent any abuse of market power.

Introduction

- The competition law, in reality, does not restrict competition in the market. This law came in force to look on to practices that have opposite impact within competition in the market(s) in India and to promote and sustain competition in markets, protect consumer rights and freedom of trade in the market(s).
- There are two schools of thoughts for a dynamic and fair competitive environment; one school is of the view to have an absolute free and unrestricted competition. Second School's approach is to create a free competitive environment model combined with regulations that will prevent any sabotage on free trade and competition.
- In India it is not illegal to hold dominant position as a dominant position can be obtained by legitimate means of competition, for example by inventing and selling a better product. The problem arises only when there is Abuse of Dominant position. It is one of the most puzzling areas of competition law since firms can achieve dominant position legally, and many practices that appear on the surface to be anti-competitive is going to serve legitimate pro-competitive purposes.

* BB.A., LL.B(H), VIth Sem, Amity Law School, Jaipur, Rajasthan.

Abuse of Market and Need for New Law Dominance

- In today's scenario dominance is increased just to maintain position in market and to generate huge profits by the market. To understand the definition and objective of competition law and the policy which is given by the European Court of justice is that dominance is *"a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers, and consumer."* This definition has two ingredients firstly ability to prevent effective competition and secondly ability to behave independently of three set of market i.e., competitor, customer, and consumer.
- Section 4 of this Act[3] forbids any company from the abuse of its dominant position. However, it must be noted that the act has prohibited any conduct that results in the abuse of dominant position and not the dominant position. Being a dominant player in a market, does not amount to an anti-competitive behaviour. However the Act seeks to target is to discourage a dominant player from using his dominance to unfavourably affect competition in a market. It was laid down by *The Raghavan Committee*[4] set up by the Government, although dominance is a necessary condition for establishing violation of provision regarding abuse of dominant position; it is by no means a sufficient condition.
- In Competition Law Act, 2002 Dominance Position is defined as the position of strength, enjoyed by an enterprise in the relevant market within India which gives it to work individually of competitive force which is running in the relevant market and which affects its competitors or consumers or the relevant market in its favour. The definition which is given by this act is same as given by the European Commission in *United Brand vs Commission of European Communities,*[5] the court observed in that case:

'….a position of strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitor, customers and ultimately of its consumers.'

Relevant Market

To judge whether there exists a dominant position or not, it is important to understand what is relevant market. The relevant market exists where there is a competition. There are two terms to understand this, product market and geographical market.

- As according to section 2(r) of this Act[6] read as: "relevant market" means the market which may be determined by the commission with reference to the relevant product market or the relevant or the geographic market or with reference to both the market.

Relevant Product Market

- Section 2(t) of this Act[7] defines the term 'relevant product market' as:

  a market comprising 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
- In simple words, a relevant market product has two ingredients:

  Demand side substitution, Supply side substitution.
- In demand side, a market player is not able to generate profit by a slight increase in price, reason being the consumer has a different option of substituting the use of such product/service but in the supply side, the increase in the supply of such product/service cancel the effect of any increase in price.
- Supply substitution is taken into notice when it shows the same effect to demand substitution and for this, suppliers have to shift their production to other when it is faced with a small increase in relative

price and have to market their entire product without adding additional cost to it and have to take a risk for a short term and when their production attains significant demand on a market and able to generate profit which pressurises competition within market then this situation is similar to demand substitution.

- To determine relevant product market by Competition Authority there are following factors:
  1. Physical characteristic or end use of goods
  2. Price of goods or service
  3. Consumer preference
  4. Exclusion of in-house production
  5. Existence of specialised producers
  6. Classification of industrial products

BCCI Case[8]

- BCCI is a central governing body to promote and control cricket in India. In 2008, it had started T20 Indian Premier League which has got the recognition worldwide and became a global brand. The informant filed the complaint against the anti-competitive practices of BCCI in relation to operation of IPL. Many allegations were imposed like irregularities in granting media rights, sponsorship rights, franchise rights for team ownership, etc. CCI ordered Director General to investigate in the matter. On the basis of the report submitted CCI ruled out following points on the grounds of violation of Sec. 4 of the Act[9]:
  1. Removal of restrictions for potential competitors by providing them opportunity to access the market.
  2. Penalty of around INR 50 crores was imposed.
  3. Some clauses were deleted from the media rights agreements.
  4. BCCI was denied from using its regulatory powers in respect to commercial activities.
- Aggrieved by the decision of CCI, BCCI approached to COMPAT (Competition Appellate Tribunal) on the grounds of violation of Natural Justice Principle i.e. *Audi Alteram Partem* and tribunal gave direction to CCI to show compliance with the principles of law in further order.

Relevant Geographic Market

- Section 2(s) of this Act[10] defines as:

  "*Relevant geographic market" means a market comprising the area in which the conditions of competition for the 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*."
- Geographic market has two elements that is homogenous condition of competition and distinct condition of market. Geographic means to find geographical area within which competition takes place. This market tells about the location of producers or sellers of the product or service.
- Determination by competition Authority regarding Geographical Market:
  1. Regulatory trade barriers
  2. Local specification requirement
  3. National procurement policies
  4. Adequate distribution facilities
  5. Transport cost and language
  6. Consumer preference

Automobiles Case

- Competition Commission of India had imposed penalties on 14 car manufacturers or Original Equipment Manufacturers ('OEMs') for conducting anti-competitive practices and abusing their dominant position by introducing agreements for spares and after sales services. It has affected around 20 million car consumers.
- The informant, Shamsher Kataria filed information against Honda Siel Cars Pvt. Ltd., Volkswagen India Pvt. Ltd. and Fiat India Automobiles Pvt. Ltd. alleging anti-competitive practices with regards to selling of spare parts of these companies. There were complete restrictions to independent repair shops regarding the technical issues, diagnostic tools and software programs for repairing and servicing of automobiles. This resulted in discouraging the competitive spirit amongst the market thinkers and promoters and violative of Sec. 4 of the Act.
- CCI ordered DG to investigate on the matter and submit a report. CCI held that restrictive agreements with Local Original Equipment Suppliers ('OES') and trade barriers in secondary market were exploitive and unethical in nature. The directions were given to OEMs to allow OESs to sale of spare parts and diagnostic tools without any obstacles to the independent repairers.

DLF Case[11]

- The recent example of DLF, a major real estate player in India, has come as it abused its dominance in the real estate market (i.e. "High end Residential Units" relevant market which are developed and sold to the prospective buyers). In this case the competition regulator found that not only the market share, size, resources and economic power of DLF, moreover its practices, had given DLF superlative market power over its competitors thus resulting in exploitation of consumers' biases, irregularity of information, costly exit option, one-sided agreements and unfair conditions being imposed on the consumers which, affected the consumers as well as competition in the market.
- Therefore, the competition regulator imposed a penalty of INR 630 crores, and also directed DLF to cease and desist from formulating and imposing unfair conditions in its agreements with buyers, and modifying the unfair conditions imposed on the buyers.

When Does Abuse of Dominace Position Attract the Law

- Dominant position does not mean that it is violating the law. Sometime there position is natural and should be appreciable and essential to industrial side for efficiency and innovation in production and marketing.[12]
- The provisions of competition law came into force only where situation arise regarding the size of the enterprise when suppress competition. Basically the provisions focus on encouraging competition and creating a balance between oligopolistic and monopolistic market.
- An enterprise is said to abuse the dominant position only when they directly or indirectly imposes unfair conditions to finish competitors.

Determinants of Dominant Position

- **Market Share**: Evaluation is one of the most important criteria to determine the position of dominance. It depends on the nature and requirements of a sector involved into and the matter under investigation. Heterogeneous products demand for evaluation on the basis of turnover and Homogeneous products on the basis of capacity to produce and the reserves. Criteria of judgement:
  1. Effective competition – fluctuating market share
  2. Degradation of market share – absence of dominance
  4. Increasing and sustain market share – state of dominant position

- **Size and Resources of Enterprise**: Enterprise having large number of resources results in higher productivity and increased sales and size of the market area. This also depicts the financial stability of the business and also contributes in determining the dominant position of the enterprise.
- **Size and Importance of Competitors**: Competitors are equally important to evaluate the stand of a business. In case the market share is comparatively more than the competitors than the enterprise is considered as dominant.
- **Trade Barriers**: Barriers are the way to prevent the profitability to some extent by imposing barriers as to entry, exit or expansion in business. Barriers can be of three types:
  1. **Structural**: The successful position of the firm can act as a discouraging factor for new entrant to enter into the market in terms of switching cost, economies of scale and scope, supplier-customer relationship, technological expertise, etc.
  2. **Regulatory**: These barriers are the creation of statutory body in order to regulate trade practices in the country to foster business plans globally and nationally. Ex- tariff and non-tariffs barrier.
  3. **Strategic**: These barriers are created to deter the entry of potential new players by entering into discriminatory agreements, exclusivity contracts, differentiated products, etc.
- **Monopoly**: The increased price of products can face constraints from the competitors and the customer's choice to switch to other substitute products. When the constraints are weak, the firm can exercise its power of dominance or monopoly by creating obstacles in the path of competitors.

Forms of Abuse

1. U/s 7 of the Act,[13] Abuse has an unfavourable impact on competition if an enterprise;
   (i) Directly or indirectly impose unfair or discriminatory
   (ii) Conditions in purchase or sale of goods and service; or
   (iii) Price in purchase of goods and service.
2. Limits
   (i) Production of goods and of services or market; or
   (ii) Technical development regarding goods or services to the prejudice of consumers.
3. Practices which results in denial of market access.
4. Makes regarding conclusion of contract subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
5. Use its dominance position in one relevant market to enter into or protect other relevant market.

Abuse of Dominant Position in Price

1. **Predatory Pricing:** Section 4 (b) of the Act[14] defines it as *"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 service, with a view to reduce competition or eliminate the competitors."*

   Predatory pricing means when seller sells their product at a low cost so that to eliminate competitors or their entry into the new market as they will not survive with this situation i.e. high price. *In case AKZO,*[15] ECJ observed that a dominant undertaking has no profit from the use of such prices, as such sales event produces loss, unless the purpose is to oust the competition in order to raise prices.
2. **Price Discrimination:** Price discrimination is abusive when it charges the same price for different products or dissimilar price for the same product. Basically dissimilar treatment is given to the customers without lawfully acceptable reason.

3. **Rebate System:** Rebate system means discount given by suppliers to the customers. Rebate are of two types firstly based on conditions i.e. buyers have to fulfil their all needs from that particular suppliers and second based on future aspect i.e. future forecasting means supplier have to understand the need of customers and then impose condition over customers.

Abuse of Dominance Position in Supply

1. Refusal to Supply

In general, refusal to supply is lawful as it is a right of a manufacturer to choose its supplier who can market their products as per their trading polices. But, it becomes breach of law when the manufacturers enter into the anti-competitive agreement with the competitors of other suppliers in order to sustain their dominant position by abusing its power.

As in case *Commercial Solvent Case,*[16] Medical company called commercial solvent which manufactured aminobutanol, an essential ingredient for treatment of tuberculosis refused to supply to the competitor called Zoja (Medical manufacturer).

ECJ observed that commercial solvent was in a dominant position and also had its subsidiary company called ICI which was in tough competition with Zoja and this conduct of commercial solvent was wrong and a breach in competition law as it abuses its power that is illegally restricting Zoja manufacturer to expand their business.

Remedies

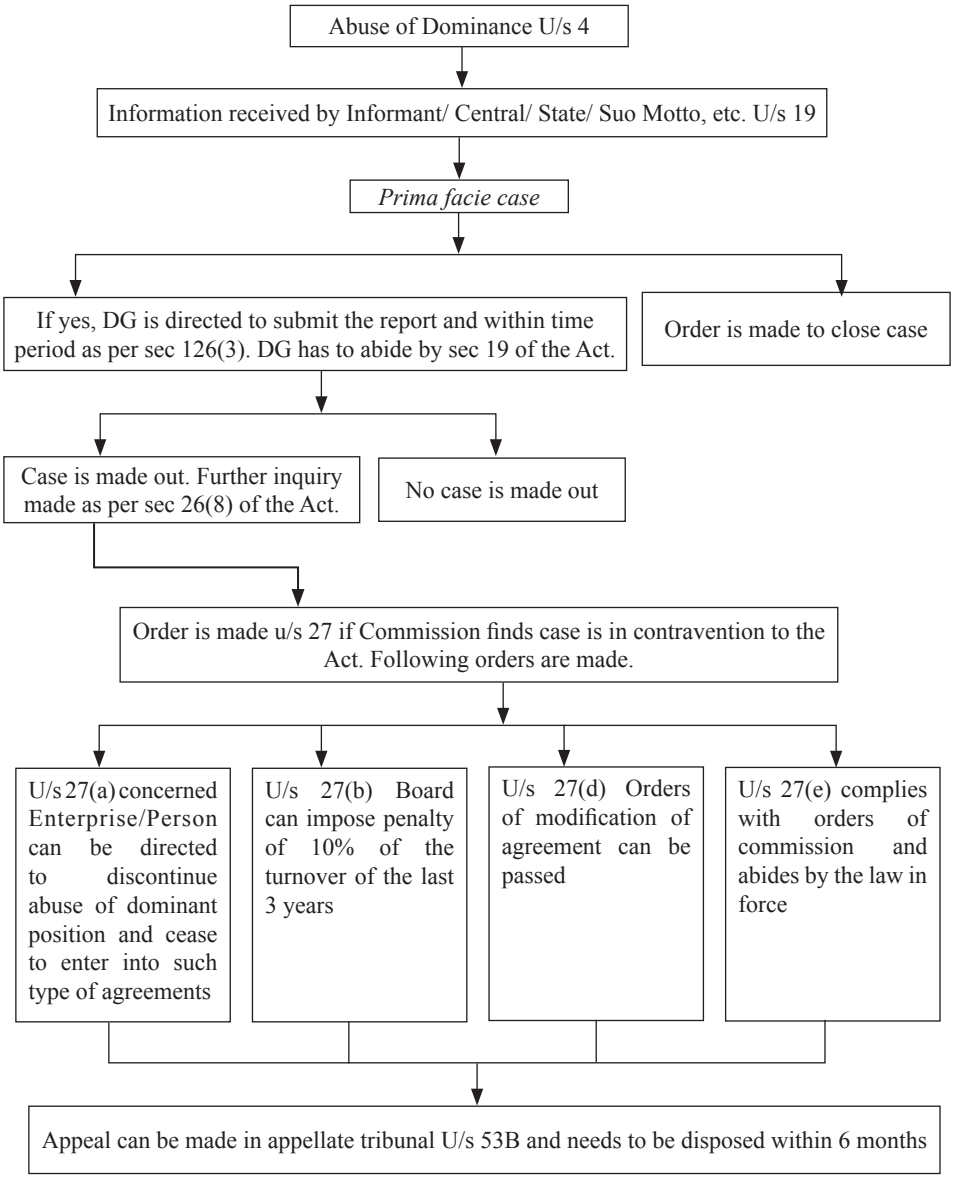
1. Commission after inquiry may pass an order against enterprise or person directing them not to enter into any kind anti-competitive agreements which is the result of abuse of dominant position.[17] The agreements maybe in relation to supply, production, distribution, acquisition, control of goods and services, etc. which will affect adversely the competition in India.[18]
2. Penalty can be imposed on the accused company which will be 10% of the average turnover of the company's last preceding 3 years.[19]
3. Modification can be made to the agreements by removing the clauses of abusive nature.[20]
4. Commission can give direction to central government regarding division of enterprise which is in dominant position to restrict it to abuse its position.[21]

Conclusion

Time demands changes and changes can be opted by welcoming new ideas and designs and which can be achieved through competition among the existing players and new players. In this context, abuse of dominant position is like an infection in the body of the economy as it is blocking the opportunities for new players and their innovative ideas. For every case proper determination of relevant market followed by the examination of dominance in that relevant market should be done. Any order or directions as may be deemed to fit by the commission by the CCI on finding any enterprise abusing the dominant position acts as a preventive measure for other enterprises.

Government's statutory provisions are not to restrict the trade policies in a country instead it is a medium through which we can exercise our business policies in legal direction and conditions. Competition in the business market moulds the product with more customer-oriented qualities which is the need of the hour. Our motive for the research is not to remove power of dominant position but to remove abuse of that power.

Investigation Process of Abuse of Dominance



References

(Endnotes)

1. Article 39 of Constitution of India.
2. Article 39(c) of Constitution of India.
3. Competition Act, 2002.
4. SVS Raghavan Committee, 2002.
5. [1978] ECR 207.

6. Competition Act , 2002.
7. *Ibid*.
8. [2013]113CLA579(CCI).
9. Competition Act, 2002.
10. *Ibid*.
11. [2011]104CLA398(CCI), 2011CompLR239(CCI).
12. Taxman, Competition Law and practice, 3rd Edition, D.P. Mittal, 2011.
13. Competition Act, 2002.
14. *Ibid*.
15. [2014] EWCA Civ 482.
16. [1974] ECR 223, [1974] 1 CMLR 309.
17. Sec 27(a) of Competition Act, 2002.
18. Sec 3(1), *ibid*.
19. Sec 27(b), *id*.
20. Sec 27(d), *id*.
21. Sec 28, *id*.

❑❑❑

CHAPTER

7

Abuse of Dominant Position in the E-Commerce Industry

Arunima Prasad and Sunidhi Gupta*

Introduction

Almost half a century since the biggest discovery for the generation today was made, the internet has not stopped spreading its roots deep into the modern-day civilization. To say that since its discovery the world has not looked back is the emptiest of clichés but the impact it has made on the human race is transcendental.

With the internet spreading it wings into different domains, it has brought an upheaval in the retail sector by giving birth to the concept of e-commerce. In spite of being at a nascent stage in India, even the most pessimist economists are also of the view that this blooming industry has tremendous potential to cause a drastic change in the entire model of the current retail system in India. The concept of e-commerce had derived to facilitate commercial transactions by conducting them electronically through the medium of internet. It has numerous benefits such as being cost effective, better productivity and providing a wide range of choice on the platter for the consumers, to its credit.

Like the two facets of a coin, with the uprising of the e-commerce industry, the law makers and the one's implementing them foresee various threats that this industry poses to the country's economy and its people. At present the most controversial issue foreseen by the rise of such an industry is the threat it poses to the competition in Indian markets, and specifically to the retail sector in the country. By providing easy access and almost an infrastructure free business option the e-commerce industry is in a position to eliminate competition from the market in the coming years. This paper analyzes how far the e-commerce industry is affecting the competition in Indian markets at present and what issues could potentially arise with the fast growing industry that it is. The scope of the paper is kept confined to section 3 and section 4 of The Competition Act which deal with Anti-competitiveness and Abuse of dominant position respectively. Even though the e-commerce industry has benefited the consumers in multiple ways, the threat that it has become to the retailers functioning in the physical markets cannot be undermined. Just like the consumers in the market, e-commerce industry has not failed to catch the eye of the Competition Commission of India. The commission, for the protection of both retailers and consumers, has looked into the present and potential threats on various occasions with the most recent one being the inquiry against various e-commerce giants such as Flipkart, Snapdeal, Shopclues and Amazon. What stands in the way of the industry which is on a wave today are section 3 and section 4 of the Competition Act. The common thread in prohibition of "Anti-competitive agreements" as well as "Abuse of dominant position" is that both seek to maintain/ sustain competition in the market and are to be enforced "ex-post".

* B.A., LL.B. 8th Semester, University School of Law and Legal Studies, GGSIPU

The current question that lies before the Competition Commission of India is that whether the e-commerce industry is promoting healthy competition or instead is hampering it.

Concept Of Dominant Position And Anti-Competitiveness

The primary concern of competition laws all over the world is regarding the acquisition and/or exercise of market power and its abuse. Market power is known by various names in different competition jurisdictions like dominant position, monopoly power and substantial market power. The philosophy followed by the Competition Act, 2002 is that of the modern competition laws which aim to foster competition and protect Indian markets from anti-competitive practices by enterprises. Anti-competitive agreements and abuse of dominant position by enterprises are prohibited by the Act and combinations such as mergers, amalgamations and acquisitions are regulated, and thus, the practices from which the enterprises should desist are laid down.

The **Dominant Position (or dominance)** is defined in terms of a position of strength enjoyed by the enterprise, in the relevant market in India, by the Act. This enables it to:

- Operate independently of the competitive forces prevailing in the relevant market; or
- Affect its competitors or consumers or the relevant market in its favour.

Therefore, the ability of the enterprise to behave/act independently of the market forces determines dominant position.

Relevant Geographic Market has been defined in terms of "the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.[1]

Abuse of Dominance

The prohibition of Abuse of Dominant Position has been stated under ***Section 4*** of the Competition Act, 2002. Dominance is not considered *per se* bad. Its abuse is. Abuse occurs when an enterprise or group of enterprises uses its dominant position in the relevant market in an exclusionary or/and an exploitative manner. There are certain specified types of acts engaged in by a dominant enterprise alone or in concert, which form the judgement regarding the abuse of dominant position and thus shall remain prohibited. No reference needs to be made by the Commission to the adverse affect on competition in Indian markets. Rather, any abuse of the type specified in the Act[2] by a dominant firm *shall* stand prohibited.

Anti-competitive Agreements

The earlier Competition laws in India were governed by the Monopolistic Restrictive Trade Practices Act (MRTP Act), 1969. Under this act, a particular trade practice was not considered void or illegal till the cease and desist order was not passed by the MRTP Commission.

Later, in 2002, the Competition Act came into force and law that prohibits agreements, practices, and decisions that are anti-competitive are provided under ***Section 3*** of this Act. The term "anti-competitive agreements" as such has not been defined by the Act. However, Section 3 prescribes certain practices which will be anti-Competitive and the Act has also provided a wide definition of agreement under section 2 (b). Section 3(1) is a general prohibition of an agreement relating to the production, supply, distribution, storage, acquisition or control of goods or provision of services by enterprises, which causes or is likely to cause an AAEC within India. Section 3(2) simply declares agreement under section 3(1) void. Section 3(3) deals with certain specific anti competitive agreements, practices and decisions of those supplying identical or similar goods or services, acting in concert for example agreement between manufacturer and manufacturer or supplier and supplier, and also includes such action by cartels. Section 3(4) deal with restraints imposed through agreements among enterprises in different stages of production or supply etc. for example agreement amongst manufacturer and supplier. Section 3 (5) provides for exceptions, it saves the rights of proprietor of any intellectual property right listed in it to restrain the infringement of any of those rights regardless of Section 3.

Growth of E-Commerce Market in India

After almost 15 years of oscillations in the e-commerce trend of the country, we now have a stable ecosystem in place and a literally booming business. With the coming of the online retail system that defies slow economic growth and spiralling inflation, e-commerce in India is thriving.

India being the fastest growing online retail country in the Asia Pacific, many online retailers look at it as a possible destination for global expansion. While the country is still maturing, the e-Commerce landscape in India currently caters to young consumers (75% of online shoppers in India are under the age of 35) with a keen eye for fashion and technology.

According to a survey,[3] the Indian e-commerce industry has grown to $16 billion in 2013, showing a staggering growth rate of 88% from the $8.5 billion in the previous year. The trend, as analysed over the years, shows that the e-commerce industry faced barriers, had a five-year-long dip and finally showed a positive growth rate by overcoming the drawbacks. The Indian e-Commerce market has bucked all the odds of an uncertain macro-economic environment and fast changing consumer preferences. In 2013, a sequential growth of 88% was recorded in the e-tailing market of India with transactions valued at $16 billion.

According to another report published in October,[4] e-commerce in India is likely to cross $6 billion in revenues in 2015, recording a 70 percent increase from a year ago.

The fact that more than 30 percent of traffic on ecommerce platforms is now coming from mobile phones and tablets aids to this growth. There is increasing traction in mobile shopping. Marketplaces, consumer product goods, and food and beverage companies have started investing in mobile commerce.

Mergers and Acquisitions (M&A) activity has shown considerable growth as well. Led by the ₹ 2,000-crore Flipkart-Myntra deals in May, the year recorded a 187 percent growth in overall M&A transactions.[5]

Since the e-Commerce industry is fast rising, changes can be seen over a year. The sector in India has grown by 34% (CAGR) since 2009 to touch 16.4 billion USD in 2014. The sector is expected to be in the range of 22 billion USD in 2015.

Another recent report revealed by the Internet and Mobile Association of India says that the e-commerce market in India is growing at an average rate of 70% annually and has grown over 500% since 2007.

In other words, the rising penetration of internet and mobile phones in the last two decades has changed the way we communicate and do business. E-commerce is relatively a novel concept and is presently heavily leaning on the internet and mobile phone revolution to fundamentally alter the way businesses reach their customers.

Is the E-Commerce Industry Anti-Competitive?

To understand the future issues that can be raised in the markets by the e-commerce industry we need to first understand what accounts to e-commerce. E-commerce has no specific definition but can be vaguely defined as a method of making commercial transactions by electronic means rather than by conventional physical ways.

As per UK Department of Trade and Industry, "Electronic commerce is the exchange of information across electronic networks, at any stage in the supply chain, whether within an organization, between businesses, between businesses and consumers, or between the public and the private sectors, whether paid or unpaid."

According to reports provided by Forrestor Research,[6] social media plays an important role in connecting consumers to brands. The success of e-commerce depends upon efficient payment and delivery services.

The scope of e-commerce is not restricted to mere buying and selling of products or availing services, but it also accounts for other transactions made in lieu of delivery, payment facilitation, service management and supply chain. While stock exchanges moving online have given a major boost to the industry, it has certain

major hurdle in its function such as a very small percentage of credit card holders and lack of uniformity in the credit agencies with a major challenge to the payment system in the model of e-commerce.

An important question before the Competition Commission of India lies whether the industry in itself is causing appreciable effect on competition and is Anti-competitive. To draw a link between the two the essentials required for a company to be Anti-competitive have to be listed. As per the Competition Act no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.[7]

What brings the industry under the purview of this section is that the complete model of e-commerce has a long road to profitability that is to say that the business typically runs into heavy losses for a long period of time before finally reaching the profitability mark.

The aim of all such enterprises which make losses on each sale initially is not to make profits, unlike other profit making organisations, but is to capture market share. Amazon took sixteen years to break even and other giants such as Snapdeal and Shopclues are yet to attain that point. Recently online giants such as Flipkart, Snapdeal and Amazon have been accused of predatory pricing stating that they are in contravention with section 3 and 4 of the Competition Act, 2002.

Predatory pricing refers to a practice of driving rivals out of business by selling at a price below the cost of production.[8] The prices of goods and services are brought to such a low level that it becomes difficult for other competitors to survive in the market. The cost is determined by rules and regulations which is generally the Average Variable cost but the Commission is empowered to use its discretion in determining the cost according to the nature of industry, market and technology being used in the same.[9]

As they operate way below their break even point in the initial years their product/service prices are way less than what retailers sell in the conventional physical market, also their primary motive is to capture market share and not profitability which is the reason why the charges of indulging in predatory pricing have been levied upon them.

Selling below cost is not an offence in itself and is totally acceptable. Issues arise when the enterprise selling below cost is "Dominant" in the given market. The test for determining whether an enterprise is indulging in predatory pricing includes examination whether the enterprise enjoys a dominant position or not, drawing out the "relevant market", is the enterprise is in anyway affected by outside competitive forces or is completely independent and abuse of such position held by the enterprise.

Deep Discounts in E-Commerce

The e-commerce companies operating in India operate as marketplaces. This is because the Indian law does not allow Foreign Direct Investment in e-commerce sites that are selling directly to customers, but allows it in marketplaces that link sellers and buyers. Services such as payment, storage and delivery are also provided by the marketplaces. Marketplaces are prohibited from exercising control over the product prices of the sellers on their platform, including the matters of discounts as the direct retail is banned. Discounts are essential for e-commerce as the buys or shoppers have resorted to online shopping in a big way, mostly because of the lucrative discounts offered by the e-commerce firms. However, deep discounting has attracted the ire of brick-and-mortar retailers who are losing their customers to online retailers and are thus fighting to survive in the market.

The online retailing sites spend huge amounts of money that they have raised from the investors and this is highlighted by the discounting process followed by them. The e-commerce companies are backed by multi-million fund injections by the foreign investors and thus are extremely enthusiastic in increasing their velocity towards gaining scale. It is because of this significant funding back-up that they are able to adopt

the strategy of providing considerable discounts while earning wafer-thin margins. According to analysts, the various methods of offering discounts adopted by e-commerce firms also reinforces the need for state governments to issue clarifications on e-commerce and come up with a clear tax code addressing the nascent but fast-growing business.

Online shopping, in India, becomes the headline grabber especially during its heavy discount sales through its blockbuster funding from domestic and international investors. Earlier in India, deep discount sales were a ritual only before the festival seasons but with the coming of the Flipkart and Amazons of the world, flat discount sales, which are many times even below the cost price, have become a daily ritual. Flipkart, also known as the poster boy of Indian e-commerce has recently surprised the market with its Big Billion Day sale in the month of October last year. This strategy also promoted its rivals to come up with their versions of day long sales offering huge discounts.

The Competition Commission of India, in an order issued on May 19 in a case,[10] said, *"Both offline and online markets differ in terms of discounts and shopping experience; buyers weigh the options available in both markets and decide accordingly. If the price in the online market increases significantly, the consumer is likely to shift towards the offline market and vice-versa."* A competition lawyer M.S. Ananth from a corporate firm[11] said, *"Aggressive pricing, including deep discounts, are not anti-competitive per se,"* and "*Unless the practice is such that it is designed to defeat competition, it cannot, in law, be anti-competitive."*

Despite the major billion dollars funding, majority of the e-commerce companies are suffering on the financial front as a whole lot of money goes into the facilitation of discounts up to as much as 70-90 percent at times. Another irony is that in the e-commerce space, there is low brand loyalty. Therefore, there is a need for e-commerce players to come up with some long-term sustainable strategies devoid of deep-discounts price wars to retain the online customer market. This is because offering deep discount will not be viable in the long run as sales at lower prices can lure customers only at the initial stage. Hence, e-commerce retailers need to think beyond discounts to acquire customers and build brand loyalty.

Case Studies

The latest case alleging Anti-competitive activities by online portals was filed by Mr. Mohit Manglani against online giants Flipkart India Pvt. Ltd. (Flipkart.com), Jasper Infotech Private Limited (Snapdeal.com), Amazon Seller Services Pvt. Ltd (Amazon.com), Vector E-commerce Pvt. Ltd. (Myntra.com) and Xerion Retail Pvt. Ltd (Jabong.com).[12]

All the respondents are e-portals or e-commerce sites dealing in online trade and commerce. It was alleged by the informant that these sites enter into 'exclusive agreements' with the sellers of goods and services thus rendering the character of anti-competitiveness to process of such online trading. It was urged that due to such exclusive agreements the consumers are left with no choice but to buy the products or avail services from these e-portals or sites on their terms and conditions, whatsoever they may be or otherwise decide not to buy. Such products are exclusively sold by these sites blocking other portals or physical channels from selling them. Accordingly the portal has all the power to decide the price and terms of re-sale, delivery period, quality, service standards etc. These conditions are non-negotiable by the consumers. Further, to create hype for the product they give an illusion of scarcity which in turn affects the price of the product or the said service. It was also alleged that Flipkart.com had been extensively campaigning the launch of Half Girlfriend, a book by celebrated author Chetan Bhagat, which was exclusively available on Flipkart. According to the informant this amounted to exclusive agreement which caused appreciable effect on competition. Several other products were highlighted which were being exclusively sold by one of the respondent e-portals or the other.

The sites in question submitted that they were following the market place model in which they provided only a platform for the sellers to sell and buyers to buy. It was also submitted that each of the product cannot constitute the "relevant product market". They also cited that the e-commerce industry accounts for a merge percentage of the total trade and commerce industry and hence did not hold a dominant position. Also it was contended that there existed no agreements of exclusivity with the sellers and there were numerous substitutes available as there are number of such sites.

After looking into the matter for a long period of time, the commission was of the opinion that the concerned entities were not causing any appreciable effect on competition.

"It does not seem that such arrangements create any entry barrier for new entrants. It seems very unlikely that an exclusive arrangement between a manufacturer and an e-portal will create any entry barrier as most of the products which are illustrated in the information to be sold through exclusive e-partners (OPs) face competitive constraints," the order, dated April 23, said. The commission noted that it was not necessary to inquire into the abuse of dominance by these entities.

Even though CCI has given a green signal to these e-commerce sites, several issues of the consumers still remain unresolved. In a recent social media uproar it was highlighted how Flipkart was giving heavy discounts on items by raising the manufacturing price. The picture of the product on the site which was discounted showed the actual price of the product thus spilling the beans about such discount offers.

In another incident Shopclues.com received the wrath of the consumers for delivering low quality products which were completely different from the pictures and description provided on the site.

Another major cause of concern has been the return policy of such sites. On one hand Snapdeal has very clear return policies; most of the other sites have vague and confusing return policies which cause a lot of inconvenience to the buyers.

These issues need urgent attention from the Competition Commission which has given these e-portals a clear slate as far as anti-competitiveness is concerned.

Prior to these cases another case was brought to the Competition Commission against the largest search engine, Google. The complaint was against Google Inc., USA and Google India Private Limited by the informant Consim Info Pvt. Ltd.[13]

It was alleged by the informant that Google ran its core business of online search and search advertising in a discriminatory manner, causing harm to advertisers and indirectly to consumers and creating an uneven playing field by favoring its own services and of its vertical partners, by manipulating the search algorithms. It was also alleged that Google provides a number of vertical search services like YouTube, Google News, Google Maps etc. and in order to promote its vertical search services, it mixes many of vertical results into organic search results.

The commission was of the opinion that there existed a prima facie case against Google and the Director General was to carry out the inquiry. Subsequently another case of Abuse of Dominant position was filed against Google by Consumer Unity & Trust Society (CUTS).[14] In this case also the commission order investigation as it found that there existed a prima facie case against the enterprise.

CCI further penalized Google for non-disclosure of information during the investigation by the Director General. The case still awaits the final judgment.

Conclusion and Suggestions

E-commerce is offering considerable opportunity for growth in a developing country like India. The e-commerce industry has become a platform for small sellers in the market to explore opportunities of widening their business prospective because of the low infrastructural and maintenance costs incurred in sale. Also it has provided the consumer with a wide array of choices at lower prices. The industry can prove

to be a boon for the retail sector if its potential is channelized in the right direction in accordance with the competition rules of the country. In spite of steering clear of all competition issues at present there are potential competition threats in the future that need to be constantly monitored by the Competition Commission of India to protect the interest of both the sellers and the consumers.

The Consumer Protection Act, 1986, provides for the regulation of unfair trade practices and forums at the National, State and District Level to redress consumer disputes and grievances. However, the Act does not explicitly provide for the laws relating to the malpractices taking place through e-commerce and the remedies for e-consumers. Hence, changes should be made to reward stricter penalties for any kind of unfair trade practices in the e-commerce industry.

The Cyber Laws of the country should also focus on this aspect of the e-commerce industry and impose stricter rules and regulations regarding the conduct of e-commerce companies in ensuring that their actions and strategies, in no way, hinder or obstruct the overall growth of the economy and should aim at providing the best possible goods and services.

Competition advocacy will go a long way in helping the industry to grow without having any adverse affect on competition in the relevant market.

"*Innovation, not Adverse Competition*."

References

(Endnotes)

1. Sub-section (s) of Section 2.
2. Clauses (a) to (e) of sub section (2) of Section 4.
3. ASSOCHAM Survey Report.
4. Report by Gartner, an American information technology research and advisory firm.
5. VCC Edge report.
6. Trends In India's e-Commerce Market': Report provided by Forrestor Research for ASSOCAM's 2nd National Conference on e-Commerce 2012.
7. Section 3, Competition Act, 2002.
8. As per explanation (b) at the end of Section 4, Competition Act, 2002.
9. As per Section 3, Competition Act,2002.
10. Ashish Ahuja Vs Snap Deal and Others.
11. Nishith Desai Associates.
12. Competition Commission of India, Case No. 80 of 2014.
13. *Ibid*. Case Nos. 07 & 30 of 2012.
14. *Id*. Case No. 30 of 2012.

❑❑❑

CHAPTER

8

Evolution of Competition Law in India: An Analysis

Anita Khurana*

Abstract

Today we are living in 21 century, a century of globalized world, a century of modernized world. Now days it is decided by the market what types of goods will be consumed by a person, now the role of market has been changed, sometimes it seems that people are governed by market; hence it became inevitable to regulate the market. In the pursuance of regulating the market a number of laws have been made by the state. Competition Law is also one of them.[1] The basic objective of competition law is to eliminate anti-competitive practice in the market, to promote competition, and to protect the welfare of the consumer.

Competition Law - An Introduction

In the contemporary era, competition law has emerged as one of the most significant branches of law the basic of competition law is to eliminate anti- competitive practices in the market and to promote the competition in the market to protect the welfare of the consumer. If there is competition in the market finally it is in the interest of the consumer, therefore to protect the interest of the consumer and to sustain the competition in the market it is the need to make Competition laws.

A brief History of Competition Laws in India

After independence the Indian government assumed the increased responsibility for the overall development of the country. Government policies were framed with the aim of achieving a socialist pattern of society that promoted equitable distribution of wealth and economic power the constitution of India also direct the state to make a policy for just and equitable society. Article 38 and 39 of the constitution of India, which are the part of directive principle of state policy to direct the state to make a policy in this regard.

Article 38

"The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."[2]

"The State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."[3]

MRTP Act 1964 was the first competitive statute which was enacted in the pursuance of article 38 and 39.

* Assistant Professor, Jagran School of Law Dehradun, Email : anitakhuranallm@gmail.com

Economic Liberalization and Inadequacy of MRTP Act

In 1991 India enter into a new era of Liberalization. India opens the door for the foreign investment and liberalized its economic policy. A need was felt for a legal regime that would aid and promote competition. The MRTP Act, with its traditional focus on curbing monopolies, was therefore perceived as inadequate to live up this challenge.[4]

MRTP Act had lost its utility and that a new competition law was required for the country, it was also reflected in the budget speech finance minister of India.

"*The MRTP Act has become obsolete in certain areas in the light of international economic development relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine the range of issue and propose a modern Competition Law suitable for our condition."*[5]

Raghvan Committee Report and Enactment of Competition Act 2002

A high level committee was set up in 1999 to advice the government to frame a suitable legislation for the country in pursuance of International Development. The committee recommended the replacement of MRTP act with a new legislation that would cover anti- competitive agreement, Abuse of dominance merger and further recommended the setting up of a new investigation and enforcement authority known as a Competition Commission of India.

There was almost unanimity among those who gave their depositions to the Committee that the MRTP Act had outlived its utility, and that a new competition law was required for the country, in tune with the liberalized regime. It was considered that amendments to the MRTP Act would have entailed cumbersome innumerable changes in its provisions. Instead, enacting a new law was considered a better option. Thus, after heated discussions on the Committee's report and the Competition Bill it recommended, as well as parliamentary debates, Competition Act 2002 was enacted in January 2003 to replace the MRTP Act. The Competition Commission of India (CCI) was established in October 2003 to implement the provisions of the Act.

Salient feature of Competition Act 2002

The Competition Act, 2002 seeks to prevent practices having adverse effect on competition; promote and sustain competition in markets; protect the interest of consumers; and ensure freedom of trade carried on by other participants in markets in India. The new law focuses on four core areas: -

- Anti-competitive agreements
- Abuse of dominance
- Combinations regulation
- Competition advocacy

Anti-competitive Agreements (Section 3)

The Act frowns upon agreement, which causes or is likely to cause an appreciable adverse effect on competition within India. The Act covers both horizontal and vertical type of agreements. The 'rule of reason' test is used for determining the illegality of an agreement. This approach does not apply in case of four types of agreements between enterprises involved in the same or similar manufacturing or trading of goods or services, which are presumed to have an appreciable adverse effect on competition. These are: - agreements determining prices, - agreements limiting or controlling quantities, - agreements to share or divide markets, - agreements to rig bids. Joint venture agreements that result in efficiency gains are not covered under these provisions of the Act. Further, the Act lays down two exceptions to the applicability of the provisions relating to anti-competitive agreements.

Abuse of Dominance (Section 4)

Dominant position has been defined in the Act in terms of the 'position of strength' enjoyed by an enterprise in the relevant market in India. Such a position of strength enables an enterprise to operate independently of competitive forces prevailing in the relevant market, or affects its competitors or consumers, or the relevant market in its favour. The new law has taken care to define the relevant market in its product and geographic dimensions.

Combinations Regulation (Sections 5 and 6)

Combinations, as defined in the Competition Act, include M&A beyond a specified threshold limit. That is, those M&As, which fall below the threshold limits are not considered in the expression "combinations" and are outside the ambit of the Act. CCI is empowered to investigate a combination on its own knowledge or information without waiting for merging parties to approach it up to a year after the combination has taken effect. The CCI can undo or modify a combination, if it causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India.

Competition Advocacy

In line with the High Level Committee's recommendation, the Act extends the mandate of the Competition Commission of India beyond merely enforcing the law (High Level Committee, 2000). Competition advocacy creates a culture of competition. There are many possible valuable roles for competition advocacy, depending on a country's legal and economic circumstances.

The Regulatory Authority under the Act, namely, Competition Commission of India (CCI), in terms of the advocacy provisions in the Act, is enabled to participate in the formulation of the country's economic policies and to participate in the reviewing of laws related to competition at the instance of the Central Government. The Central Government can make a reference to the CCI for its opinion on the possible effect of a policy under formulation or of an existing law related to competition. The Commission will therefore be assuming the role of competition advocate, acting pro-actively to bring about Government policies that lower barriers to entry, that promote deregulation and trade liberalization and that promote competition in the market place.

MRTP Act vs. Competition Act

The Competition Act, 2002 seeks to prevent practices having adverse effect on competition; promote and sustain competition in markets; protect the interest of consumers; and ensure freedom of trade carried on by other participants in markets in India. The new law focuses on four core areas: Anti-competitive agreements - Abuse of dominance - Combinations regulation - Competition advocacy. Explicit definitions and criteria have been specified in the Competition Act (as against the MRTP Act) to assess whether a practice has an appreciable adverse effect on competition. One distinguishing feature of the new law is that it emphasizes on behavioral approach to examining competition in the market, as against the structural approach followed by the MRTP Act. Importantly, the CCI has been given a competition advocacy role, which would help in creating a culture of competition. Merger regulation provision has returned to the scope of the Indian competition law, after being removed from the MRTP Act, during the 1991 amendments. Another important distinction is that the new law no longer covers unfair trade practices (UTPs), and all pending cases are to be transferred to the Consumer Protection Act, 1986, which covers UTPs.

Now-a-days Government is Adopting a liberal Policy for Merger and Acquisition

The government under the 'Make in India' initiative has announced and implemented several steps to encourage investments and improve the environment by simplifying the multiple processes for doing business in the country. Significant relaxations were announced in the FDI policy last year. Finance Minister Arun Jaitley has urged the states also to reform presumably in line with the broader efforts of the government;

the financial thresholds above which any merger or acquisition (M&A) must be reported to the Competition Commission of India (CCI) for its approval have been significantly raised. The Ministry of Corporate Affairs, through its recent notification, has raised the merger thresholds by 100 per cent for a period of five years until March 3, 2021. This makes the Indian merger thresholds among the highest in the world.

The ministry has also increased the thresholds for the small target exemptions, popularly known as the de minimis exemption. In 2011, in response to the industry's protests over the requirement to approach the CCI for even minor transactions, first the CCI itself, and then the government had exempted transactions involving small targets from seeking the commission's approval for five years, i.e. where the target enterprise had assets less than ₹ 250 crore or turnover less than ₹ 750 crore in India there was no need to seek CCI's permission. The government has now extended the exemption for another five years till March 3, 2021, and has simultaneously increased the thresholds: from ₹ 250 crore to ₹ 350 crore for assets or from ₹ 750 crore to ₹ 1,000 crore for turnover.[6]

Conclusion

India is at a juncture of implementing a new law designed to suit the changing times. Anyhow, there are several challenges that the new competition authority would have to face in the initial years of its inception as has been elucidated above.[7] While the current law is not without controversy and certain limitations, no competition law is ever perfect, and the law evolves through time, through experience, and development of the case law.

References

(Endnotes)

1. Wounter P J Wills , *"Is Criminalization of EU Competition Law The Answer"* 28 issue. World Competition Journal.
2. Article 38 (1) of the Indian Constitution.
3. Article 38(2), *ibid*.
4. G R Bhatia, "Law in Focus Competition Law in India", Indian journal For International Economy.
5. Budgetary speech in Parliament by Finance Minister Yashvant Sinha in 1999.
6. www.Business standard.com., "Liberal policies for Merger and Acquisition"
7. Pradeep S Mehta , "Competition law Regime in India : Evolution Experiences & challenges"

❑❑❑

CHAPTER

9

3D in Relation to Trademarks: New Means of Competition

Abhishek Sarma*

Introduction

Trademark refers to the mark or a symbol under which any trader, manufactures and trades his goods. Similar to human faces trademark gives an identity and distinguishes each goods from others.

"Trademark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours: and, a registered trademark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark: and, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark."[1]

This 21st century is an era of millionaires and all of them are B'lions[2]. In this B'era[3]to boost the business everyone has to pierce the minds and hearts of the public. So, 'trademark' is a first use weapon with which they can rule the innocent public minds and hearts.

The first use of trademark was during the reign of the Roman Empire, by the blacksmiths to identify their swords.[4] The first legislative Act for trademark was passed by the Parliament of England under the reign of King Henry III in 1266. The Act was specially used by the bakers as they were required to use trademarks for identification of their breads they sell.[5]

The first modern trademark law emerged in the late 19th century in France as 'Manufacture and Goods Marks Act' in 1857. In Britain Merchandise Act was passed in 1862 as to stop others from defrauding with another's trademark. In United States the Congress first attempted to establish trademark law in 1870.

Bass Brewery's logo became the first registered trademark in 1876 under the Trade Mark Registration Act 1875 in United Kingdom.[6] In United States the design mark with an eagle and a ribbon and the words "Economical, Brilliant" was the first registered trademark, filed by the Averill Chemical Paint Company on August 30, 1870 under the Trademark Act of 1870.[7] In Germany, Krupp steel company registered three seamless train wheel tires, which are put on top of each other, as its label in 1875, under the German Trade

* LL.M 2015-16, Gujarat National Law University, Attalika Avenue, Knowledge Corridor, Koba, Gandhinagar, Gujarat-382007. Email: abhisheksarma80@gmail.com

Mark Protection Law of 1874.[8] These are the few examples of oldest registered trademarks throughout the world which indicates the use of trademarks in a regularized way for the protection of goods and services from getting deceived by others with registration of trademark.

In early days people used trademarks just to identify the goods made by any particular manufacturer, when trademark was unfamiliar with people. But as the time passes business environment got very competitive for all the business personalities, and which resulted trademark as an important element of competition in trading. Similarly it made the business world to rethink about the modernisation of the forms of trademarks which will help them to catch more eyes for their products. So, as earlier people used to use two dimensional (2D) trademarks and due to modernisation and growing competitiveness in the business world they started using three dimensional (3D) trademarks.

3D in Relationship with Trademark

According to the definition of the trademark, as it says that it is an identification mark for the product, which also says that it also contains combination of designs and colours. Inclusion of design in trademark can be effective with any form, i.e. 2D and 3D.

2D trademarks are very common in practice from the very beginning of trademark era. After certain time people started using 3D trademarks, which are just modified forms of the 2D trademark of any business. 3D trademarks are basically in the form of shapesunlike 2D trademarks in the form of pictures.

In recent scenario, business people are more using 3D trademarks to compete in the market. Objective of using 3D trademark is to magnetize products towards people, as 3D trademarks provides more attractive form of the product.

With the evolution of technology, means of advertising of brands has also changed its ways. The real competition was with the protection of the brand view in the minds of the customers. In this practice the business intellects developed their ideas to another phrase of representation, which normally does not belong to a pre-existing, i.e. colours, shapes, moving images, holograms, positions, sounds, scents, tastes and textures. These categories were not usable earlier as trademarks, but recently they got so popular with the business environment and attached with the public minds that they are only the means to win over the customers. And from these practices there comes the emergence and relationship of 3D with trademarks.

1. Walt Disney has its trademark with glittering stars always.
2. Castle Rock has its trademark with the searchlight and water always moving.

Why 3D?

Business is a means of livelihood for many in the world from the birth of human race. Earlier people used to have business just to survive, where they were in practice of Barter system. People at that time used to exchange goods and services by another where both the exchangers were in need of the good or service of the other for their living. This system was not at the level of what today the entrepreneurship is, because that was not helping to gain profits, which is the only motive and aim to have business.

Starting from the 18th century, business entrepreneurs used trademarks advertisements for selling their products just with normal logo of the product. In later century they started to have some additions along with the trademark, i.e. tag lines, which started attracting people towards the products. But human minds are not static and so, when the earlier idea faded up in their minds, business tycoons started searching for more ideas to attract people, from where they came up with the idea of having some other form of trademarks along with the original trademark, i.e. 3D trademarks.

The efficiency of any trademark would depend on its ability to create an impact on the minds of the potential customers of the product. The market researchers took up the idea of characterization of product and its representation to be unique, so that it would appeal to the people's minds and perceptions in a very significant manner.[9] With this theory they took up introducing and using of non-traditional trademarks. Motion and sound marks would capture the attention of the people much more efficiently than traditional marks, which in turn have catapulted their popularity in today's commercial world.[10]

Public Views and Understanding About 3D Trademarks

Primarily trademark is the logo used for the identification of the goods, but now human minds are not only limited to that only. People are much more attracted towards the extra imitation of the product without depending only upon the quality of the products. The extra imitation elements which can win over human minds are beyond the normal represented logo of the product, extending up to sound as aural trademark, shape, colour combinations, holograms and even smell of particular product.

'Tommy Guns' branded vodka bottle & Clive Christian No.1 Perfume and its bottle

In 18th century people used to have normal packaging with a trademark which denotes only the origin of the product but not necessarily distinguishable from the others, but that time trademark was unfamiliar with public. In later century to lead up in the business, the entrepreneurs started using distinguishable trademarks from that of the other. When people got a good taste of trademark along with the product, they started using that. But then also people were not so attached with trademarks, as very few brands were present in the competition. Starting from the 20th century, people started referring those products bearing trademarks. After the war of trademarks started where there was only use of trademarks was necessary, finally comes the development of trademarks as there started a huge competition with the newly joining brands and old

surviving brands in the war of trademarks. So they started using different means other than the trademark to achieve stability in the market where people got a new taste of addition along with the trademarks and gradually those extra means also turned up to be playing the role equivalent to trademark. Those extra means got more values in the minds of the customers, where a trademark was supposed to have that value. So, now these marks are also treated as trademarks but they are unconventional. So, all these drastic changes are only the result of changes in the public demands and tastes, through which it can be said that if anyone wants to rule in the business world then he/she needs to win over the minds of the public by any means which would be suitable to attract them to the products, that recently an unconventional trademark is doing, where there is inclusion of 3D trademarks.

5. Registrability of 3D Trademarks

From the definition of the trademark as defined in Section 2(1)(zb) of the Trade Marks Act 1999, registerable element of any trademark is 'graphical representation'.[11] Graphical representation refers to that the mark should be capable of being represented physically in the registrar during registration and should also be able to publish in the journals for the process of registration. The graphical representation clearly means that a mark should be able to see in a fixed way without any movements as the mark is.

In Swizzels Matlow Ltd.'s application (No.2)[12] the Court explained two chief reasons for the requirement of the graphical representation criterion:

(a) To enable traders to identify, with clarity, what other traders (carrying on the same business or otherwise) have applied for registration as a trademark and for which product.

(b) To enable the public to determine, with precision, the sign which forms the subject of trademark registration.[13]

The graphical representation is a wide concept, which makes it difficult to be said whether a mark is graphically represented or not. There are certain guidelines in UK, and with the fulfilment of three broad criteria a mark can be said as graphically represented.[14]

(i) The mark should be explainable from the graphical representation itself without any supporting examples.

(ii) The graphical representation shall stand in place of the mark itself.

(iii) The persons, who will be inspecting the trademark or read the journal shall be able to understand the nature of the trademark from the graphical representation itself. Any colour standards, musical notes, or scientific measurements put forth to represent marks must be precise and:

- Make it reasonably practical for the users of the system to be able to obtain a clear understanding of the mark.
- Be able to compare the sign accurately with other similar signs that the applicant proposed to use.

In India, these above mentioned guidelines are not well followed. Indian legislature has incorporated 'graphical representation' as a wider term rather than using 'visual perceptibility' as used under TRIPS.[15] Though Trade Marks Act, 1999, don't explain graphical representation clearly, but Rule 2(1)(k) of the Trade Mark Rules, 2002 defines 'graphical representation' of a trademark as the representation of the mark 'in paper form'. Therefore, it can be said that whatever form the trademark is, it must be presented in the paper for the registration application.

3D trademark comprises of specific shape, packaging technique, moving pictures. The definition of trademark expressly includes shape, i.e. it can be meant for both the shape of the product and also packaging. Also moving pictures as an element of 3D trademark which includes the Entertainment Production House Marks as they are having moving pictures.[16]

So, it can be said that every product which only comprises of the shape and packaging of the product, including moving pictures can be laid down under the provisions as provided by the Trade Marks Act, 1999 because they can be graphically represented as per the words laid down by the and Rule 2(1)(k) of the Trade Mark Rules, 2002 as it says in paper form. Rule 29(3) of Trade Mark Rules, 2002 says about in the application of 3D trademarks needs to be represented in 2D form or through photographs. Therefore, representation of shape, packaging and moving pictures in paper form will not be so difficult, because the can be convert down to a continuous series of still pictures to represent graphically.

So, 3D trademarks impliedly prevails a position under the umbrella provided by the provisions and rules of Trade Mark Law and Rules in India and can be easily registered with the provided rules registered under the Act. So, it is clearly reflecting that filing of application in relation to 3D trademark is permissible under the statutory law provided in India for registration and regulation of trademarks.

Issues and Suggestions

The issues which are the centre focus of this project are as follows:

The wide emergence of use of 3D trademarks has made us constrain to think twice upon the trademark protection and regulation issue. Because the situation is strongly reflecting that the business entrepreneurs using 3D trademarks are not well protected from infringement as it has no express view by any law in India.

As we know that trademarks is only just an identity of the product, but here the 3D trademarks not only reveals the identity of the product but also the characteristics as a whole. Which cannot be protected and can easily be infringed partially. This means that in 3D trademarks, especially in moving pictures it can be infringed apart of the moving picture.

Moving pictures are just like a small show, so what will be its protection copyright or trademark?

Suggestions

Until there is demand in human minds entrepreneurs will try to fulfil their demands as far as possible and on the basis of this there will be frequent change of means and forms of trademarks on regular basis.

1. Keep the law flexible on basis of forms and means of trademarks.
2. Make provisions for the regulation and registration of unconventional marks also.
2. Do not limit the definition of trademark, because trademark can become through any means.

Conclusion

The study of 3D in relation to trademarks has given the idea of the frequent changes of trademarks from its beginning with the starting of normal mark till today with 3D trademarks and unconventional trademarks.

Human minds are not static, as they change their tastes from time to time. Along with this the business world is also changing, to its level best competition to meet up the minds of the people. But to achieve that level there will be always a need of something new which people will get innovative than the previous one.

Likely trademarks will change frequently but there will be need of law which will protect them whenever they emerge in the market. And for this there will also be need of such flexible law which can spread it until the new emergence always. All these trademarks are represented by some symbols or names, and in the minds of the people these symbols overlaps one another. Every symbol has its own value and they are dependent upon each other. The relationship between them is clear within the profession they do. So, they all need to be valued for maintenance of their relationship.

Bibliography

Primary Sources

Statutes

- Trade Marks Act, 1999.(IND)
- Trade Marks Act, 1994.(UK)

Legislation

- TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

Secondary Sources

Online Journals or Articles

- GaryRichardson, 'Brand Names Before the Industrial Revolution'(April 2008) National Bureau of Economic Research, (Apr. 8, 2016) http://www.nber.org/papers/w13930.
- "Mytkhun "Trade mark Bureau, History, (Apr. 8, 2016) http://www.tmprotect.idknet.com/eng/history.html.
- Arka Majumdar and Ors. "The requirement of graphical representability of Non-Conventional Trademarks" (Sep2006), (Apr. 9, 2016) http://nopr.niscair.res.in/bitstream/123456789/3588/1/JIPR%2011(5)%20313-317.pdf.

Departmental Manual

- Department of Trade Mark Registry UK, 'UK Trade Mark Registry work Manual', (August 1998 editon) p.18, reinforced by Practice Amendment Circular 2/00 cited in ref. 8.

References

(Endnotes)

1. The Trade Marks Act, Section 2 zb, 1999.
2. Business Lions.
3. Business Era.
4. Gary Richardson, 'Brand Names Before the Industrial Revolution', (April 2008) National Bureau of Economic Research, (Apr. 8, 2016), http://www.nber.org/papers/w13930.
5. "Mytkhun" Trade mark Bureau, History (Apr. 8, 2016), http://www.tmprotect.idknet.com/eng/history.html.
6. United Kingdom Intellectual Property Office, 'Case details for trade mark UK00000000001, (Apr. 8, 2016), https://www.ipo.gov.uk/tmcase/Results/1/UK00000000001?legacySearch=False.
7. Anne H. Chasser, "A Historical Perspective: The International Trademark Association and the United States Patent and Trademark Office" Vol. 93 TMR, Jan-Feb 2003, (Apr. 8, 2016), http://www.inta.org/TMR/Documents/Volume%2093/vol93_no1_a2.pdf.
8. ThyssenKrupp, (Apr. 8, 2016), https://www.thyssenkrupp.com/independent/zoom_image.html?id=419&lang=de.
9. Arka Majumdar and Ors."The requirement of graphical representability of Non-Conventional Trademarks" (Sep 2006), (Apr. 9, 2016) http://nopr.niscair.res.in/bitstream/123456789/3588/1/JIPR%2011(5)%20313-317.pdf.
10. *Id* [Beyond Tradition: New ways of making a mark, (Nov.10, 2005) http:// www.wipo.org/sme/en/documents/wipo_magazine/7_2004.pdf].

11. UK also has the same criteria under Section 1 of the UK Trade Marks Act 1994, a trademark is a 'sign capable of being represented graphically'.
12. Supra 10 [Swizzels Matlow Ltd.'s Application (No. 2), (2000) ETMR 58].
13. Supra 10.
14. Department of Trade Mark Registry UK, 'UK Trade Mark Registry work Manual', (August 1998 editon) p.18, reinforced by Practice Amendment Circular 2/00 cited in ref. 8.
15. Trade Related Aspects of Intellectual Property Rights, Article 15, 1994 lays down that ' Members may require, as a condition of registration, that signs be visually perceptible'.
16. See pictures under the 'Relationship with Trademark' head.

❑❑❑

CHAPTER

10

Abuse of Dominant Position and Competition Law When Refusal to Deal Becomes an Abuse of a Dominant Position

Atreyi Das[1]

Introduction

Refusal to deal provisions are under the *Competition Act* are contained in Section **75** of the Act. Under these provisions, a distributor or reseller whose supply has been terminated by a supplier may, where all of the elements of the provision are met, have an alternate remedy in addition to contractual or other remedies (e.g., termination rights under a supply or distribution agreement).

The refusal to deal with the provisions of the Act were passed to address a concern that in some Canadian industries there may be relatively few suppliers and, as such, a customer that has been terminated may be unable to secure alternate sources of supply.

Under Section 75, the Competition Tribunal has the power to make "remedial orders" to order a supplier to accept a person as a customer on "usual trade terms" where all of the following elements need to be established:

1. The person is substantially affected in his business, or precluded from carrying on business, due to an inability to obtain adequate supplies of a product anywhere in a market on usual trade terms.
2. The person is unable to obtain adequate supply of the product because of insufficient competition among suppliers in the market.
3. The person is willing and able to meet the supplier's usual trade terms.
4. The product is in ample supply.
5. The refusal to deal is having (or likely to have) an adverse effect on competition in a market.[1]

Both the Commissioner and private parties (with leave) may make applications to the Tribunal for remedial orders (i.e., for conduct to stop or resupply) under section 75.

As discussed above, three other sections of the *Competition Act*, in addition to potential contractual, tort and other legal causes of action, can also apply to refusals to deal or supply terminations.

1 LL.M., Corporate & Business Law, Gujarat National Law University, Gujarat , Email: atreyi91@gmail.com.

The expression "refusal to deal" has been characterized above as to incorporate any understanding which confines or is liable to limit by any method the persons or classes of persons to whom goods and services are sold or from whom products are purchased. This relates to prohibitive trade practice as characterized in section 33(1) (a) of the old act. This provision relates to the restriction of the customers, which is properly referred as refusal to deal, which would include both refusal to sell and refusal to buy.

Refusal to Deal in Exercise of Discretion for Selection of Customers

Refusal to deal is anti competitive, if it is practised by a dominant firm to enforce anti competitive practices such as resale price maintenance and selective distribution arrangements etc. It is done with the objective of eliminating or impairing competition, not by way of exercise of discretion as regards selection of customers. This provision does not restrict the long recognised right of the trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal, unless the purpose is to create or maintain monopoly.[2]

In ***Lorain Journal Co. Et al. V. United States*** (342 US 143), the Supreme Court of the United States held: The right claimed by the publisher as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases is neither absolute nor exempt from regulation. A manufacturer has the right, even if its not absolute to devise its market policies and *modus operandi* in such a way as to be able to compete effectively with other manufacturers and that it may not be in the interest to supply the goods to whosoever wants it in the capacity of the dealer, the result of which may be that in the long run, it would lose the market in comparison with other competitors.[3]

A dominant firm has no general duty to co operate with its competitors[4] but it may not use its market power to impede competition in the relevant market. The absence of an unqualified duty to co operate does not mean that every time a firm declines to participate in a particular co operative venture, that decision may not give rise to a liability in certain circumstances. The absence of a duty to transact business with another firm is, in some respect the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value which is placed on the right to refuse to deal with other firms does not mean that the right is unqualified. Refusal to deal are not anti competitive and the firms should be free to choose to deal and also to indicate the circumstances under which it will refuse to sell announced in advance.

If there is no intention to create or maintain monopoly, a manufacturer engaged in private business is free to announce in advance the price at which his goods may be resold and to refuse with wholesalers and retailers who do not conform to such prices. That freedom is subject to the requirement that there is no intention to create or maintain a monopoly.

In ***Commercial Solvents***[5] the European Court of Justice held that the CSC, which held a dominant position on the Common Market as regarded the production of a raw material, had abused its dominant position as it ceased to supply a manufacture of derivatives. This was the first case brought to the EC Court regarding the use of an essential facility. However, even though the case played an important role concerning the refusal to deal, the essential facilities doctrine was never mentioned in the judgement.

Refusal to Supply

A refusal to supply to a willing buyer is not a normal competition, if there is no objective justification. It is anti competitive, if it is an effort to get the customer buy exclusively from the undertaking. It is also anti competitive, if the customer is a potential competitor to any of its activities in another market or if any of the few competitors is forced to leave the market. Refusal to supply will have anti competitive effect only if the buyer cannot obtain goods or services from elsewhere or if there is a downstream of competitors. Refusal to supply is abusive, if it stifles completion by compelling the existing competitors to exit or creating any barriers for the potential competitors. For example, an undertaking which has a dominant position in the

market in raw materials, and which, with the object of reserving such raw materials for the manufacturing of its own derivatives, refusal to supply a customer, which is a manufacturer by itself of these derivatives and therefore risks eliminating all competition on the part of his customers, is abusing its dominant position.[6] The same is also applied in the case of an undertaking holding a dominant position on the market in a service which is indispensable for the activities of another market. In fact, refusal to supply by a dominant producer to an established customer without objective justification is an abuse.[7] Thus refusal to supply its products or services or to grant access to facilitate by an undertaking in a dominant position is an abusive practice, if such refusal impedes competition. Therefore a refusal to supply to a customer who is not its competitor includes:

- Making supplies dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods,
- Making supplies only on discriminatory and unfair condition
- Making offer to supply on terms and conditions which the supplier knows that it is unacceptable.

It also includes making supply of particular goods dependent upon the purchase of other goods or services from the supplier. Such a tying arrangements which is an abuse as refusal to supply is also an abuse. Therefore making the supply of particular goods and services dependent of the restriction on the distribution or manufacture of competing or other goods, is a behaviour which is an aspect of "exclusive dealing arrangements". Making supply of particular goods or services dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods, results in exclusion of competitors from the market. The purchaser will deal the product of the dominant enterprise exclusively. As a condition of such exclusive right, the enterprise will frequently require the purchaser not to deal in, or manufacture, competing goods. Under such arrangements, the distributor relinquishes part of his commercial freedom in exchange for the protection from sales of the specific product in question by competitors.

Therefore Competition Agencies should be careful enough that no mistake or injury to competition with injury to individual competitors. Orders requiring firms to provide mandatory access to essential facilities should be sought only when the benefits of providing such access clearly outweigh the cost. Authorities should avoid embracing an excessively broad 'essential facilities doctrine', that is, routinely compelling firms to deal with rivals, which often benefits competitors but not competition.

European Commission: Assessment of Claims

A dominant firm should have the right to choose its own partners and dispose of its property freely. However there may be an anticompetitive refusal to deal with when the upstream market dominates the downstream market.

Kapoor Glass Limited v. Schott Glass Limited 2012 CCI Judgement

Kapoor Glass, a glass amoules manufacturer or converter alleged that Schott India (who sold borosilicate glass tubes to converters used while packaging liquid medicine) was abusing its dominance. By offering discriminating targets, loyalty discounts and long term agreement benefits to short India group companies Joint Venture without offering such benefits to others. The compact overrule the decision of CCI and held that offering different prices and sale conditions, on sale of varying quantities cannot be considered as discriminatory. Because the transaction involving sale of a large quantity cannot be treated in a similar manner, as a transaction involving sale of a smaller quantity.

Although US and EC case law and policy on refusals are sometimes characterized as being widely divergent, the difference can be overstated. The 1998 European Court of Justice Decision in ***Bronner***[8] suggests that the EC and US approaches are more convergent. Bronner originated from the refusal by the Mediaprint, a major Austrian newspaper publisher, to provide access to its local distribution network to a much smaller rival, Oscar Bronner. The Court held that a refusal to deal is an abuse of a dominant position when it is likely

to eliminate all competition in the market and that it is incapable of being objectively justified, but also that they refused service be indispensable in carrying on that person's business, in as much as there is no actual or potential substitute.

Hence in the circumstances of the case, the court held that Oscar Bronner had not been able to demonstrate that the distribution network for which it requested access was indeed indispensable for entry. Hence the Court concluded, the refusal to deal was not an abuse.

Refusal to License

When dealing with a case involving the refusal to grant a license, there has to be a balance between two conflicting issues: the main concern is to protect the industrial and commercial property rights based on national law of the Member States, Therefore it can be difficult to prove if a refusal to access constitutes an abuse. A mere existence of a patent, trademark or copyright is not sufficient to establish a dominant position and nor is the exercise of an intellectual property right by a dominant undertaking can be held to be abusive. Intellectual property rights are important for the development of European industry and economics and therefore it must be protected. If there is denial of access to a facility protected by an intellectual property right then it would always constitute an abuse, the effective goal could not obtain. However, a license may constitute an essential facility for a competitor who wishes to enter into a new market and a dominant undertaking can easily eliminate such competition by denying the license.

In the US, established case law indicates that there is a very strong or possible absolute prerogative of patent holders in refusal of licensing of their technology. The European Court of justice in the Magill case[9] has defined criteria for requiring access to IP and has confirmed them in the IMS health case.[10] Theses criteria stipulates that in order for a refusal to license to be treated as an abuse the following requirements must be established:

- There must be no actual or potential substitute for the IP protected product in the relevant market.
- There can be no business justification for the exclusion.
- A new product must be denied to consumers because of the refusal.

In 2004 European Commission case against the Microsoft Corporation provides further scope for reflection. A key aspect of this case concerned the refusal by Microsoft to provide competitors with information relating to its operating system source code, which was alleged and was necessary for the development of competing software products. In the *Microsoft's* case, the commission's treatment of the first two requirements that the Court had developed in IMS was straightforward; it found on the facts, that there was no substitute for the IP protected products in the relevant market and that no satisfactory business justification for the exclusion had been shown.

An obligation to provide access to a competitor has to be associated with an indication to provide access would be unprofitable, so as to make sure that access at excessively low prices would not reduce the incentives to invest or to innovate on the part of essential facility owners.

Both *Renault* and *Volvo*[11] regarded the refusal by a car manufacturer, who held intellectual property rights over car body parts, to licence other manufacturer to make copies. The both car manufacturers refused even though they were offered a reasonable royalty. The cases therefore involved a clear conflict between intellectual property rights and the theory that a monopolist must let new competitors on the market.

The legally independent company Eric Veng Ltd. (Veng), imported automobile body panels from Italy and Denmark for sale in the UK. Volvo commenced proceedings against Veng alleging infringement of its Registered Design. In his defence Veng, inter *alia*, relied on article 82 and the question of whether a car Manufacturer in a dominant position, which holds registered designs, is abusing its position if it refuses to licence others, was referred to Court for a preliminary ruling.

In the ***Renault*** case, there had grown up an industry, which copied spare parts. CICRA was a trade association made up of a number of Italian undertakings, which manufactured and marketed motor vehicle bodywork

components as spare parts. One of its members produces bodywork components for Renault cars. CICRA brought actions against Renault for the annulment of certain protective rights. The national court expressed doubts regarding, inter *alia*, the compatibility with article 82 and referred the question to the Court for a preliminary ruling.

The Court gave reasoning that "the right of the proprietor of a protected design to prevent third parties manufacturing and selling or importing, without its consent, products incorporating the design constituted the subject matter of the exclusive right." Therefore, the Court concluded that "a refusal to grant such a licence cannot in itself constitute an abuse of a dominant position."

However, the Court agreed that the exercise of an intellectual property right might constitute an abuse. This would be the case when an undertaking holding a dominant position engaged in abusive conduct such as "the arbitrary refusal to supply spare parts of independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation."

Conclusion

It is very difficult to say that in which course EC rivalry law will create. A portion of the targets set by the Commission, for example, liberalisation; require a firm control of prevailing dominant undertakings. All together for the money to be effective, the EC needs solid European fare organizations, equipped for contending on the world business sector, with a specific end goal to achieve achievement, these organizations may require a more prominent flexibility in their activities.

In this paper the discussion is mainly being focused on the reprimanding the Commission and the Court. It is essential to clarify that both the Commission and the Court have fizzled in supplying a meaning of what obligations article 82 puts on the dominant undertakings. It is difficult to acknowledge that productivity and the formation of an extensive variety of good items coveted by the buyers ought to be the objective of EC rivalry law. In a business sector taking into account the free rivalry the opposition would not be for long term. Dominant undertakings will be allowed to utilize their monetary quality to enter new markets and imposing business models controlled by private premium might be the outcome. At last productivity and new speculations may happen to auxiliary enthusiasm as the dominant undertakings free all opposition and in this manner all motivating forces to make strides. Notwithstanding, rivalry can't be protected at any expenses. The protection of small and medium sized organisations is also a threat to efficiency.

References

(Endnotes)

1. http://www.ipvancouverblog.com/competitionactrefusaltodeal/ last access 9.4.2016.
2. *United States v. Colgate & Co*. 250 US 300.
3. *Masvi Fabrics v. Arvind mills Limited*, 1993 1 CTJ 454 (MRTPC).
4. *Goldwasser v. Ameritech Corp*. 222 F.3d 39 (7th Cir 2000).
5. *Commercial Solvents Corp. v. Commission* (1974) ECR 223.
6. *Ibid*.
7. *United Brands v. Commission* (1978) ECR 208.
8. *Oscar Bronner GmbH & Co. K.G. v. Mediapring Zeitungs und Zeitchriftenverlag GmbH & K.G*., 1998 ECR 1 7791.
9. *Radio Telefis Eireann and Independent Television Publications Ltd v. Commission (Magill)* (1995) ECR 743.
10. *IMS Health GmbH & Co. OHG V. NDC Health GmbH & Co. KG*,(2004) ECR 1 5039 .
11. http://www.konkurrensverket.se/globalassets/forskning/uppsatser/uppsats2002_fredriksson.pdf, last access 10.4.2016.

❑❑❑

CHAPTER

11

Competition Law and 'Abuse of Dominant Position' – Issues and Approaches for Developing Countries

Gopa Chandra Mandal*

Abstract

Law is an instrument of social change. With the emergence of string and dominating market players, law was required to regulate human behaviour (be it social life or business life) in the market. As countries across the world have been shifting to market economies, they have been adopting, or modernising competition laws. Since, competition law is primarily based upon economic and legal principles, the reasoning behind competition law should be described by analogy (not logic but experience) and the reasoning should be gathered by keeping in mind the legislative goals of competition law. The Article on "Competition Law and 'Abuse of Dominant Position'–Issues and Approaches for Developing Countries" has been orchestrated with this view.

The development of competition law started in the Europe in the early 18th century. However, the Sherman Act, 1890 is considered as the first attempt in the drafting of modern competition law.

Years of government controls and protective regimes have left India with a weak competition culture. Ascertaining the literacy and other factors crucial to the Indian economy and social system, the Indian Parliament was aware of the fact that India needs an efficient competition law regime for the protection of the consumers. India took up economic reforms in the early 1990s, and in the second phase of the reforms, it enacted a new competition law to replace the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969; which had become obsolete in certain respects. The Competition Act, 2002 came on the Statute Book in January 2003, which is in economic terms a more sophisticated law. It covers the three standards limbs of competition law: anti-competitive agreements, abuse of dominant position and merger regulation. It also mandates the Competition Commission of India to undertake competition advocacy.

Competition law has two-fold purposes: firstly, competition law ensures competition in the market and secondly, competition law restricts unfair competition in the market. Because wherever there is competition, there is a likelihood of unfair competition and violation of the "rules of game" is the essence of unfair competition. The nature of competition law is to determine those rules.

* LL.M. Part II, Department of Law, University of Calcutta, Hazra Campus. E-mail : gopachandra27@gmail.com

Introduction

"Competition may be viewed as a social mechanism which, in the economic field, first cleared the way for the modern complex economic structure and then produced organised monopolistic groups which are now so potent a control."[1]

The need for evolving and stating the competition policy of India can hardly be overemphasised. The experience of industrially advanced countries, the United States, for example, shows that direct intervention of the government in the running of industries through controls is inappropriate as a means to speed up industrial progress. The government's role is best limited to laying the basic rules for operating in the country, and providing the means for preserving the freedom of both sellers and buyers, so that there is the minimum of *'a working competition'*. That takes us to the question of appropriate machinery for enforcing such a competition policy and this again is determined by the structure of the country's market.

History and Development of Competition Law

The modern statutes controlling cartels and monopolies, however, first appeared in the United States in 1890.[2] The development of competition law started with the grant of individual freedom against existing guilds in the Europe in the early 18th century. This shows that the roots of competition law are very deeply rooted. The first traceable event of origin of competition law can be regarded as the book of *'Wealth of Nations'* by Smith, where he gave the metaphor of the invisible hands. According to him, the person intends only his own gain, and he is in this, led by an invisible hand to promote an end which was no part of his intention.[3] The *'invisible hand'* of competition ensured that social welfare would be maximised.

However, the Sherman Act, 1890[4] is considered as the first attempt in the drafting of modern competition law. It was an attempt to promote and preserve competition. The Act was enacted in response to the rising number of large-scale business enterprise in the post-civil war period and the growing number of trusts by American companies. The Sherman Act, 1890 prohibited contracts, combinations, or conspiracies in restraint of trade,[5] and also prohibited monopolization or attempts or conspiracies to monopolize.[6]

Meaning of Competition

Competition law was not a theory about price or cost relationships, as it came to be in neo-classical economics, nor was it a theory about the *'struggle for survival'*.[7] Rather competition was a belief about the role of individual self-determination in directing the allocation of resources; it was a theory about the limits of State power to give privileges to one person or class at the expense of others.[8]

Competition law is the engine of free enterprise. Market economy performs with respect to competition in the market. From an economist perspective, competition involves a process of business rivalry between the firms that strive to win customer's business by achieving the lowest level of costs and prices, developing new products or services or exploiting particular strengths, skills or other advantages to meet customer's needs more effectively than competitors.[9]

Goals of Competition

It is generally accepted that efficiency and consumer welfare are the primary goals of competition law. Apart from that there are some non economic and societal goals, which competition law would like to achieve. The societal purpose rationale for competition law finds its introduction in the passage of Justice Hands in *United States v. Aluminium Co. of America;*[10] where he preferred the preservation of small business over the preservation of free market in the following words:

> "It is impossible, because of its indirect social and moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."

Competition law forces the market players to search for better permutation and combination for providing greater profits through greater efficiency. Shuffling and reshuffling of products makes the output maximized because there is no further possibility of rearrangement of resources that could increase the value to consumers of total output. This leads to a prosperous society and permits individual consumers to determine by their own actions what goods and services they want most.[11]

The Competition Act, 2002

The Competition Act, 2002[12] received the assent of the President on 13th January 2003, subsequent to which various sections have been brought into force from time to time. *The Object of the Act,* set out in the Preamble is "to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

Objectives of the Competition Act, 2002

The basic objective of the Competition Act, 2002 is to provide a law relating to competition among enterprises that will ensure that the process of competition among enterprise is left free without stronger trading enterprises manipulating the market to their advantage and following from that, to the disadvantage of consumers.[13] The key provisions include –

- Section 3, which deals with anti-competitive agreements,
- Section 4, which discusses about of a dominant position, and
- Section 5, which deals with the regulation of combinations; a combination may be an acquisition or a merger.

The New Competition Law Repealing the MRTP Act

It was realized by the Indian Government that many provisions of the MRTP Act and judicial pronouncements thereof, are not useful in the changing economic and social milieu of India. The need for a new law has its origin in Finance Minister's Budget Speech in February, 1999:

> "The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions."

The Competition Act, 2002 repealed the Monopolies and Restrictive Trade Practises Act, 1969 (MRTP Act). The replacement of the MRTP Act of 1969 by a new Competition Act is a natural corollary to economic liberalisation and opening up of trade to competition. It is to be noted that the MRTP Act was inadequate, in comparison with the competition laws of many countries, for regulating anti-competitive practices. The general definition of a restrictive trade practice under that Act was seen as not specifically covering the numerous categories of anti-competitive agreements, practices, etc.

Under the Act as originally enacted, the Competition Commission was the authority to deal with competition issues arising out of market conditions and complaints of violations of the Act. In *Brahm Dutt v. Union of India (2005)*,[14] it was successfully challenged that the Competition Commission could not combine in itself the roles of a market regulator and an adjudicatory body. This lead to a large number of amendments to the Competition Act in 2007, the principal ones being the basic nature of the functions of the Competition Commission in that the Competition Commission will not only function as a market regulator, an expert body performing advisory and regulatory functions and the establishment of a Competition Appellate Tribunal which would be a quasi-judicial adjudicatory body.

The Competition Act, 2002 as amended in 2007 and 2009, covers the major provisions dealing with anti-trust issues, viz. regulation of anti-competitive agreements, abuse of dominant position and a combination or an acquisition falling under the Act.

Abuse of Dominant Position

The traditional definition of *'dominance'* is that it relates to a position of economic strength enjoyed by an enterprise in the relevant market which enables it to prevent effective competition by affording it the power to behave independently of competitors and of customers.[15]

The abuse may result in the restriction of competition, or the elimination of effective competition. Some of the various forms of abuse are: price-fixing, imposing discriminatory pricing, 'predatory' pricing, limiting supply of goods or services, denial of market access, etc.

Section 4: Dominant Position Abuse

Section 4 of the Competition Act, 2002 deals with the abuse of a dominant position. Section 4(1) prohibits abuse by an enterprise of its dominant position. Sub-section (2) of Section 4 defines when there is abuse of dominant position within the meaning of Section 4(1). It lists the anti-competitive practices of imposing unfair or discriminatory trading conditions or prices or predatory prices, limiting the supply of goods or services, denial of market access, imposing on other contracting parties obligations not related to the basic contact with them and using a dominant position in one market to gain entry into another market or to protect that other market.

Amendments to Section 4

Certain amendments have been made to Section 4 by the Competition (Amendment) Act, 2007. The amended Section reads as follows: –

Section 4. Abuse of dominant position. [(1) No enterprise or group shall abuse its dominant position.][16]

(2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group.][17]–

(a) directly or indirectly, imposes unfair or discriminatory –

  (i) condition in purchase or sale of goods or service; or

  (ii) price in purchase or sale (including predatory price) of goods or service.

  Explanation.–For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts–

  (i) production of goods or provision of services or market therefore; or

  (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulge in practice or practices resulting in denial of market access [in any manner];[18] or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

  Explanation.–For the purposes of this section, the expression–

  (a) "dominant position" means 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) affects its competitors or consumers or the relevant market in its favour.

(b) "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.

(c) [(c) "group" shall have the same meaning as assigned to it in clause (b) of the Explanation to section 5].[19]

Elements Constitute Dominant Position

The dictionary meaning of the word 'dominant' is *'overriding',* or *'influential'*. Second explanation to Section 4 defines 'dominant position' and 'predatory price'. The elements that constitute dominant position are: –

1. a proposition of strength;
2. that position being enjoyed in a relevant market in India (both product and geographical markets);
3. and such a position that gives the enterprise the power to 'operate independently of competitive forces in the relevant market', meaning thereby that it can at will, disregard market forces and conditions and impose its own trading conditions, which will include the prices at which it is prepared to supply goods or services.[20]

Comparative Law

As stated earlier, *'dominant position'* has a specific meaning under Section 4 of the Competition Act, 2002, and in the European Community Law, in Article 82, on which both the Indian Act and the Competition Act, 1998, UK, are based. It does not contain the commonly understood connotations of dominant position, as constituted by size or market share of an enterprise, though they are relevant in ascertaining dominant position.

Dominant Position

A dominant enterprise is one that has the power to disregard market forces, i.e., competitors, customers and others and to take unilateral decisions that would benefit it and also, in the process, cause harm to the process of free competition, injuring the customers by saddling them with higher prices, limited supplies, etc.

A dominant position is acquired over a period of time and the many factors which may further the acquiring of a dominant position by an enterprise are – technological superiority, access to certain intellectual property rights in the supply of the products, early entry, weak competition, the nature of the industry, government regulations, etc. The Office of Fair Trading (United Kingdom) believes that an enterprise cannot be in a dominant position when it does not have substantial market player.[21]

Abuse

An enterprise abuses its dominant position when it resorts to an anti-competitive practice to maintain or increase its position in the market, especially when such practice is not a response to the market, and when it has a significant effect on competition. In *Hoffman-La Roche v. Commission*[22] the European Court has held that the concept of abuse is an objective concept regarding behaviour of an undertaking in a dominant position, which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which through recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

Dominant Position in Relevant Market

In a particular case, before abuse can be established, it will be necessary to determine that the enterprise is dominant. This involves two important exercises – *first,* to define the relevant market, and *secondly,* to assess whether the enterprise is dominant in the relevant market.

Relevant Market

The relevant market identifies the producers or services which are such close substitutes for each other that they operate as a competitive constraint on the conduct of the suppliers thereof; it sets the framework within which dominance is to be determined.[23]

A dominant position is always with reference to a relevant market, both the relevant product and relevant geographic markets. The determination of the relevant market is of crucial importance.

'Relevant market' means the market which 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.[24]

'Relevant geographic market' means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.[25]

'Relevant product market' means a market comprising 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.[26]

Conclusion

The dominant position of an enterprise is a question of fact to be determined in each case, taking into consideration a number of relevant factors. Section 19(4) of the Competition Act, 2002 sets out the factors that ought to be taken into consideration by the Commission while inquiring into the question whether an enterprise enjoys a dominant position, within the meaning of Section 4. An enterprise may acquire a dominant position over a period of time by its own efficiency in running the enterprise and also by the way the market evolves. Acquiring a dominant position is not prohibited, only its abuse is prohibited.

In recent years, there has been a rapid growth in the amount of legislation with the object of securing a more competitive business environment. Competition law or anti-trust law has thus assumed a more prominent place as an area of study in business and management courses. It lies at the crossroads between economic and social policy.

Bibliography

1. Abir Roy and Jayant Kumar, *Competition Law in India* (Eastern Law House Pvt. Ltd., 2008).
2. Competition Act, 2002.
3. Competition (Amendment) Act, 2007.
4. D.M. Raybould, *Comparative Law of Monopolies* (E. Susan Singleton Ed., 1999).
5. Hovenkamp, *The Political Economy of Substantive Due Process* (1988).
6. J.H. Agnew, *Competition Law* [Allen & Unwin (Publishes) Ltd., 1985].
7. Julious Stone, *The Province and Function of Law.*
8. Richard Wsish & David Bailey, *Competition Law* (Oxford University Press 2102), 7th Edition.
9. Smith, *Wealth of Nations* (W. Pickering, 1995).
10. T. Ramappa, *Competition Law in India- Policy, Issues, and Developments* (Oxford University Press, 2006) 3rd Revised Edition Published in 2004.
11. Vinod Dhall, *Competition Law Today: Concepts, Issues, and the Law in Practice,* (Oxford University Press, 2007).

References

(Endnotes)

1. Julious Stone, *The Province and Function of Law,* pp. 762,763.
2. D.M. Raybould, *Comparative Law of Monopolies* (E. Susan Singleton Ed., 1999) pp. 3-4.
3. Smith, *Wealth of Nations* (W. Pickering, 1995).
4. Canada enacted its first law in 1889 and some states of the United States too had earlier law but, on account of their limited effectiveness, they have not acquired comparable significance in anti-trust history.
5. Section 1, Sherman Act, 1890.
6. Section 2, *ibid.*
7. Hovenkamp, *The Political Economy of Substantive Due Process* (1988) 40 Stan L Rev 379 (417-419).
8. See *Supra* note 11.
9. See *Supra* note 13, at p. 15.
10. *United States v. Aluminium Co. of America,* 148 F 2d 416; 2d Cir 1945.
11. Abir Roy and Jayant Kumar, *Competition Law in India* (Eastern Law House Pvt. Ltd., 2008) p. 15.
12. Act No. 12 of 2003.
13. T. Ramappa, *Competition Law in India- Policy, Issues, and Developments* (Oxford University Press, 2006) 3rd Revised Edition Published in 2004, p. 1.
14. *Brahm Dutt v. Union of India (2005) 64 CLA 214 SC.*
15. *United Brands and United Brands Continental BV v. Commission of the European Communities (1978) 1 CMLR 429* and *Hoffman-La Roche v. Commission (1979) 3 CMLR 211.*
16. *Substituted* by the Competition (Amendment) Act, 2007 for "No enterprise shall abuse its dominant position."
17. *Substituted* by the Competition (Amendment) Act, 2007 for "under sub-section (1), if an enterprise."
18. *Inserted* by the Competition (Amendment) Act, 2007.
19. *Inserted* by the Competition (Amendment) Act, 2007.
20. T. Ramappa, *Competition Law in India- Policy, Issues, and Developments* (Oxford University Press, 2006) 3rd Revised Edition Published in 2004, p. 159.
21. *Ibid,* pp. 160-161.
22. *Hoffman-La Roche v. Commission (1979) 3 CMLR 211.*
23. Vinod Dhall, *Competition Law Today: Concepts, Issues, and the Law in Practice,* (Oxford University Press, 2007) p. 11.
24. Section 2(r), the Competition Act, 2002.
25. Section 2(s), *ibid.*
26. Section 2(t), *ibid.*

❑❑❑

CHAPTER

12

Abuse of Dominant Position in Indian Context: A Critical Analysis

M.A. Saleem Ahmed*

Abstract

The Competition Act, 2002 (as amended), follows the philosophy of modern competition laws and aims at fostering competition and at protecting Indian markets against anti competitive practices by enterprises. The Act prohibits anticompetitive agreements, abuse of dominant position by enterprises, and regulates combinations (mergers, amalgamations and acquisitions) with a view to ensure that there is no adverse effect on competition in India.

Competition laws all over the world are primarily concerned with the exercise of market power and its abuse. The term "market power" is variously known as "dominant position", "monopoly power" and/ or "substantial market power".[1]

Dominance

The Act defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India, which enables it to behave/act independently of the market forces that determine its dominant position. In a perfectly competitive market no enterprise has control over the market, especially in the determination of price of the product. However, perfect market conditions are more of an economic "ideal" than reality. Keeping this in view, the Act specifies a number of factors that should be taken into account while determining whether an enterprise is dominant or not.[2]

Factors to Determine Dominant Position

Dominance has been traditionally defined in terms of market share of the enterprise or group of enterprises concerned. However, a number of other factors play a role in determining the influence of an enterprise or a group of enterprises in the market. These include:

- Market share,
- The size and resources of the enterprise;
- Size and importance of competitors;
- Economic power of the enterprise;
- Vertical integration;
- Dependence of consumers on the enterprise;

* M.A., M.L., PGDLAL, Guest Lecturer, Government Law College, Chengalpattu, Tamil Nadu.

- Extent of entry and exit barriers in the market;
- Countervailing buying power;
- Market structure and size of the market;
- Source of dominant position viz. Whether obtained due to statute etc.;
- Social costs and obligations and contribution of enterprise enjoying dominant position to economic development.
- The Commission is also authorized to take into account any other factor which it may consider relevant for the determination of dominance.

Abuse of Dominant Position

It is the abuse of dominant position which is prohibited by provisions of Sec. 4 of competition act. The term dominant position has been defined to mean a position of strength enjoyed by an enterprise in the relevant market in India which enables him to,

1. Operate independently of the competitive forces prevailing in the relevant market.
2. Affects its competitors or consumers on the relevant market in its favor.

The act does not consider dominance as anti-competitive, but its abuse.[3] The abuse of dominance which prevents, restricts or distorts competition needs to be removed by competition law. The dominancy has a tendency to be abused. The competition act of India does not have the word dominance, but the dominant position. It is the ability of the enterprise to act independently.

There are two important elements in sec. 4,

1. There must be a dominant position
2. That position is abused

In Anush Kumar Bhati vs. Sony Entertainment Television, it was alleged that the opposite parties in their programme KBC-4 has not adopted fair method in selecting candidates or choosing questions. It was held that they were not in a dominant position because at the prime time of broadcast, viewers had choice to see whatever channel they wanted according to viewership rating and hence, the opposite parties were not in a dominant position consequent to which, matter was closed under Sec. 26(2) of competition act.

The abuse of dominant position affects the fair competition between firms and exploits the consumers and makes it difficult for other players to compete with the dominant enterprise. Abuse of dominant position includes,

1. Imposing unfair condition or price
2. Predatory pricing
3. Limiting production or technical development
4. Certain barrier to entry
5. Applying dissimilar conditions to similar transactions
6. Denying market access
7. Using the dominant possession to gain advantages in other markets

Previously, Sec. 4 was applicable to enterprises, but not to a group of enterprises. But after 2007 amendment, it is applicable to a group of enterprises also.

Essential Elements for Dominant Position

1. How strong the entity is in the market?
2. Relevance of position of the strength in the relevant market.
3. Whether this position of strength enables the entity to take decision unilaterally?
4. Whether the entity can impose its own trading conditions?

When the 3rd and 4th factors are present, then it is very clear that there is an abuse of dominant position.

Adversely Affecting Factors

1. The entity is taking decision without regard to market forces.
2. It will adversely affect the consumers by cutting down free and healthy competition.

Collective Dominance

The dominant position need not be done by a single entity. A group means where two or more entities join together and make them to be in a position to control directly or indirectly over another entity.

Traditionally, abuse of dominance provisions have hinged on the danger of unwelcome practices in markets that resemble monopolies.[4] Monopolies have generally been deemed undesirable (except in rather specific circumstances), pushing competition law to attack them whenever it can. The raising of a suspicious eye towards collusion by rival enterprises arises out of a similar apprehension of increased market concentration in an oligopoly. An oligopoly is a market with a limited number of large suppliers, none of whom achieves market dominance. Suppliers in such oligopolies have an increased chance of coming together to create an ostensible 'joint monopoly', with characteristics much like those of an independent one.

Two major perils of such a collusive situation may be identified.

First, it would lead to an effective break-down of the competitive process, a process which enjoys the presumption of essentially despite criticism from some corners.

Second, it would allow the participants thereof to contort the market to their favour, as is the wont of a monopoly.

Competition Law regimes combat the former through explicit prohibitions on 'anti-competitive' agreements on price-fixing, geographical division and the like, all at the stage of the existence of the agreement itself. Traditionally, these provisions were understood to have the mandate of controlling collusive behaviour, while abuse of dominance provisions were understood to be restricted to monopolistic practices by single entities.[5] Unfortunately, this understanding has severely curbed the ability of enforcement authorities to check a monopoly-like contortion of the market.

Extending abuse of dominance provisions to encompass those situations where independent companies, in acting together, create situations of dominance should logically serve to remedy this defect. Thereby, when several independent companies maintain economic ties of such a nature that they are able to adopt similar practices in a market which render them immune to the competitive forces therein, even if they would be unable to do so individually, they are considered jointly dominant in that market. This would make it possible to punish, for instance, the hidden charges placed by most telecom operators today – none of whom dominate the market by themselves. With its focus on the behavioural element of abuse rather than on concentration *per se*, importation of this concept theoretically serves to sidestep the express necessity of agreements in anti-competitive agreement provisions.

Legally, however, the treatment of collective dominance appears somewhat confused world over. The test that European Economic Community jurisprudence has supplied is an insufficient one – necessitating that firms, to be dominant jointly, must show 'connecting factors' that allow them to act similarly in a relevant market,

in doing which they would be able to function independently of the competitive forces in the market.[6] No effectual objective parameters have been developed to determine where such dominance exists. In practice, factors used to demonstrate collusive behaviour under anti-competitive agreement provisions are often re-hashed to prove the existence of 'economic links'. Consequently, the practical utility of the addition, other than in specific circumstances has thus far been limited.

The major conditions for Collective Dominance[7] is,

1. When two or more entities are exercising 26% or more of the voting rights of another entity.
2. They are able to appoint more than 50% of directors on board.
3. Where they are managing other enterprises or business.

If any of the above three points are proved, then there is a collective dominance.

Factors to be Considered

1. Market share – Percentage of the share, the entity is holding in the market.
2. Resources of the enterprises
3. Resources of the competitors
4. Commercial advantage
5. Economic power
6. Sources of funding
7. Vertical integration
8. Storage facilities – For example, warehouses
9. Dependency of consumers on the enterprise
10. Monopoly
11. Entry barriers
12. Social obligations of the entity
13. Any other factors as the commission deems fit.

Different Types of Abuse

1. Unfair pricing – predatory pricing is possible if a firm is in dominant position
2. Restricting development – limiting other entities to use the technical advancements
3. Denying access to market
4. Making the external factors to conclude on the contractual subjects

Predatory Pricing

The practice of predatory pricing involves price cutting with the intention of eliminating competition by driving out the competitors in the market.

Predatory pricing is classified under Section 4[8] as an abuse of dominance. Stated in simple terms, Predatory Pricing refers to a practice of driving rivals out of business by selling at a price below the cost of production.[9] Predatory pricing is a commercial strategy by which a dominant firm first lowers its price to a level which will ultimately force its rivals out of the market. When the latter have been successfully expelled, the company can raise the prices again and reap the rewards.[10] However, the simplicity of the definition masks the extremely complicated nature of this concept. Across jurisdictions, there is little agreement whether the practice of Predatory pricing really exists and whether it should be treated under antitrust/competition laws.

The main challenge in penalising Predatory pricing is that it is hard to distinguish between fair, aggressive pricing (which is an essential ingredient of competitive markets) and unfair, predatory pricing.[11] The United States Supreme Court has expressed doubts about the likelihood that firms would engage in below-cost pricing.

- First, a decision to engage in below-cost pricing is very costly, as it is unclear how long the prices have to be set below cost in order to drive out competitors.
- Second, the last firm standing must be able to raise prices to an anticompetitive level so as to recoup the losses it has suffered.

Almost inevitably high prices invite new entrants, reducing the predator's profits, making the strategy unworkable. Given the considerable cost, uncertainty and risk present in any decision to engage in a below-cost pricing campaign, the United States Supreme Court reached the conclusion that 'predatory pricing schemes are rarely tried, and even more rarely successful.'[12] Predatory pricing is analyzed under antitrust/competition laws as illegal monopolization or attempt to monopolize.

As stated earlier, under the Act, it is dealt with under Section 4 which prohibits the 'Abuse of Dominant Position' by an enterprise.[13] 'Abuse of Dominant Position' refers to the conduct of an enterprise[14] that enjoys a 'dominant position' which is defined under the Competition Act to mean 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) affects its competitors or consumers or the relevant market in its favour. Conduct amounting to an abuse of dominant position may also be such that it affects its competitors or consumers or the structure of the market in its favour. This results when abuse of a dominant position would impair the ability of the competitors to compete as they would and consumers would, as a consequence, have to accept higher prices or reduced quality. Where the freedom of those constituting a market is eroded in this manner, the structure of the market is deemed to have been altered in favour of the dominant enterprise abusing its position. PREDATORY PRICING is an exclusionary practice. Although the enforcement provisions of the Act have not yet been notified, it can be expected that the CCI when interpreting Section 4 of the Act will look into an allegation of PREDATORY PRICING not only when it has actually produced the pursued exclusionary effect, such as the elimination of competition or creation of an entry barrier, but also when such a conduct is 'likely' to attain these goals. A similar approach is followed in the European Community where the European Court of Justice has held that it must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated since the aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.

Once a predatory price allegation is established, the enterprise would be said to have abused its dominant position. Where after inquiry, the CCI finds that an enterprise in a dominant position is in contravention of the provisions of Section 4, it may pass any of the orders specified under Section 27 of the Act and may further under Section 28 of the Act direct the division of an enterprise enjoying a dominant position to ensure that such an enterprise does not abuse its dominant position.

Consequences of Abuse

The competition commission after an enquiry into abuse of dominant possession may pass all or any of the following orders under Sec. 27 of the Competition Act,

1. Direct an enterprise with dominant position to discontinue such abuse.
2. Impose penalty not exceeding 10% of average turnover for the last 3 preceding financial years.
3. Direct the enterprises to abide by such other order as the commission pass.
4. In addition to the above said orders, the competitive commission has the power to order division of enterprise enjoying the dominant position to ensure that it does not enjoy further dominant position under Sec. 28 of Competition Act.

Concluding Remarks

Thus, Competition law and policy, in India, seeks to be a means to achieve the ends of efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. It can be seen that the Indian competition law mostly follows the EU model and so its influence is evident in the Indian provisions regarding dominant position also. But the Indian definition of dominant position differs from the EU definition in some aspects. It is important to recognize that the Competition Act does not frown upon positions of market dominance per se, unlike the Monopolies and Restrictive Trade Practices Act, 1969. It is not illegal for an undertaking to have a dominant position; However, where a firm is found to be in a dominant position it has a special responsibility not to allow its conduct to impair genuine competition on the common market.

References

(Endnotes)

1. Michal S. GAL, Competition Policy for Small Market Economies (Harvard University Press, 2003) P. 23.
2. http://competitioncommission.gov.in/advocacy/Booklet_AbuseOfDominance11032008.pdf (accessed on 27-Mar-2016).
3. http://www.oecd.org/daf/competition/prosecutionandlawenforcement/27123114.pdf (accessed on 27-Mar-2016).
4. https://stillinlawschool.wordpress.com/tag/dominant-position/ (accessed on 28-Mar-2016).
5. http://www.oecd.org/competition/abuse/2379408.pdf (accessed on 28-Mar-2016).
6. ec.europa.eu/competition/antitrust/legislation/handbook_vol_1_en.pdf (accessed on 28-Mar-2016).
7. https://www.oecd.org/daf/competition/44445750.pdf (accessed on 28-Mar-2016).
8. [Explanation (b) of Section 4].
9. Hovenkamp, H., Federal Antitrust Policy-The Law of Competition and its Practice, (3rd ed., 2005, Thompson West) at p. 339.
10. Faull, J., & Nikpay, A., The EC Law of Competition, (2nd ed, 2007, Oxford) at p. 373.
11. Monti, G., EC Competition Law, (Cambridge University Press, 2007) at p. 178.
12. Matsushita Elect. Industrial Co. vs. Zenith Radio 475 US 574 (1986).
13. Section 4(2) of the Indian Competition Act, 2002 states that – "There shall be an abuse of dominant position under sub-section (1), is an enterprise or group – directly or indirectly, imposes unfair or discriminatory – condition in purchase or sale of goods or services; or price in purchase or sale (including predatory price) of goods or services Explanation – For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (1) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition. Furthermore, the Explanation (b) to Section 4 defines "predatory price" to mean 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 the competition or eliminate the competitors.
14. Section 2(h) of the Act defines an "enterprise" to mean a person or a department of the Government, who or which is, or has been engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space. Explanation – For the purposes of this clause – "activity" includes profession or occupation; "article" includes a new article and "service" includes a new service; "unit" or "division", in relation to an enterprise includes – a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods; any branch or office established for the provision of any service.

❑❑❑

CHAPTER

13

International Antitrust Enforcement – with Special Reference to US Antitrust Laws and European Union Competition Law

N. Nisha Devi*

Introduction

About 80 WTO member countries, including some 50 developing and transition countries, have adopted competition laws, also known as "antitrust" or "anti-monopoly" laws.[1] Typically, these laws provide remedies to deal with a range of anti-competitive practices, including price fixing and other cartel arrangements, abuses of a dominant position or monopolization, mergers that limit competition, and agreements between suppliers and distributors ("vertical agreements") that foreclose markets to new competitors. The concept of competition "policy" includes competition laws in addition to other measures aimed at promoting competition in the national economy, such as sectoral regulations and privatization policies.

Companies engaged in international commerce should by no means relax up on competition compliance, given all the new watchdogs on the beat worldwide. In recent years the number of anti-cartel and fair competition authorities globally has ascended as a host of new countries — including China, Mexico, India, and South Korea, to name a few — have joined the U.S., EU and other established players in going after violators of antitrust laws.

In all, more than 115 countries now have antitrust regimes in place.[2] Roughly a third of those are aggressively targeting cartel activity, with nearly a dozen state actors pursuing price-fixing and other anti-competitive activity beyond their own borders. Obviously that takes teamwork. In recent years antitrust authorities have stepped up inter-agency coordination on everything from search warrants to pre-dawn raids, while promoting far greater information-sharing of evidence of wrongdoing.[3]

The list of countries engaged in extra-territorial anti-cartel prosecutions continues to grow. Meanwhile, other foreign competition enforcement agencies in Brazil, Japan and South Africa are on track to have their own banner years. As of October, Brazil and Japan had each levied more than $200 million in fines against antitrust violators in 2013. South Africa, a relative newcomer to competition enforcement, has leveled nearly $150 million in fines in 2013.[4]

* M.A.,M.L., Lecturer (Senior Scale), Government Law College, Chengalpattu, Tamil Nadu, Email: nishakeren@gmail.com

Not a bad payoff, especially at a time when anemic global economic growth has kept tax revenues down, and left governments with steep budget shortfalls. As more countries find that there's significant revenue to be had, it's a good bet that enforcement actions will continue to climb, and already sky-high penalties could easily go up even more.

Competition law has already been internationalized along with the lines of US model. Chapter V of the Havana chapter contains an antitrust code.[5] But this was never incorporated by WTO. During the Doha conference for WTO, discussion included bringing down an international regime for competition law. The two largest and most influential system of competition regulations are US antitrust laws and European Union competition law.

Antitrust Law

Antitrust law means an act adopted by congress to restrict business practices considered to be monopolistic or which restricts the interstate commerce. Competition law is known in US as antitrust law that maintains market competition by regulating anticompetitive conduct by companies.

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

The antitrust laws forbid unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective; to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

The Three Core Federal Antitrust Laws

The Sherman Act prohibit "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." Long ago, the Supreme Court decided that the Sherman Act does not prohibit *every* restraint of trade, only those that are *unreasonable*.[6] For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "*per se*" violations of the Sherman Act;[7] in other words, no defense or justification is allowed.

The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison.[8] Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.[9]

The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.

The Clayton Act[10] addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.

In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.

Principles

Antitrust laws has three main elements,

1. Prohibiting agreements that restricts free trading and competition
2. Banning abusive behavior by forming domination in market. For example, tying and price grouping.
3. Supervising the mergers and acquisitions of large companies

Usually competition laws vary from jurisdiction to jurisdiction. Let us see how international enforcement can be made in the field of competition law.

US Antitrust Law Enforcement

The attorney general of the state of New York through his antitrust bureau enforces both state and federal antitrust laws. Antitrust laws have been called the bill of rights and *magna carta* of American system of free enterprises. The vigorous enforcement of antitrust law assures the ability to compete in open market. The antitrust law seeks to ensure that the industry is competitive with a number of manufacturers or distributors for a product or service.

Federal Antitrust Law

The Sherman Act enacted in 1890 prohibits all agreements and conspiracies in restraint of interstate trade and commerce. It includes such practices as price fixing, market allocations, boycotts, tying up agreements, and cartels. The act also prohibits monopolies, or attempts to monopolize any part of the industry. The court has power to stop these practices, order refund of gains illegally obtained and to award damages of three times the amount. Violations can also be held liable for criminal penalties up to 10 years' imprisonment.

The Clayton act prohibits mergers, certain exclusive dealing arrangements, and price discrimination which may reduce competition.

The federal trade commission act prohibits unfair methods of competition. The Act provides the federal trade commission with powers to enforce Sherman and Clayton Act and its provisions and to act as a consumer protection agency.

New York Antitrust Law

New York antitrust law was enacted in 1899. The act prohibits price fixing, bid rigging, and customer allocations, monopolization, boycotts and tying arrangements. The act permits the attorney general to bring action for civil fines. Private parties may also get damages by this act. The attorney general has exclusive powers to sue for civil fines and may bring state criminal prosecutions.

Antitrust Division

The antitrust division has statutory authority to enforce the Sherman and Clayton act by civil and criminal proceedings. The antitrust division will also issue business review letters to companies seeking advice. It is responsible for enforcement of antitrust laws in US.

Federal Trade Commission

Federal trade commission was established in 1914. The major functions of the commission are–

- Prevention of unfair methods of competition
- Conduct of investigation relating to violations of antitrust acts
- Making of reports and recommendations to US congress
- Prescribing interpretative rules with respect to unfair trade practices

Exemptions to Antitrust Laws

Labor unions, agricultural cooperatives and banks were exempted from antitrust laws. Mergers and joint agreements of professionals, game leagues, are exempted.

European Union Law

In 1957, western European countries signed the treaty of European community which over the last 50 years has grown into European Union of nearly half a billion citizens.[11] Where an application or by its own knowledge, if the commission finds that there has been an infringement of any of the articles, it may by decision require the undertakings, concerns to bring such infringement to an end. In making any investigations on the violation of articles, the officials authorized by the commission are empowered to examine the books and other records, to take copies or an extract from the books or business records, to ask oral explanations, to enter any premises for the purpose of the Act. Fines may be levied depending upon the gravity of the breach.

European antitrust policy is developed from two central rules set out in the Treaty on the Functioning of the European Union:

- First, Article 101 of the Treaty prohibits agreements between two or more independent market operators which restrict competition. This provision covers both horizontal agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels, i.e. agreement between a manufacturer and its distributor). Only limited exceptions are provided for in the general prohibition. The most flagrant example of illegal conduct infringing Article 101 is the creation of a cartel between competitors, which may involve price-fixing and/or market sharing.
- Second, Article 102 of the Treaty prohibits firms that hold a dominant position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.

The Commission is empowered by the Treaty to apply these rules and has a number of investigative **powers** to that end (e.g. inspection at business and non-business premises, written requests for information, etc.). The Commission may also impose fines on undertakings which violate the EU antitrust rules.[12]

NCAs[13] are empowered to apply Articles 101 and 102 of the Treaty fully, to ensure that competition is not distorted or restricted. National courts may also apply these provisions to protect the individual rights conferred on citizens by the Treaty. Building on these achievements, the Communication on Ten Years of Antitrust Enforcement identified further areas to create a common competition enforcement area in the EU.[14]

As part of the overall enforcement of EU competition law, the Commission has also developed and implemented a policy on the application of EU competition law to actions for damages before national courts. It also cooperates with national courts to ensure that EU competition rules are applied coherently throughout the EU.

US and EU Antitrust Laws

Article 81 of the European community treaty prohibits cartels and other concentrated practices that distort competition. The European Union also has counterpart to the Sherman Act. The main objects of these provisions that contain Acts are against anticompetitive agreements such as to restrict free trading or by monopolizing the product. Therefore, the antitrust laws in US and EU are mainly to promote or maintain market competition by regulating anticompetitive conduct by companies.

Competition law has already been internationalized along with the lines of US model. During the Doha conference for WTO,[15] discussion included bringing down an international regime for competition law. The two largest and most influential system of competition regulations are US antitrust laws and European Union competition law. Both the United States (US) and European Union (EU) utilize a model of dual enforcement to assure compliance with their antitrust or "competition" laws.

In the US, federal antitrust authorities do not have the power to direct or prevent state antitrust enforcement efforts. Federal and state governments are essentially coequals in antitrust enforcement, primarily because Congress has not reserved exclusive antitrust jurisdiction to the federal government and courts have (on federalism grounds) held that federal antitrust laws generally do not pre-empt state antitrust laws. Federal antitrust law applies in federal courts while state antitrust law applies in state courts. Although states can bring suits under federal antitrust laws in federal courts, federal antitrust law does not apply in state courts.

In general, EU competition authorities enforce Community competition law, but national competition authorities may enforce Community competition law and national competition laws. Community competition laws can apply in national courts and in administrative proceedings initiated by national enforcement authorities.

Thus antitrust laws in US and EU are mainly to promote or maintain market competition by regulating anticompetitive conduct by companies.

References

(Endnotes)

1. https://www.wto.org/english/thewto_e/minist_e/min01_e/brief_e/brief13_e.htm (accessed on 31-Mar-2016).
2. http://www.allenovery.com/SiteCollectionDocuments/Global_Antitrust_Trends_in_2013.PDF (accessed on 31-Mar-2016).
3. http://www.thedailybell.com/ news-analysis/regarding-antitrust-please-check-your-premises/ (accessed on 31-Mar-2016).
4. https://issuu.com/edgedavao/docs/edge6issue182/9 (accessed on 31-Mar-2016).
5. Wolfgang Fikentscher, Freedom as a task 218, (1997).
6. John W. Johnson, Historic U.S. Court Cases: An Encyclopedia 415 (2003).
7. Section 1, Per Se Violation. Conspiracy to Fix Prices. (Includes Alternative "Rule of Reason" Instruction) In this case the Plaintiff claims that the Defendants violated Title 15, United States Code, Section 1, commonly known as Section 1 of the Sherman Act, which is part of the antitrust laws of the United States.
8. Robert G Picard & Steven S Wildman, Handbook on the Economics of the Media, 323 (2015).
9. Richard A. Mann & Barry S. Roberts, Business Law and the Regulation of Business 993 (2015).

10. The Clayton Antitrust Act is an amendment passed by the U.S. Congress in 1914 that provides further clarification and substance to the Sherman Antitrust Act of 1890.
11. https://en.wikipedia.org/wiki/European_Union (accessed on 30-Mar-2016).
12. The main rules on procedures are set out in Council Regulation (EC) 1/2003.
13. National Competition Authorities.
14. David Lewis, Building New Competition Law Regimes: Selected Essays 122 (2013).
15. The Doha Development Round or Doha Development Agenda (DDA) is the current trade-negotiation round of the World Trade Organization (WTO) which commenced in November 2001 under then director-general Mike Moore. Its objective is to lower trade barriers around the world, and thus facilitate increased global trade. The Doha Round began with a ministerial-level meeting in Doha, Qatar in 2001. Subsequent ministerial meetings took place in Cancún, Mexico (2003), and Hong Kong (2005). Related negotiations took place in Paris, France (2005), Potsdam, Germany (2007), and Geneva, Switzerland (2004, 2006, and 2008).

❑❑❑

CHAPTER

14

Role of Competition Commission of India To Curb Negative Aspect of Competition

Rekha Rani*

Abstract

Competition laws have been described as Magna Carta of freed enterprise. These are important to the preservation of economic freedom and our free enterprise system. The Competition Act 2002 aims to prevent practices having adverse effect on competition and abuse of dominance of enterprises either by entering into anti-competitive agreement, or combinations. To achieve this aim, there was need to setup an administrative functionary (CCI) fully empowered to curb the unhealthy and unfair competition among business corporation and to protect the rights of consumers. This paper of mine is aimed to describe as to modus operandi up to what extent protect the consumers and make a healthy competition between corporations. Competition Commission of India still exploring new hypothesis to make the environment compatible for corporate competition examples are a pharmaceutical company case and a Bengaluru Cab case have set the new dimension in the new competition era. Apart from setting the new dimension for healthy competition, there is so many drawbacks which are still irresistible in the system. The current Competition Act, 2002 does not have any provision for the CCI to close the case if the director general's report recognizes a contravention of the Act. In this situation the affected party is left no power to appeal with the higher authority. In merger there is high threshold limits. The Competition Commission of India is tremendously slow in giving healthy environment for small scale business and consumers. The need of hour is to give more suggestions and making rules to regulate the healthy competition among all scales of enterprises in India.

Keywords:

Magna Carta, Enterprise, Consumer Protection, modus operandi, rules and regulation.

Introduction

Law is an instrument to regular human behavior, be it social life on business life with the emergencies of string and dominating market players,[1] law was required to regulate their behavior in the market. Therefore competition law was introduced. Competition in the market is required for the welfare of the consumers. Competition in the market however has to be fair and healthy. Markets trends and the urge to cover the maximum gain by a few leads to the practice of unhealthy competition which neither fair for the market participants nor is in the interest of the consumers who depend upon the market conditions. If the market

* Assistant Professor (Law) ILR Jasana, Faridabad.

conditions are not conductive to the competition, the worst sufferers are the other participants in the market and the consumers. A competitive market environment promotes healthy trends and results in fairness which is a *sin qua non* for proper market conditions. Competition entails putting in more energy, more effort and more creativity which leads to better results. Competition cuts across individual motivation which results in favorable situation for the society and beneficiaries of society.[2]

The concept of monopoly is quite ancient and can be traced back to the civilization of India and the Roman Empire B.C. The modern statutes controlling cartels and monopolies, however, first appeared in the United States In 1890.[3] The development of Competition Law started with grant of individual freedom against existing guilds in the Europe in early 18th century. This shows that the roots of competition law are very deeply rooted.

Why We Need Competition Law

Competition laws have been described as Magna Carta of freed enterprise. They are important to the preservation of economic freedom and our free enterprise system.[4] The need for competition law arises because market can suffer from failures and distortion, and various players can resort to anti competitive activities such as cartels, abuse of dominance etc which adversely impact economic efficiency and consumer welfare. Thus there is a need for competition law to provide a regulative force which establishes effective control over economic activities. There is widening consensus among jurisdiction with competition law that, "the basic objective of competition policy is to protect competition as the most appropriate means of ensuring the efficient allocation of resources and thus efficient market outcomes in free market economies."[5]

Goals of Competition

It is generally accepted that efficiency and consumer welfare are the primary goals of competition law.

Classical Goal

Primary Goal of competition law has been categorized. They are:

Enhancement of

- efficiency in the market.
- promoting consumer welfare
- avoiding of conglomeration of economic power.
- protection of smaller firms from anti competitive agreements

Specific Goals

The specific goal of competition law is the creation of a single market, which helps in bringing out lower price, better consumer welfare and liberty to sellers and buyers. The single market relies chiefly and competition and regulatory authorities to maintain a level playing field for the free movement of goods and services.[6]

Competition Law in India

Indian parliament was aware of the fact that India need and efficient competition law regime for the protection of the consumer. Along with thus it was not only necessary to protect the consumers from all sorts of market abuses, but also to create consumers by increasing the purchasing power of the people living in the poverty.[7]

In 1969 the Monopolies and Restrictive Trade Practice Act was enacted.[8] MRTP Act regulates three types of trade practices, monopolistic trade practices, restrictive trade practices and unfair trade practices that hamper competition in India or are prejudicial to public interest.[9] When the economic reforms of 1991 were introduced, the MRTP Act was not conductive from globalization and liberalization. The govt. hence set up a high level committee on competition policy and law (The SVS Raghavan Committee) in 1999.

The committee recommended that the MRTP Act did not contain definition to many of the acts which are essentially anti competitive in nature like predatory pricing, cartel collusion, bid-rigging etc the MRTP Commission was also very poorly resourced with the adequate weapons while checking anti competitive practices in the market.[10] Raghavan committee recommended that in view of the inadequacies in the MRTP Act in tackling anti competition practices a new law on competition should take in place of MRTP Act after the Indian Parliament enacted Competition Act, 2002. This act was made on the lines of US and European Economic Community (EEC).[11]

Aim and Objectives of the Competition Act, 2002

The Competition Act 2002 aims to prevent practices having adverse effect on competition and abuse of dominance of enterprises either by entering into anti-competitive agreement, or combinations. The Act typically focuses on four areas:

(i) Anti-Competitive Agreements

The Competition Act defines the term 'agreement' under section 2(b) as to include any arrangement, understanding or action in concert. Such arrangement, understanding or action in concern could either be in writing or oral; and it could either be enforceable or not by legal proceedings.[12] The definition given under the Act is very wide and covers both vertical as well as horizontal agreements. Section 3 of the Act states that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. This clearly shows the government's departure from rule of law approach because there the restriction is not qua agreement but rather based upon certain factual proposition which can render an agreement void because of its anticompetitive behavior.

(ii) Abuse of Dominance

The terms 'dominance' doesn't signify any arithmetic or quantities share in the market; rather it is a matter of subjective analysis. Explanation to Section 4 of the Act defines dominant position as a position of strength enabling an enterprise to operate independently of competitive pressure and to appreciably affect the relevant market share, competition and consumer. Section 4 of the Act expressly bars abuse of dominant position by an enterprise. The Section enumerates following acts as an abuse of dominant position:[13]

1. An enterprise directly or indirectly imposes unfair or discriminatory conditions or unfair or discriminatory price in purchase or sale of goods or service;
2. An enterprise limits or restricts production of goods or provision of services or market thereof;
3. An enterprise limits or restricts technical or scientific development relating to goods to the prejudice of consumers;
4. An enterprise indulges in practice or practices resulting in denial of market access;
5. An enterprise makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
6. An enterprise uses its dominant position in one relevant market to enter into, or protect, other relevant market.

(iii) Combination Regulation

The definition of "Combination" as contemplated under the Act covers merger, amalgamation, acquisition and takeover. The Act considers acquisition, merger and amalgamation to be a combination, provided the

combined asset value or turnover value, as the case may be, exceeds the threshold limits. The CCI is empowered to investigate into the dealings with respect to combinations on its own knowledge or information[14] without waiting for merging parties to approach it. The CCI can undo or modify a combination, if it causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. The Act also lists several factors that need to be taken into account for the purpose of determining whether a combination would have an appreciable adverse effect on competition within the relevant market in India.[15]

(iv) Competition Advocacy

Advocacy is often referred as compliance without enforcement. The concept of competition advocacy is rather of recent origin having gained acceptance in developed and developing economics with the gradual opening up of the erstwhile state monopolies in sectors such as telecom, electricity etc. to market economy and when the benefits of free competition started emerging in these sectors. Through competition advocacy a competition agency can influence government policies by proposing alternatives that would be less detrimental to economic efficiency and consumer welfare. Looking from a public policy perspective, in a country like India, where consumers as well as Small and Medium Size Enterprises needs to be educated before and during their confrontation with the competition culture as established by the law. The awareness amongst market players also helps in encouraging self-compliance and reducing the need for direct action against erring enterprises. In such a case, the competition agencies have an important role in the educational purpose also. Thus, competition advocacy can be a useful tool to usher in regulatory reforms and create a policy climate that favour deregulation in a number of sectors and thereby increase consumer welfare.

The Competition Commission of India (CCI) is enabled to participate in the formulation of policies and reviewing of policies relating to competition at the instance of the government.[16] The commission is also required to take suitable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

Competition Commission of India

Administration and enforcement of the Competition Law requires and administrative setup. This administrative setup could be more proactive than reactive for the administration of the Competition Policy. This administrative setup should make a proactive stand to be specified and adopted to promote competition by not only proceeding against those who violate the provisions of the Competition Law, but also by proceeding against institutional arrangements and public policies that interfere with the fair and free functioning of the markets. It is in this context that a competition authority should have the following two basic functions:[17]

(a) Administration and enforcement of Competition Law and Competition Policy to foster economic efficiency and consumer welfare.

(b) Involvement proactively in Governmental policy formulation to ensure that markets remain fair, free, open, flexible and adaptable.

The principles that govern an effective application of competition law and authority are:

(a) CCI should be a multi-member body comprised of eminent and erudite persons of integrity and objectivity from the fields of judiciary, economics, law, international trade, commerce, industry, accountancy, public affairs and administration.

(b) CCI should be independent and insulated from political and budgetary controls of the Government.

(c) CCI should separate the investigative, prosecutorial and adjudicative functions.

(d) The proceedings of CCI should be transparent, non-discriminatory and rule-bound.[18]

(e) CCI should have a positive advocacy role in shaping policies affective Competition.

Flaws of Competition Law 2002

Competition Act is silent on penalizing trade bodies. There is nothing in the law for trade bodies in the most of cartel cases arise from trade association but since in India the law does not state about penalizing trade bodies.

The current Competition Act 2002 does not have any provision for the CCI to close the case if the director general's report recognizes a contravention of the Act. In this situation the affected party is left no power to appeal with the higher authority. This situation is against *audi alteram partem* (the right to be heard).

In merger there is high threshold limits so it should be least.

Delhi High Court asks CCI to expeditiously decide Verifare case[19]

CCI should make rule to eradicate these loopholes either send recommendation to the Central govt. apart from drawback Competition Commission of India takes all efforts to achieve goal of Competition Law of India.

Conclusion and Suggestions

Competition laws have been described as Magna Carta of free enterprise. Competition law protects competitive markets from promoting efficiency by proscribing certain type of conduct. Any conduct which prohibit or restricts firm from entering into markets, introducing new products are considered illegal by competition law. Competition is the engine of free enterprise market economy performs with respect to competition in the market. Competition law forces the market players to search for better permutation and combination for providing greater profits through greater efficiency. Apart from free market system, competition law also has social purpose. The social rational for competition law finds its introduction in the passage of justice hands in United States Vs Aluminum Co. of America where he preferred the preservation of small business over the preservation of free market.

Central Govt. established competition Commission under the Act for the economic development of the country, to prevent practices having adverse effect on competition to promote and sustain competition in markets, to protect the interest of the consumer and to ensure freedom of trade carried on by other participants in the markets in India .The absence of a fair competition, stagnation is caused and there is a lack of incentive, innovation and efficiency.

For the achievement of the goal there should be competition policies and two element of such policy is here:

- There should be enhances competition in local and national markets. By this way trade policy would be liberalized, relaxed foreign investment and ownership requirement and economic deregulation anti competitive agreement should be prevent and unnecessary government intervention should also control some anticompetitive agreement like Cartel, price fixing, bid rigging, single branding, limited distribution, exclusive distribution, exclusive customer allocation, market partitioning tying agreement, are taken place in market then these should per se illegal because by this type of anti competitive agreement both consumer and producer face injury for controlling black marketing and hording Competition Commission of India should take suo moto necessary action against the wrong doer.
- The competition commission of India Curb the negative aspect of competition. By the way of competition advocacy people can aware about their right as consumer and as participant in the market competition is one of the corner stones of market expansion both internal and external level. So in order to curb anti competitive marketing the CCI should take necessary step quickly. CCI should prohibit arrangements which are monopolistic trade conspiracies, combination or other contracts made to that effect. The CCI that will act as a watch-dog for the introduction and maintenance of competition policy.
- Through competition advocacy the awareness among markets players also helps in encouraging self compliance and reducing the need for direct action against erring enterprises. Thus competition advocacy can be useful tool to usher in regulatory reform and create a policy climate that favor deregulation in a number of sections and thereby increase consumer welfare.

The current Competition Act 2002 does not have any provision for the CCI to close the case if the Director General's report recognizes a contravention of the Act. In this situation the affected party is left no power to appeal with the higher authority. In merger there is high threshold limits. The Competition Commission of India is tremendously slow in giving healthy environment for small scale business and consumers. The need of hour is to give more suggestion and making rules to regulate the healthy competition among all scales of enterprises in India.

References

(Endnotes)

1. Competition Law in India written by Roy, Abir Kumar Jayant.
2. Corporate Law II written by Myneni, Dr. S.R.
3. Smith: Wealth Nation.
4. United States v Topaco Associates Inc 1972 405 US 596 (610).
5. Competition Law in India written by Roy Abir Kumar Jayant.
6. Supra.
7. Supra.
8. Corporate Law II written by Myneni, Dr. S.R.
9. Competition Law in India written by Roy Abir Kumar Jayant.
10. Corporate Law II written by Myneni, Dr. S.R.
11. Competition Law in India written by Roy Abir Kumar Jayant.
12. *Ibid*.
13. Competition Law in India written by Roy Abir Kumar Jayant.
14. Competition Act 2002, Sections 29 - 31.
15. Competition Act 2002, Sections 20(4).
16. Competition Act 2002, Sections 49(1).
17. Corporate Law II written by Myneni, Dr. S.R.
18. *Ibid*.
19. www.livemint.com (19.4.2016).

❑❑❑

CHAPTER

15

Merger, Acquisition, Joint Venture and their Regulation Under the Competition Laws in India

Seema Deshwal*

Abstract

The Companies and Business Enterprises target their business expansion to curb competition by acquiring other Companies and Firms with objectives of improving efficiency and economic scale. At times, an enterprise on the verge of closure, can avoid said fate by merging with a more efficient Company. However, sometimes in a given case, merger could be a way to eliminate the Competitor. In such cases, Merger Control/Review is the tool to regulate Combinations, by which the competition regulators prevent mergers and acquisitions that are likely to reduce competition in the market and lead to higher prices and lower quality of goods or services.

The Indian Competition Act, 2002, has provisions for regulating mergers and acquisitions (known as 'Combinations' and includes mergers and amalgamations, joint ventures (proxy mergers) acquisition and acquisition of control). It is the Competition Commission of India that assess whether a particular Combination is legally feasible, whether it will caste appreciable adverse effect on competition in the relevant product and geographical market. After assessment, the Commission may approve or reject a particular Combination with modifications. In line with the merger thresholds, notified by way of Combination Regulations 2011, the CCI looks into the aspect of effect on market competition efficacy and effectiveness of a particular Combination. However, the merger regime in India is liberal (due to high threshold levels).

In this paper emphasis is laid on major aspects: defining Combination, regulation of Combinations, procedure of investigation, available remedies & appeals.

Introduction

Competition is a situation in market, in which sellers independently strive for buyer's benefaction to achieve business objectives. In an open market economy, some enterprises may undermine the competition in market by resorting to anti-competitive practices for short-term gains. These practices can completely nullify the benefits of competition such as offering wide array of choices to consumers at reasonable prices, stimulating innovation and productivity, and optimum allocation of resources. Consumers are always at a risk of facing the consequences if unethical practices are adopted by such enterprises for personal gain.

* LL.M., Jagan Nath University, SH-22, Bahadurgarh- Jhajjar road, Haryana-124507 .

Enterprises have an inherent desire to acquire substantial market power, which leads to expansion of business, through merger and acquisitions. While most of the Combinations improve efficiency and are thus beneficial, some Combinations can have anti-competitive effects through unilateral or coordinated effects. Not all the Combinations call for scrutiny unless the resulting combination exceeds the threshold limits in terms of assets or turnover as specified by the Competition Commission of India (hereinafter referred to as the "CCI/Commission"). Generally, there can be little objection from competition authorities to such business initiatives. However, some mergers, particularly large ones, may have adverse implications on the consumer's interests.

The need for appropriate competition policy deepened on arrival of international business player in the Indian market and in line with the international trend, in order to cope up with the changing realities, the Competition Act, 2002 (hereinafter referred to as the "Act") was enacted, establishing the Competition Commission of India (a quasi judicial body) as the competition regulatory authority with significant objectives inter alia Regulation of Combinations. Later, the Combination Regulations, 2011 were passed in order to provide additional provisions to govern the Combinations in India (hereinafter referred to as the "Regulations").

Combinations Defined

Combinations mean merger,[1] amalgamations of companies[2] or acquisition of control,[3] shares,[4] voting rights or assets of one company[5] by another company or business group.[6] Combinations are usual business activities, which allow companies to consolidate their position in markets. Combinations are further classified into:

1. **Horizontal Combinations:** Horizontal combinations are those that are between rivals and are most likely to cause appreciable adverse effect on competition;
2. **Vertical Combinations:** Vertical combinations are those that are between enterprises that are at different stages of the production chain and are less likely to cause appreciable adverse effect on competition;
3. **Conglomerate Combinations:** Conglomerate combinations are those that are between enterprises not in the same line of business or in the same relevant market and are least likely to cause appreciable adverse effect on competition.

Merger: A merger is a combination of two or more businesses into one business, also referred to as amalgamation in India. The Income Tax Act, 1961, Section 2(1A) defines amalgamation as the merger of one or more companies with another or merger of two or more companies to form a new company, in such a way that all assets and liabilities of the amalgamating companies become assets and liabilities of the amalgamated company and shareholders not less than nine-tenth in value of shares in the amalgamating company or companies become shareholders of the amalgamated company.

Acquisition: An acquisition may be defined as an act of acquiring effective control by one company over assets or management of another company without any combination of companies. In an acquisition, two or more companies may remain independent, separate legal entities, but there may be a change in control of the companies.

Proxy Merger in the disguise of Joint Venture: In certain cases, two enterprises decide to merge, but instead of passing a resolution for Merger under the provisions of the Act, the two companies may rather establish a Joint Venture (JV) Company, which would carry out all the activities on their behalf. The two enterprises can resort to en entity which is in reality a merger but is portrayed as a JV by invoking the defense under Section 3(3) of the Act. This kind of merger under the disguise of JV is known as proxy mergers. The CCI need to look into all the aspects of such a proxy merger and decide whether such a resulting entity will actually enhance efficiencies and promote the consumer good. In absence of these factors, such JV should be tackled as mergers and defense under Section 3(3) should not be allowed.

Two forms of Merger in India

1. Merger through absorption–absorption is a combination of two or more companies into an existing company. All companies except one lose their identity in such a merger.
2. Merger through consolidation–consolidation is a combination of two or more companies into a new company. In this form of merger, all companies are legally dissolved and a new entity is created.

Regulation of Combinations

The core purpose of regulating combinations is to prevent the prospective anti-competitive effects of Combinations through appropriate remedies, including prohibition, if necessary. In a given case, merger could be a way to eliminate the Competitor, in such cases, Merger Review is a tool to regulate Combinations, by which the competition regulators prevent mergers and acquisitions that are likely to reduce competition in the relevant product and geographical market[7] and lead to higher prices, lower quality of goods or services, or less innovation.

Under the Indian Competition Law Regime, where the parties to the acquisition, merger or amalgamation satisfy the prescribed monetary threshold in relation to size of the acquired enterprise and the combined size of the acquiring and acquired enterprise, then such combinations are approved. The thresholds are unambiguously specified in the Competition Act, 2002 in terms of assets or turnover in India and abroad.

The scrutiny of a combination under the Act is usually expected to take place before it comes into effect with an idea of preventing a possible anti-competitive behavior which may adversely affect the consumers. Combinations likely to have an anti-competitive effect can be permitted after such effects are removed by modifications.

The review process for combination under the Act involves mandatory pre-merger notification to the CCI of combinations that exceed the prescribed threshold. In case of a merger (to be notified mandatorily) is not notified, the CCI has the option to inquire into it within one year of the taking into effect of the merger. In case such an inquiry finds appreciable adverse effect on competition, the Competition Commission of India may order de-merger which would involve social and economic costs. The CCI is also authorised to impose a fine which may extend to one percent of the total turnover or the assets of the Combination.

The Act provides for mandatory filing of proposed combinations based on thresholds, which were further raised by 50% through notification by the Government of India. The relevant provisions of the Act relating to Combinations have come into effect from 1st June, 2011[8] after an extensive consultation process with stakeholders.[9] The main enforcement provisions of regulation of combinations are given under the following sections: Section 5 (Combination), Section 6 (Regulation of combinations), Section 20 (Inquiry into Combination by Commission), Section 29 (Procedure for Investigation of Combinations), Section 30 (Procedure in Case of Notice under Sub-Section (2) of Section 6) and Section 31 (Orders of Commission on certain Combinations).

In order to minimise regulatory compliance cost on the industry, the Regulations lay down the categories of transactions that ordinarily are not likely to have an appreciable adverse effect on competition and, therefore, ordinarily not required to make any filing. The Regulations also provide certainty on the applicability of the law by stipulating that only combination proposals approved by their boards, or for which binding documents were executed, on or after 1st June, 2011, are required to make a filing to the CCI.

The Combination Regulations are reviewed and amended from time to time with a view to simplify the filing requirements and bring about greater certainty in the application of the Act and the Regulations. The CCI has the power to take *suo moto* action by calling for notice from parties to the mergers, who do not comply with the mandatory filing requirements.

Merger Control Thresholds

The criteria that will trigger a merger filing in India relate to either the *turnover* or *assets* of the acquirer and the target (the individual or parties); or the group to which the merged entity will belong after the acquisition (the Group).[10]

A. **Individual:** The current merger control thresholds for Individual are as follows-

   Domestic Presence: Either the combined assets of the enterprises are more than ₹ 1500 crores in India or the combined turnover of the enterprise is more than ₹ 4500 crores in India.

   International Presence: In case either or both of the enterprises have assets/turnover outside India also then: the combined assets of the enterprises are more than U.S. $ 750 million, including at least ₹ 750 crores in India, or combined turnover of the enterprises is more than U.S. $ 2250 million, including at least ₹ 2250 crores in India

B. **Group:** The current merger control thresholds for Group are as follows-

   Domestic Presence: The Group to which the enterprise (whose control, shares, assets or voting rights are being acquired) would belong after the acquisition or the group of which the enterprise remaining the merger or amalgamation would belong has either, assets of more than ₹ 6000 crores in India or turnover more than ₹ 18,000 crores in India.

   International Presence: Where the group has presence in India as well as outside India then the group has assets more than U.S. $ 3 billion including at least ₹ 750 crores in India or turnover more than U.S. $ 9 billion including at least ₹ 2250 crores in India.

Evaluation of Appreciable Adverse Effect on Competition ("AAEC")

Most Combinations does not give rise to a competition concern and CCI may not see any reason for interfering with them. Some instances of such combinations are:

1. Combinations within the same group of companies;
2. Acquisition of not more than 15% of voting rights, not leading to control;
3. Acquisition of shares where the acquirer already has 50% or more shareholding;
4. Combinations taking place entirely outside India which, have insignificant local nexus and effects on markets in India.[11]

The vertical mergers and conglomerate mergers also does not give rise to competition concern. The concern mostly arises in the case of horizontal mergers between competitors operating in the same market, i.e. dealing with same goods in the same area. Mergers are subject to review because of their potential adverse effect on competition in the relevant market. Such adverse effect could be the result of a unilateral conduct (exercise of dominance) or of coordinated conduct between two or more enterprises facilitated by the merger. Control of either type of conduct is prospective and aimed at preventing such conduct post-merger.

Effect of merger on competition is thus classified into two broad categories:

1. **Unilateral Effects:** When a merged enterprise gains sufficient market power to enable it to behave independently of market forces, such conduct results in unilateral effect on competition. This happens when the rivals in the market are not able to increase output in response to a unilateral increase in price by the merged enterprise. It can also occur when the products are differentiated and are not close substitutes of each other.
2. **Coordinated Effects:** The anti-competitive effect of a merger is termed coordinated when it facilitates collusive behaviour, either due to express agreement among competitors, as in cartels, or due to tacit coordination by competitors that have similar effects, irrespective of whether the coordination is legal

or not. Markets that are highly concentrated make such coordination easy. Product markets that are homogenous are prone to such coordination.

In order to evaluate appreciable adverse effect on competition, the Act empowers the Commission to evaluate the effect of Combinations on the basis of factors mentioned in sub-section (4) of section 20.

It is significant to mention the case of ***Haridas Exports* v. *All India Float Glass Manufacturers Association***[12], wherein it was held that the words "appreciable adverse effect on competition" embraces acts, contracts, agreements or combinations which operate to the prejudice of the public interests by unduly restricting competition or unduly obstructing due course of trade. Public interest is the first consideration. It does not necessarily mean interest of the industry. If the expression is not defined abstractly or in general terms in the Competition Act, every case has to be examined individually and facts are to be considered peculiar to the business condition.

Case Studies

A. **Future Retail Limited ("FRL") and Bharati Retail Limited ("BRL") Amalgamation** (Feb 2016)

In 2015-2016, the largest retailer of India i.e. Future Retail Limited ("FRL") acquired the business of Bharati Retail Limited ("BRL") to curb the emerging competition in the form of retail convenience stores named "Easyday". The CCI was notified of the matter and CCI observed that FRL transferred its retail business operations under the brand names "Big Bazaar", "fbb" and "Foodhall" to BRL and in turn BRL transferred its retail infrastructure into BRL vide a composite scheme of arrangement.

This exercise led to improved efficiency and minimizing the financial losses of BRL, which BRL was incurring from "Easyday" stores while operating independently. CCI further observed that it was not the case of malafide acquisition to eliminate the competition but to achieve the economic scale through same logistics channel, one backend infrastructure and production efficiency for all the stores combined under the two entities. The scheme of amalgamation was finally approved in February 2016.

B. **Reliance Industries Limited ("RIL") stake buying in Network 18** (May 2012)

A notice was filed by Independent Media Trust relating to a series of inter-connected and inter-dependent acquisitions intended to acquire control over Network18 Group companies by Reliance Industries Limited. The CCI observed that the subscription to optionally convertible debentures ("OCDs") amounted to acquisition of shares of the target enterprises. CCI held that subscription to OCD's enabling the acquirer to exercise decisive influence over the management and affairs of a company would amount to acquisition of control. The CCI assessed the effect of the combination on the businesses for supply of televisions channels, event management services and broadband internet services using 4G technologies and content accessible through such services. It was concluded that the combination was not likely to give rise to any appreciable adverse effect on competition and was cleared.

Investigation of Combinations

Certain Combinations that meet a specified financial threshold must be notified to the CCI and are subject to review by the CCI for possible adverse effect on competition. Such transactions cannot be completed until the CCI has explicitly approved the transaction. The transactions referred to here may be in the nature of acquisition of shares, voting rights, control over assets, mergers and de-mergers and amalgamations that meet the prescribed financial thresholds.

If CCI is of prima facie opinion that a combination has caused, or is likely to cause an appreciable adverse effect on competition within the relevant market, it is empowered to investigate into such combination under section 29 of the Competition Act, 2002 and Regulation 19 of the Combination Regulations 2011.

Merger Review or Control has two stages:

First Stage

Upon forming a prima facie opinion, the CCI, within 30 working days of receipt of the notification of a Combination filing (time frame extendable up to another 15 working days) shall either decide to approve the Combination within this period or scrutinize such Combination for further investigation (Regulation 19(1), Combination Regulations 2011).

Second Stage

The CCI either itself or through its Director General, conduct an investigation. Within 180 working days, CCI must decide whether to approve, modify or reject a Combination under investigation. In the event of CCI's failure to deliver such decision, the said Combination will be deemed to have approved (section 29(1A) and section 31(11) of the Competition Act, 2002 and Regulation 28(6) of the Combination Regulations 2011).

Procedure of Investigation

In case an investigation is initiated into a particular Combination filing, the CCI can ask the parties to the Combination to file additional information, accept modifications proposed by the parties, and may ask for information from any other enterprise in relation to a proposed Combination (Regulations 19(2) and (3) of the Combination Regulations, 2011):

Following provisions of the Competition Act, 2002 would be relevant to understand the Investigation procedure:

1. **Section 29(1)**: The CCI will issue a show cause notice to the parties concerned to respond within 30 days of the notice to explain why an investigation should not proceed;
2. **Section 29(2)**: Upon receipt of response from the parties to the show cause notice, the CCI may direct its Director General to submit a report within 7 working days and after receipt of the parties' response or receipt of the Director General's report, further direct the parties to publish details of the Combination to the public within 10 working days;
3. **Section 29(3):** The CCI can invite affected or likely to be affected parties or members of the public to file written objections to the Combination within 15 working days from the date of publication of details of the Combination;
4. **Section 29(4) & (5):** Within 15 working days of the expiry of the time for filing objections by affected parties or members of the public, the CCI can direct the parties to file additional information within 15 working days.
5. **Section 29(6):** Upon receipt of all the requested information, the CCI must close the case within 45 working days.

The Act aims to eliminate or minimize the harmful effects of anti-competitive effects of a Combination, therefore, during the investigation; the CCI must (i) identify the relevant product market as well as the relevant geographic market; (ii) scrutinize the Combination to determine its appreciable adverse effect on competition in the relevant market (under Section 20(4) of the Competition Act; (iii) decides to approve, reject or approve with modifications, a Combination under investigation. The maximum period to CCI for approving a Combination provided under the Act is 210 days; however, most Combination filings are approved in shorter duration of 180 under the Combinations Regulations. The Combination filings with serious competition concerns are referred to the investigation, which will routinely be cleared upon expiry of 210 days, in absence of no approval or rejection by the CCI.

Commission's Order under Section 31 of the Competition Act[13]

Section 31 of the Act empowers the CCI to issues certain orders with respect to the Combinations, such as approve the Combination [Section 31 (1)]; in case of AAEC, direct the Combination not to take effect [Section 31 (2)]; propose appropriate modification to the Combination [Section 31(3)] and Parties shall carry out such modification within specified period [Section 31(4)]; upon parties' failure to carry out modifications, deal with such combination in accordance with the provisions of the Act [Section 31(5)] etc.

The above is mere illustrious and not exhaustive. Section 31 of the Act contains various provisions with respect to investigation, procedure of combination filing, hearing, modification and dealing with the Combinations in different manner at different stages.

Remedies and Appeals

Remedies: Most of the anticipated anti-competitive effects of Combination can be remedied without holding back the Combination itself. The CCI has specific power to propose and accept modifications to combinations in order to avert an appreciable adverse effect on competition in the relevant market. Furthermore, the CCI may appoint certain agencies to oversee the implementation of such modifications or remedies where it considers that they require supervision. Combination analysis consists of assessment of the likely anti-competitive effect of the merger under question and how such effect could be minimised or eliminated. Prohibition is considered only when remedies are either not available or not feasible.

Remedies can be either structural or behavioral. Although behavioral remedy is preferable, its implementation and monitoring is difficult. On the other hand, structural remedy would require the combining enterprises to make structural adjustment which could be in the form of sale of assets, divestment of a division or a unit or creation or strengthening competitors through, for example, licensing of an Intellectual Property Right.

Appeals: The Central Government has notified the Competition Appellate Tribunal (COMPAT) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under respective sections of the Act, such as orders relating to notification of Combination, inquiry by the Commission and penalties.[14] An appeal has to be filed within 60 days of receipt of the order, direction or decision of the Commission.

Concluding Remarks

Competition laws in India are aimed to imbibe the social and economic philosophy enshrined in the Directive Principles of State Policy contained in the Constitution. The mandate to draw up a policy that prevents the concentration of wealth and means of production to the common detriment can not only be located in the Constitution but also in the Act which aims to prevent anti-competitive practices. The pillars of Competition Law in India, primarily are- the anti-competitive agreements; abuse of dominance; regulation of combinations and competition advocacy. Although Mergers and Acquisitions are a normal feature of a vibrant economy but the Act regulates the various forms of business combinations through Competition Commission of India which has anti-competitive behavior and the one of the significant objective of the Act is to prohibit the Combinations resulting in an appreciable adverse effect on competition within the relevant market in India.

Bibliography

Statutes Referred-

1. The Constitution of India, 1956.
2. The Competition Act, 2002.
3. The Competition Amendment Act, 2009.
4. The Combination Regulations, 2011.

5. The Combination Regulations Amendment, 2015.
6. The Companies Act, 1956.
7. The Companies Act, 2013.

Books Referred

1. Avtar Singh, *The Competition Law*, Eastern Book Company, First Edition 2012, Chapter 4: Duties, Powers and Functions of Commission.
2. Siddharth Bawa, *Law of Competition in India,* Allahabad Law Agency, First Edition 2005, Chapter III: Prohibition of Certain Agreements, Abuse of Dominant Position and Regulation of Combinations.
3. Krishan Keshav & Divya Verma, *Competition and Investment Laws in India,* Singhal Law Publications, 2016 Edition, Chapter 2: Prohibition of Agreements, Abuse of Dominant Position and Regulation of Combinations.

References

(Endnotes)

1. See: Siddharth Bawa, *Law of Competition in India,* Allahabad Law Agency, First Edition 2005, p.28.
2. Amalgamation of Companies means the combination of one or more companies into a new entity. An amalgamation is distinct from a merger because neither of the combining companies survives as a legal entity. Rather, a completely new entity is formed to house the combined assets and liabilities of both companies.
3. Section 2(a) of the Competition Act, 2002.
4. Supra.
5. Section 2(v) of the Competition Act, 2002.
6. Group has been defined in clause (b) of the explanation to Section 5.
7. Section 2(t) of the Competition Act, 2002 defines "relevant product market" as a market comprising 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. Section 2(s) defines "relevant geographic market" as a market comprising 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.
8. See: The Central Government notification S.O. 479(E) dated 4th March, 2011.
9. Combination Regulation, 2011 (No. 3 of 2011).
10. See: Krishan Keshav & Divya Verma, *Competition and Investment Laws in India*, Singhal Law Publications, p.82-83.
11. See: Piyush Gupta, *Competition Laws in India: An Overview*, Kochhar & Co, p.7 (http://www.kochhar.com/pdf/Rationale%20For%20Competition%20Laws.pdf, visited on: 22-04-16).
12. (2002) 111 Comp. Cas. 617 (SC).
13. See: Avtar Singh, *The Competition Law*, Eastern Book Company, sFirst Edition 2012, p.209.
14. Section 53A of the Competition Act, 2002- Establishment of Appellate Tribunal.

❑❑❑

CHAPTER

16

Deep Discounts by Online Retail Industry in India: A Study on Predatory Pricing

Isha Saluja*

Abstract

This article makes an attempt to clarify the concept of predatory pricing under the Competition Act, 2002 and whether the deep discounts which are offered by E-commerce industry are anti-competitive or not. After reviewing the fundamental concepts and provisions relating to predatory pricing, the article argues that the deep discounts offered by online retailers are not predatory pricing. It concludes by arguing that main aim of competition law is to save competition and not the competitors.

Introduction

Major investment and increase in the number of internet users has grown the e-commerce sector in India at a major level within a short period of time. Indian e-commerce sales are expected to reach US$ 55 billion by 2018 and the online retail market is expected to grow from US$ 6 billion to US$ 70 billion during FY15-FY20.[1] The Brick and Mortar retailers have been worst hit by increase of online retail market. Low prices and deep discountsby online retailers attract a lot of customers to shop online thereby impacting the business of brick and mortar retailers. Brick and mortar retailers have high cost of operation which disables them to provide huge discounts. Online giants including Flipkart, Snapdeal and Amazon have time and again been accused by brick and mortar counterparts of predatory pricing. Brick and Mortar retailers are distressed about the fact that if the practice of offering discounts by the online retailers continues, it may result into a monopoly. Online retailers will dominate the retail market and the only option with the brick and mortar stores will be to exit the market. Therefore, this paper analyses that whether selling below cost and offering deep discounts by online retailers is predatory pricing under the Competition Act, 2002 ("the Act").

Concept of Predatory Pricing

Predatory pricing is one of the types of abuse of dominant position by the dominant players in the market. Predatory pricing means the sale of goods or provision of services, at a price which is below the cost of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.[2] Dominant players in the marketuse predatory pricing to create barriers for the new entrants in the market or to drive them out of the market. In *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., DotEx International Ltd. and Omnesys Technologies Pvt. Ltd.*[3] the CCI said that predatory pricing is the conduct where a dominant undertaking incurs losses or foregoes profits in the short term,

* Assistant Professor (Law), Jagan Nath University, Bahadurgarh, Haryana

with the aim of foreclosing its competitors. Therefore, predatory pricing should be with a view to reduce competition or eliminate the competitors. The main challenge in penalising Predatory Pricing is that it is hard to distinguish between fair, aggressive pricing (which is an essential ingredient of competitive markets) and unfair, predatory pricing.[4] Competition Commission of India ("CCI") has adopted Average Variable Cost ("AVC")[5] as the appropriate measure of the cost to address this challenge. It is presumed in most cases that where the enterprise sets in sale price below its AVC, it has engaged in a predatory pricing which is an anti-competitive practice.

Issue of predatory pricing can only arise when seller is in a dominant position in the relevant market. Dominant position means the position of strength enjoyed by a firm which enables it to operate independently of the competitive forces prevailing in the relevant market or which affects the consumers, competitors and the relevant market in its favour.[6] Relevant market can be identified both on the basis of product and geography. A product market is identified on the ease with which consumers can interchange or substitute a product. A geographic market is identified as an area where the supply or demands of goods are distinctly homogenous.

Deep Discounts not A Case of Predatory Pricing

It has been upheld by the CCI that online retailers are not involved in Predatory Pricing mainly because of the reason that there are many players in this emerging online retail market and none of them occupy dominant position in the relevant market. Online retailers have also claimed that in spite of growing demand of online retailing, it accounts for less than 1% of the total retail in India. They further claim that online retail is a sub-set of the organized retail market and since organized retail itself constitutes a miniscule portion, about 8% approximately of the total retail market in India, the share of online retail is extremely less.

CCI noted in the case of *Ashish Ahuja vs Snapdeal.com and SanDisk Corporation*[7] that both offline and online markets differ in terms of discounts and shopping experience and buyers weigh the options available in both markets and decides accordingly. If the price in the online market increase significantly, then the consumer is likely to shift towards the offline market and vice versa. Therefore, the CCI was of the view that these two markets are different channels of distribution of the same product and are not two different relevant markets. CCI also observed that in the e-commerce market in India competitors like Snapdeal, FlipKart, Amazon, eBay, ShopClues, Yebhi, jungle.com, rediff.com, indiatimes.com etc. are operating and any one of them prima facie cannot be termed as a dominant player.

In *MohitManglani vs. Flipkart India Pvt. Ltd. and others.*[8] CCI held that the relevant market needs to be determined where e-commerce firms are operating and held that irrespective of whether we consider e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the e-commerce firm seems to be individually dominant and therefore the CCI did not go into the question of abuse of dominance by the e-commerce firms.

There are other arguments also which operate in favour of online retailers not being involved in the predatory pricing. The discounts and deals which are offered by online retailers in effect benefit the consumers. One important criterion that needs to be established for predatory pricing is the enterprise deliberately incurring short term losses to eliminate competition in the market and be able to charge excessive price in the future. However, discounts by online retailers are not used to eliminate competition and prevent other players to enter the market. Therefore, initial short term losses faced by the online retail companies may not be classified into losses incurred for engaging in predatory pricing in the longer term.

For establishing predatory pricing against online retailers, the sustainability of the pricing strategies and the funding of the discounts in the long term also needs to be examined. The pricing strategy that these online retail companies have adopted is for a limited period, ranging from a day to three days. Even the brick and mortar retailers put up clearance sales and offer deep discounts on limited occasions which cannot be termed as predatory pricing. The initial losses of the online retailers could be attributed to these companies investment in building brand name, customer loyalty, and relationships with the sellers for their marketplace model.

Conclusion

Brick and mortar retailers are at strife because of the successful entry of online retailers. However, it has been widely agreed that the purpose of competition law is to protect competition in order to maximise consumer welfare and not the protection of competitors. Protection of competition is important as consumers benefit by getting the best product at the lowest price through competition. Competition might produce injury as an enterprising firm may negatively affect rivals profits or drive them out of business.[9] However, if a company has competed aggressively on the merits and caused another firm to go out of business, it cannot itself be a violation of antitrust laws as this may simply be the competitive process playing out precisely as it should.[10] Therefore, brick and mortar stores should try to compete with online retailers and try to sustain competition in the market. One of the options available with brick-and-mortar retailers is to identify e-commerce store and use them as the platform to sell their products. Any heavy discount sale of a short duration is merely a demonstration of fierce competition in the retail market and not a case for predatory pricing. Customers are happy with online retailers due to reduction in price, home delivery of product and ease of shopping.

References

(Endnotes)

1. Available at http://www.ibef.org/industry/indian-retail-industry-analysis-presentation.
2. Section 4 of the Competition Act, 2002.
3. MCX Stock Exchange Ltd v. National Stock Exchange of India Ltd., DotEx International Ltd. and Omnesys Technologies Pvt. Ltd, 2011 CompLR 129 (CCI).
4. Monti, G., EC Competition Law, (Cambridge University Press, 2007) at p. 178.
5. Regulation 3 of the Competition Commission of India (Determination of Cost of Production) Regulations, 2009.
6. *Ibid*.
7. Case No. 17 of 2014.
8. Case No. 80 of 2014.
9. Available at: http://www.justice.gov/atr/public/reports/236681_chapter1.htm (last seen on May 11, 2014).
10. Available at: http://www.atg.wa.gov/antitrustguide.aspx#.U1mJpL23TIU (last seen on May 11, 2014).

❑❑❑

CHAPTER

17

A Confounding Wringer: Abuse of Dominant Position in Competition Law Perdures to Perplex All

Joyeeta Banerjee* **and Rajdeep Banerjee****

Abstract

The competition law is an emerging field of law. The Act has been enacted only in the year 2002. The preamble of the predecessor Act i.e. The Monopolies and Restrictive Practices Act, 1969 (MRTP Act, 1969) advocated a socialistic philosophy by declaring that the Act was intended to ensure that the operation of the economic system did not result in the concentration of economic power to the common detriment. The Act was intended to control Monopolies and to provide for the prohibition of Monopolistic and Restrictive Trade Practices. But MRTP Act, 1969 was found to be very ineffective due to a variety of reasons. A High Level Committee on Competition Policy and Law was constituted to examine its various aspects and make suggestions keeping in view the competition policy of India which made recommendations and submitted its report on 22nd of May, 2002. After completion of the consultation process, the Competition Act, 2002 was enacted. As per the statement of objects and reasons, the enactment is India's response to the opening up of its economy, removing controls and resorting to liberalization. The natural corollary was that the Indian market should be geared to face competition from within the country and outside. The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India. Under the scheme of the Act, the Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed Regulations called The Competition Commission of India (General) Regulations, 2009. Primarily, there are three main elements which are intended to be controlled by implementation of the provisions of the Act, which have been specifically dealt with under Sections 3, 4 and 6 read with Sections 19 and 26 to 29 of the Act. They are anti-competitive agreements, abuse of dominant position and regulation of combinations which are likely to have an appreciable adverse effect on competition. The Act defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India. It is the ability of the enterprise to

* BE (Mechanical), LL.B, PGDADR, PGDML, PGDPL,PGDHRL, PGDCL.
** B.Sc. (Maths Hons), LL.B, PGDCL, PGDPL, PGDML,PGDADR, PGDHRL.

behave/act independently of the market forces that determines its dominant position. Dominance is not considered bad per se but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/ and an exploitative manner. Various definitions and factors have been included in the Act for determining whether in a particular case an enterprise or group abuses its dominant position.

Keywords: *Competition Law, Abuse of Dominant Position, Competition Commission of India, COMPAT, DLF case, BCCI case, Ajay Devgn case.*

Introduction

The decision of the Government of India to liberalize its economy with the intention of removing controls persuaded the Indian Parliament to enact laws providing for checks and balances in the free economy. The laws were required to be enacted, primarily, for the objective of taking measures to avoid anti-competitive agreements and abuse of dominance as well as to regulate mergers and takeovers which result in distortion of the market. The earlier MRTP Act, 1969 was not only found to be inadequate but also obsolete in certain respects, particularly, in the light of international economic developments relating to competition law. Most countries in the world have enacted competition laws to protect their free market economies- an economic system in which the allocation of resources is determined solely by supply and demand. The rationale of free market economy is that the competitive offers of different suppliers allow the buyers to make the best purchase. The motivation of each participant in a free market economy is to maximize self-interest but the result is favourable to society.[1]

The Act seeks to cover three Anti-Trust issues namely: (a) Anti-Competitive Agreements by an Enterprise or association of Enterprises or person or association of persons; (2) Abuse of Dominant Position; and (3) Combinations. While Anti-Competitive Agreements are dealt with by Section 3, Abuse of Dominant Position is dealt with by Section 4 and Combination by way of acquisition or merger or amalgamation is dealt with by Sections 5 and 6. The Act is divided into 9 Chapters, Chapter-I dealing with preliminaries, Chapter-II dealing with Anti-Competitive Agreements, abuse of dominant position and regulation of combinations, Chapter-III dealing with the establishment of the Competition Commission, Chapter-IV dealing with the duties, powers and functions of the Commission, Chapter-V dealing with the duties of Director General, Chapter-VI dealing with penalties, Chapter-VII dealing with Competition Advocacy, Chapter-VIII dealing with finance, accounts and audit, Chapter VIII-A dealing with the establishment of the Appellate Tribunal, its procedure and powers and the appeal to the Supreme Court and Chapter-IX dealing with miscellaneous.[2] The validity of the Act and the Rules came to be challenged before the Supreme Court in *Brahm Dutt v. Union of India*.[3] In the course of hearing, the Central Government informed the Supreme Court that they intended to make amendments to the Act. Thereafter, the Act was amended substantially by the Competition (Amendment) Act, 2007. Under the Amended Act, the Competition Commission was to function only as a Market Regulator and an Expert Body performing Adversary and Regulatory functions. In the year 2009, there was yet another amendment. One of the most difficult but vital issue is the prohibition of abuse of dominant position. In India, there have been few very important rulings on abuse of dominant position recently which has thrown much light on the finer details and interpretation of the relevant clauses under the Act.

Belaire Owner's Association V. DLF

DLF launched a Group Housing Complex (The Belaire) in Gurgaon, planning to construct 5 multistoried residential buildings. In its initial plan, DLF designed five multi-storied buildings which would consist of only 19 floors with a total of 368 apartments to be constructed within a period of 36 months. In May 2010, the informant filed the case under Section 19(1) (a) of the Competition Act, 2002 and alleged that DLF, by abusing its dominant position, imposed highly arbitrary, unfair and unreasonable conditions on the informant through its agreements. It was alleged that the Apartment Buyer's Agreements were signed months after the

booking of the apartment and by that time the allottees had already paid substantial amount as they hardly had any option but to adhere to the dictates of Appellant. The said Apartment Buyer's Agreement (ABA) was devised by the Appellant for booking the apartments and a person desirous of booking the apartment was required to accept it in 'toto' by giving assent to the ABA on signing the dotted lines, even when clauses of the ABA were onerous and one-sided. It was further contended that in the present form the ABA was heavily in favour of the Appellant in as much as it gave unbridled decision making power in favour of the Appellant. All the above-said clauses were described as ex-facie unfair and discriminatory attracting the provisions of section 4(2)(a) of the Competition Act, 2002. It was urged that this amounted to abuse of dominant position by the Appellant.

The CCI ordered investigation by the DG, who proceeded and came out with a report. The DG came to the conclusion that the relevant product would be services' provided by developers for providing high-end apartments to the customers. The DG stated the apartments in the said building as 'high-end apartments', as the DG found special category of the apartments, costing more than ₹ 2-3 crores. As far as 'relevant geographic market' is concerned, the DG found the territory of Gurgaon of National Capital Region of Delhi, as the relevant geographic market. Thus the DG came to the conclusion that the Appellant was a dominant player in the relevant market. On practically all the factors in section 19 of the Act, the DG found the Appellant to be a dominant player. The DG also considered the size and resources of the Appellant, size and importance of the competitors, as also economic power of the enterprise including commercial advantages over competitors etc. The DG also commented on vertical integration of the enterprise or sale or service network and dependence of consumers on the enterprise. The DG also referred and commented on entry barriers, such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers. The facts like countervailing buying power, social obligations and social costs were also considered by the DG.[4]

The Commission after going through the entire Apartment Buyers Agreement considered the impact of conditions imposed[5] and found DLF Ltd. in contravention of section 4 (2) (a)(i) of the Act. It further imposed a penalty of ₹ 630 crores. In exercise of powers under section 27 (a) of the Act, the Commission directed DLF Ltd. and its group companies offering services of building/developing:

(i) to cease and desist from formulating and imposing such unfair conditions in its agreements with buyers in Gurgaon.

(ii) to suitably modify unfair conditions imposed on its buyers as referred to above, within 3 months of the date of receipt of this order.[6]

Ajay Devgn Films V. Yash Raj Films Private Ltd.

In Ajay Devgn Films v. Yash Raj Films Private Limited,[7] the informant's grievance was that the opposite party released its mega starrer film Ek Tha Tiger (ETT) on 15th August, 2012. At that time the opposite parties were contemplating to release another untitled film later named as Jab Tak Hai Jahan (JTHJ) at the time of Diwali. The opposite parties before the release of ETT had put a condition on single screen theatres that if they wanted to exhibit ETT, they would have to simultaneously agree to exhibit the other film JTHJ at the time of Diwali. Any single screen theatre who did not agree to booking of his theatre for both the films would not get the right to exhibit the single film. While some theatres entered into agreement with the opposite parties for exhibition of both the films, namely ETT and JTHJ, some did not agree to this and did not enter into the agreement. Since ETT was a big ticket film bound to be a block buster and its exhibition was profitable for the single screen theatres, majority of single screen theatres entered into agreement for exhibition of both the films because of the big name and dominance of opposite party. Since there was a threat that the opposite parties would not allow exhibition of even ETT if the contract for exhibition of other film was not entered simultaneously, it amounted to abuse of dominance. The single screen theatres under

compulsion had to enter into this contract. The informant alleged that this was violation of section 3 as well as section 4 of the Competition Act. The informant submitted that ETT was released at the time of EID and JTHJ is to be released at the time of Diwali. This grievance of the informant arose because the informant feared that he would not get enough theatres for his own film Son of Sardar because of the agreement of single screen theatres with the opposite parties at the time of releasing ETT. The informant contended that the agreement between the opposite parties and the film exhibitors for exhibition of the two films together amounted to contravention of various sections including 4(2)(a). The informant alleged that the opposite parties were dominant in the relevant market of 'film industry in India'.

The Commission held that the informant failed to substantiate how 'film industry in India' was the relevant market and how the opposite parties were dominant in this relevant market. While inquiring whether an enterprise enjoys a dominant position or not under section 4, the Commission is required to consider all or any of the following factors stated under section 19(4).[8] It observed that the informant did not place on record data either of market share or of economic strength to show how the opposite parties were dominant in the proposed relevant market on the basis of above stated guiding factors. No enterprise can be considered dominant on the basis of big name. Dominance has to be determined as per law on the basis of market share, economic strength and other relevant factors stated under section 19(4) of the Act. A large number of movies are released in India every year. As per the information available in public domain, in Bollywood itself, 107 and 95 films were released in 2011 and 2012 (till now) respectively. Out of this, the opposite parties produced only 2-4 films each year. This cannot be said to amount to dominance even in the Bollywood industry, leave aside film industry in India. Therefore, the claim of the informant that opposite parties were dominant players in the market 'film industry in India' could not be accepted. There was prima facie no contravention of section 4 of the Act.[9]

Board of Control for Cricket in India V. CCI

A cricket fan filed a information under section 19(1) of the Act alleging violation of section 4 of the Act by the appellant (BCCI) and Indian Premier League (IPL). The DG in its report held that the whole set up of the IPL tournament has left no room for anybody to enter further and accordingly the market has been restricted by putting barrier on entry and foreclosure of competition for any new franchisee for the said IPL tournament due to the abuse of dominance by the BCCI. Further, abusing its dominant position, the BCCI entered into the agreements with the franchisee on its unilateral terms and conditions which is unfair and discriminatory and hence restricted the market for others having adverse appreciable effect on competition within the meaning of provisions of section 4(2) of the Act. By abusing its dominant position the BCCI has not only provided benefits to them but also foreclosed the market for others. It further held that subsequently, being in its dominant position, the contracts were terminated and again entered with the same parties or other related parties. Consequently, after termination of the initial agreements, no further process of tendering was resorted. It has denied any other eligible party of their right to bid and obtain the tender and hence having adverse effect on competition as market was not made open for bidding. The period of contract was for a period of 10 years which clearly reflects that no other party could bid for further 10 years and the access to market is restricted. Further, the terms of the agreement are such that the parties were made to sign on the dotted lines, as the BCCI is in the position of monopoly to provide such rights, having the position of strength. The media rights were terminated abruptly by the BCCI without any plausible cause after one year and re-entered again. This act of BCCI-IPL is clearly abusive of its dominant position. Therefore, looking to the above features and considering their dominant position in the market, actions of the BCCI-IPL clearly makes them liable under the provisions of section 4(2) of the Act, having appreciable adverse effect on competition. The process of granting theatrical rights and FCT rights are also not transparent and fair. Accordingly, the BCCI has abused its dominant position by imposing unfair or discriminatory conditions and not having allowed to open the market for other eligible vendors. Such actions of the BCCI have appreciable adverse effect on competition

within the meaning of provisions of section 4(2) of the Act. The DG thus concluded that the conduct of BCCI in the matter of awarding various franchisee rights, media rights and other rights are clearly discriminatory and unfair which has caused appreciable adverse effect on competition in violation of section 4(2)(a)(i), 4(2)(b)(i) and 4(2)(c) of the Act.

The Commission, after considering the DG's report, held the information allegedly available in public domain about advertisement revenue, TAM ratings, applied SNNIP test and held that the relevant market is the Organization of Private Professional Cricket Leagues/Events in India. The majority then examined the issue relating to dominance of the appellant in the market for Organization of Private Professional League Cricket events and held that owing to regulatory role, monopoly status, control over infrastructure, control over players, ability to control entry of other leagues, historical evidences, the appellant is in a dominant position in the relevant. They finally referred to clause 9.1 (c)(i) of the Media Rights and held that the appellant had abused its dominant position in contravention of Section 4(2)(c) of the Act.

The Commission thus found BCCI guilty of contravention of Section 4(2)(c) of the Act. In exercise of powers under section 27 of the Act, the Commission directed BCCI:

(i) To cease and desist from any practice in future denying market access to potential competitors, including inclusion of similar clauses in any agreement in future.

(ii) To cease and desist from using its regulatory powers in any way in the process of considering and deciding on any matters relating to its commercial activities.

To ensure this, BCCI will set up an effective internal control system to its own satisfaction, in good faith and after due diligence.

(iii) To delete the violative clause 9.1(c)(i) in the Media Rights Agreement.

(iv) The abuse by BCCI was of a grave nature and the quantum of penalty that needs to be levied should be commensurate with the gravity of the violation. BCCI's economic power is enormous as a regulator that enables it to pick winners. BCCI has gained tremendously from IPL format of the cricket in financial terms. Virtually, there is no other competitor in the market nor was anyone allowed to emerge due to BCCI's strategy of monopolizing the entire market. The policy of BCCI to keep out other competitors and to use their position as a defacto regulatory body has prevented many players who could have opted for the competitive league. The dependence of competitors on BCCI for sanctioning of the events and dependence of players and consumers for the same reason has been total. BCCI knowing this had foreclosed the competition by openly declaring that it was not going to sanction any other event. BCCI undermined the moral responsibility of a custodian and defacto regulator. A penalty of 6% of the average annual revenue of BCCI for past three years was thus imposed under Section 27(b) of the Act.

The Appellate Tribunal held that the finding recorded by the Commission on the issue of abuse of dominance was legally unsustainable and was liable to be set-aside because the information downloaded from the net and similar other material did not have any evidentiary value and, in any case, the same could not have been relied upon by the Commission without giving an effective opportunity to the appellant to controvert the same. As there was breach of principles of natural justice the impugned order was set aside and the matter was remitted to the Commission for fresh disposal.[10]

Conclusion

As has been aptly observed by the Supreme Court in *Competition Commission of India v. Steel Authority of India Ltd. and Anr.,*[11] "the overall intention of competition law policy has not changed markedly over the past century. Its intent is to limit the role of market power that might result from substantial concentration in a particular industry. The major concern with monopoly and similar kinds of concentration is not that being big is necessarily undesirable. However, because of the control exerted by a monopoly over price, there are

economic efficiency losses to society and product quality and diversity may also be affected. Thus, there is a need to protect competition. The primary purpose of competition law is to remedy some of those situations where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other."

The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law. The Act defines dominant position (dominance) in terms of a position of strength enjoyed by an enterprise, in the relevant market in India. It is the ability of the enterprise to behave/act independently of the market forces that determines its dominant position. Dominance is not considered bad per se but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/ and an exploitative manner. The question whether the dominant position has been abused continues to flummox courts. As more cases come before the Commission, the exact contours of this emerging law will be crystallised by the judicial opinions.

References

(Endnotes)

1. *Competition Commission of India v. Steel Authority of India Ltd. and Anr.*, 2010 AIR SCW 6238.
2. *Tamil Nadu Film Exhibitors Association v. Competition Commission of India*, AIR 2015 Mad 106.
3. (2005) 2 SCC 431, AIR 2005 SC 730.
4. The DG's ultimate conclusion was as follows: "it is due to its sheer size and resources, market share and economic advantage over its competitors that DLF is not sufficiently constrained by other players operating in the market and has got significant position of strength by virtue of which it can operate independently of competitive forces restraints and can also influence consumers in its favour in the relevant market in terms of explanation to section 4 of the Act." The DG found that the Appellant had abused its dominant position. For that the DG relied on the following facts: (a) Commencement of project without sanction/ approval of the projects. (b) Increase in number of floors mid-way. (c) On constructing of floor area ratio and density per acre. (d) The fact that time schedule for completion and possession was not kept by the Appellant. (e) The action on the part of the Appellant to forfeit the amounts paid by the consumers. The DG also found fault with the language of the ABA and found it to be totally one sided. For that the DG particularly referred to Representation-F, which gave the right to the Appellant to reduce the land unilaterally pursuant to approval/ sanction of the layout plan. The DG also referred to various other factors in the ABA including Clauses 23 and 24 of the ABA thereof. The DG also commented on the delay in completing the project and the effect thereof. The DG also referred to clauses whereby the allottees were subjected to payment of interest @ 15% per annum or as the case may be, 18% per annum, if the period for their payment was defaulted. Thus, on various other factors, the DG found the Appellant clearly guilty of abusing its dominant position.
5. (i) Unilateral changes in agreement and supersession of terms by DLF without any right to the allottees.
   (ii) DLF's right to change the layout plan without consent of allottees.
   (iii) Discretion of DLF to change inter se areas for different uses like residential, commercial etc. without even informing allottees.
   (iv) Preferential location charges paid up-front, but when the allottee does not get the location, he only gets the refund/adjustment of amount at the time of last instalment, that too without any interest.
   (v) DLF enjoys unilateral right to increase / decrease super area at its sole discretion without consulting allottees who nevertheless are bound to pay additional amount or accept reduction in area.
   (vi) Proportion of land on which apartment is situated on which allottees would have ownership rights shall be decided by DLF at its sole discretion (evidently with no commitment to follow the established principles in this regard).

(vii) DLF continues to enjoy full rights on the community buildings / sites / recreational and sporting activities including maintenance, with the allottees having no rights in this regard.

(ix) Allottees liable to pay external development charges, without there being disclosed in advance and even if these are enhanced.

(x) Total discretion of DLF regarding arrangement for power supply and rates levied for the same.

(xi) Arbitrary forfeiture of amounts paid by the allottees in many situations.

(xii) Allottees have no exit option except when DLF fails to deliver possession within agreed time, but even in that event he gets his money refunded without interest only after sale of said apartment by DLF to someone else.

(xiii) DLF's exit clause gives them full discretion, including abandoning the project, without any penalty.

(xiv) DLF has sole authority to make additions / alterations in the buildings, with all the benefits flowing to DLF, with the allottees having no say in this regard.

(xv) Third party rights created without allottees consent, to the detriment of allottees' interests.

(xvi) Punitive penalty for default by allottees, insignificant penalty for DLF's default.

6. Belaire Owner's Association v. DLF & Others., Case No. 19 of 2010, Date of Order: 12.8.2011, CCI. COMPAT upheld the order in M/s. DLF Limited v. Competition Commission of India & Others., Appeal No. 20 OF 2011, Date of Order : 19.05.2014.
7. Case No. 66 of 2012, Date of Order: 05.11.2012, CCI.
8. The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:- (a) market share of the enterprise; (b) size and resources of the enterprise; (c) size and importance of the competitors; (d) economic power of the enterprise including commercial advantages over competitors; (e) vertical integration of the enterprises or sale or service network of such enterprises; (f) dependence of consumers on the enterprise; (g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; (h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; (i) countervailing buying power; (j) market structure and size of market; (k) social obligations and social costs; (I) relative advantage,by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;(m) any other factor which the Commission may consider relevant for the inquiry.
9. The order was sustained in appeal too. Appeal No. 130 of 2012 with IA No. 264 of 2012, Date of Order: 13.11.2013 (COMPAT).
10. Appeal No. 17 of 2013 with I.A. No. 26 of 2013, date of order 23.02.2015.
11. 2010 AIR SCW 6238.

❑❑❑

CHAPTER

18

Cartels and the Role, Efficacy of the Competition Commission of India: A Study of Legislative Trends

Jiten Mishra*

Abstract

In pursuance of the legal provisions of the Competitions Act,2002(The Act) and vested with the mandate to ensure a fair competition, the Competition Commission of India(The Commission), established under section 7 of the Act, has been undertaking several measures and competition advocacy programs to detect, investigate and eliminate cartels. As per the provisions of the Act, cartels are illegal and prohibited. The Act categorizes cartel as a civil, pernicious offence but not a criminal one. The Commission has the twin functions of enforcement and advocacy which are complementary to each other and must be pursued simultaneously. The Competition law in India is at an early stage of development, yet its effect is somewhat visible on the economy. Over the last few years, the Commission has levied exorbitant amounts as cartel fines, within the ambit of the law, on errant companies in the sectors of real estate, pharmaceuticals, insurance, cement and airlines. Cartel investigations are ongoing in several other sectors as well. However, there are several issues to be addressed which can truly enhance the efficacy of the Commission in combating the cartels.

As regards cartelization, there is no guidance in the Act or in its regulations as to the kind of evidence acceptable by the Commission from the whistle blowers. The Commission therefore must define well the standard of circumstantial evidence and provide formal guidance on the matter to avoid inconsistencies in its rulings. Confidentiality of information and whistle blower's protection is absolutely necessary to motivate them for the disclosure. The procedures, guidelines, and the processes of the leniency program have to be transparent and fair to instill confidence of the whistle blowers. The Commission must formulate the standard procedure for investigation, collection and examination of evidences, depositions etc. It must adopt unambiguous ex ante and ex post anti-cartel policies to minimize the probability of cartel formation. As competition law is nascent in India, the Commission should learn from the experience of its counterparts in the matured jurisdictions and should embrace the global best practices to improve its cartel detection and busting efforts.

* Non-Practicing Lawyer & Ph.D. Research Scholar, Jagan Nath University, Haryana.

Introduction

After liberalization of Indian economy, the Monopolistic and Restrictive Trade Practices Act, 1969 (MRTP Act) became obsolete in certain respects particularly related to competition laws. One of the main causes of this was that reforms necessitated a shift of focus from controlling the monopolies to encouraging competition. The Government of India constituted a High Level Committee on Competition Policy and Law which submitted its report on 22 May 2000. The Central Government consulted the trade and industries associations, general public, all other stakeholders and keeping their suggestions in view, decided to enact the law on competition. The Government introduced Competition Bill, 2001 which was duly passed by both houses of parliament and got the Presidential assent on 13 January 2003. It repealed MRTP Act 1969 came on the statute book as the Competition Act, 2002 (The Act).

The Indian Competition Act is modeled partly on European Union law and partly on other mature competition regimes. It has incorporated elements of international best practices. Despite fierce opposition from business lobbies, after many years of delay and debate, India has been able to enact a modern competition law.

The Act provided for the establishment of this quasi-judicial body, called the Competition Commission of India to create awareness, impart training on competition issues, to prevent practices having detrimental effect on competition, to promote and sustain fair competition in the market, to protect the interest of consumers, to ensure freedom of trade, and to administer all related and incidental matters. Although the Act was passed in 2002, its provisions were brought into force in 2009 due to litigation surrounding the establishment of Commission. Finally, the Commission became fully operational from 1 September 2009.

The vision of the Commission is *"to promote and sustain an enabling competition culture through engagement and enforcement that would inspire businesses to be fair, competitive and innovative; enhance consumer welfare; and support economic growth."*

The mission of the Commission is to establish robust competitive environment by engaging with all stakeholders such as consumers, government, industries etc. by adhering to professionalism, transparency, resolve and wisdom in enforcement.

In pursuance of the legal provisions and vested with the mandate to ensure a fair competition, the Commission has been undertaking several measures and the competition advocacy programs to detect, investigate and to eliminate cartels in India.

Objectives

- To explore the nature of the cartels and to understand the some of the legal provisions to combat it.
- To study the role and the efficacy of the Competition Commission in combating the cartels.
- To study and suggest the issues that would further enhance the efficacy of the Competition Commission.

A Brief Study on Cartels

The agreements between the competitors to distort or restrict competition in the market are called anticompetitive agreements. There are two kinds of anticompetitive agreements: *"horizontal"* and *"vertical"*. The agreements between the organizations which are *"at the same stage of supply chain"* are called *"horizontal agreements"* and the agreements between the organizations *"at different stages of supply chain"* are called *"vertical agreements"*. The cartel is a kind of *"horizontal agreement"* to fix price, allocate customers or market or for bid-rigging. Since the cartel does great harm to the consumers and the economy, it is of greater worry for the regulators of competition law.

As per the provisions of the Act, cartelization is illegal and prohibited. The Act categorizes it as a civil, pernicious offence but not a criminal one. The cartel, in fact, is a special type of oligopoly. Some common characteristics found in the cartels are delineated hereunder:

- Cartels usually operate in absolute secrecy as they are pure conspiracies.
- Generally, the cartel members try to camouflage their activities to avoid detection by the authorities
- In case any cartel member deviates or changes his mind, he receives punishment from other members. They punish him by temporary price cuts to isolate him and to take away his business.
- The cartel members demand compensation from the deviating member who sells more than his allocated share.

These are strategies that the cartel members adopt to avoid betrayal by its fellow members. It may be noted here that cartels are difficult to sustain for long as its members usually tend to derive maximum benefits by cheating their fellow-members and violating the cartel price. In fact, cheating is easier in case of heterogeneous products and geographically diverse markets. If any member discovers cheating by one of his fellow-members, either the cartel collapses itself or he informs the competition authorities.

It is difficult for the cartels to form and function when there is effective competition in the market. However, having free market does not necessarily mean that cartels cannot be formed. The international cartels are the best examples to prove this. Similarly, if a firm is making high profits, it does not necessarily mean that it is involved in cartelization as high profits can be earned due to any other factors.

The ideal conditions conducive for cartels to form and sustain are when:

- There are only a few competitors and there is high concentration,
- There are high entry and exit barriers,
- The products are homogenous,
- The production costs are similar,
- The consumers depend very much on the product and the demand is inelastic,
- There is excess capacity and
- There is active trade association.

Formation of cartel is one of the most pernicious forms of agreements and the most egregious violation of competition law. The prime objective of cartelization is to raise the price above the level of competition. Effectively, this means high price for the consumers with low quality and less or no choice of goods and services. Cartelization therefore hurts the consumers as well as the economy.

Some Legal Provisions

As per section 2 (c) of the Act, *"Cartel includes an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of or trade in goods or provisions of services."* In other words, cartels are agreements between individuals or entities not to compete on price, goods and services, or customers. Cartel is said to exist when there is an implicit or explicit agreement between entities to fix price, to limit production and supply, to allocate market share or sales quotas, or to engage in bid-rigging in the market. There are some essential factors that prove the existence of a cartel. First, there has to be an agreement between the competitors not to compete or to restrict competition and to create monopoly. The agreement need not be in written form. A concerted plan of action by the competitors with intention to create monopoly is enough to prove the cartel. The second factor is the fixing of prices or creating parity of prices.

Section 3 of the Act prohibits formation of cartels and section 3(3) forbids four types of *"horizontal agreements"* including cartels that indulge in price fixing, limiting or controlling markets, sharing of markets, bid rigging etc. These four types of agreements are anticompetitive; and they are agreements between the competitors having the effect of fixing sales or purchase price; controlling production, supply or market; eliminating or reducing competition for bids or manipulating the process of bidding.

Section 27(b) of the said Act distinguishes cartel from other anticompetitive agreements in terms of penalties imposed by the Commission. In case of cartel, the Commission is empowered to impose a penalty against each seller, trader, producer or service provider up to thrice its amount of profit for each year of the continuance of such agreement or ten percent of its turnover for each year of continuance of such agreement, whichever is higher. The Commission can pass orders directing the parties to discontinue the cartel agreement and not to re-enter it, or to modify the agreement, and to abide by any other orders that it may pass including payment of costs.

As per section 19(1) of the Act, any person or entity or even a statutory authority can raise a complaint against a cartel and on receiving it, the Commission has to form a *prima facie* opinion that the competition law has been contravened before initiating its investigation. If it deems there is no contravention of law, it can dismiss the complaint and may pass orders including imposition of cost against the complainant. The above section empowers the Commission to act on information received, reference made to it by the Central or a State Government or to initiate *suo motu* investigations against suspected cartel behavior.

To determine whether competition law has been contravened and whether section 3 of the Act is attracted, the Commission examines if the agreement has an *"appreciable adverse effect on competition."* The Act does not define this phrase but it lays down the following factors under section 19(3) that it gives due regard while examining the agreement. It checks if the agreement-

- creates barriers to new entrants in the market;
- drives existing competitors out of the market;
- induces foreclosure of competition by hindering entry into the market;
- accrues benefits to consumers;
- causes improvements in production or distribution of goods or provision of services; and
- promotes technical, scientific and economic development by means of production or distribution of goods or provision of services.

Section 36(2) of the Act bestows upon the Commission the power of a Civil Court for summoning and enforcing attendance, production of documents, receiving evidence on affidavits, and requisitioning public records. All the procedures have to follow the principles of natural justice prevalent under the common law.

Section 54 of the Act empowers the Central Government to exempt any enterprise from the application of its provisions related to cartels. *Horizontal agreements* entered into by way of joint ventures are not presumed to have adverse effect on competition if they enhance efficiencies in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Section 46 of the Act provides the leniency provision for the members of the cartel and the whistle blowers. Such provision is based on the assumption that successful prosecution against cartelization requires evidence provided by a member of the cartel. The Commission can impose a lesser penalty on a cartel member who makes a full and true disclosure on the cartel. The reduction in penalty will however depend on the stage at which the applicant for leniency comes forward for the disclosure, the quality of the information provided by the applicant and the evidence already in possession of the Commission. The leniency program is to encourage the parties involved in such violations to come forward and disclose the details of the anticompetitive agreements. This provision is a kind of whistle blower protection. The protection is also available to those individuals and enterprises that honestly cooperate with the investigations. The identity of the whistle blowers is kept confidential unless the law makes it mandatory to disclose or the whistle blower himself has already disclosed or consented for the disclosure.

The Act does not have retrospective operation and therefore any contravention of its provisions prior to May 20, 2009, the date of its applicability, is not punishable. However, the Commission can take cognizance of a cartel which came into existence prior to the said date and continued beyond it.

The applicability of the Act is across India. However, section 32 empowers the Commission to inquire and pass orders against the cartels outside the country which has an *"appreciable adverse effect"* on competition within India.

The Act provides for an appeal process under its sections 53A and 53B. Anyone aggrieved with the order of the Commission may appeal to the Competition Appellate Tribunal within sixty days of the communication of the order. Furthermore, section 53T provides for the final appeal before the Supreme Court of India within sixty days of receiving the order of the Competition Appellate Tribunal.

The Role and The Efficacy of The Competition Commission

Prior to enactment of the Act, India did not have a satisfactory record of enforcement against cartels and history is witness to this. The cartels did operate in several sectors including steel, tyre, cement, and trucking industries etc. Although the Monopolistic and Restrictive Trade Practices Commission (MRTPC), predecessor of the Competition Commission had the legal authority to take action against the cartels, it hardly took action in this regard. One of the main reasons of the reluctance of MRTPC to act against the cartels was that it did not have enough power to impose effective sanctions to support its decisions. The Competition Act, 2002 however, clearly defines cartels and gives enough power to the Commission to deal with them. Though the Commission is a new enforcement agency, its performance has been largely positive. The competition law is at an early stage of development, yet its effect is visible on the economy. The Commission has been trying to make an impact on the mode of operation of businesses in India. It has not shown mercy on errant companies so far and has been levying heavy penalties on them. Though many of its orders are under appeal, yet it has been able to successfully convey a strong message to the violators to abide by the law or face the consequences. The cartel fines are levied on the erring companies in the sectors of real estate, pharmaceuticals, insurance, cement and airlines and many others. Cartel investigations are ongoing in several sectors as well. The Commission takes the assistance and cooperation of the competition regulators in other countries on enforcement of competition law in India with regard to those international companies working in India and those wishing to enter Indian market. The programs that the Commission runs to comply with its mandate are discussed below.

1. Competition Advocacy Programs

The Commission has the twin functions of enforcement and advocacy which are complementary to each other. Therefore, it is not only the authority to enforce competition law but also the advocate of healthy competitive environment. Both the functions must be pursued simultaneously. Section 49(3) of the Act requires the Commission to undertake suitable programs for the promotion of competition advocacy, creating awareness and imparting trainings on competition issues. The Commission has been running several competition advocacy programs to create awareness on the benefits of competition law. Creating such awareness promotes compliance on the part of market players. The market players take initiatives and ensure that their organization does not indulge in anticompetitive activities and cartelization. The businesses take cues from orders, guidelines, regulations, advocacy booklets of the Commission and decide their future course of action. Reputational damage, loss of business, financial penalties etc. are the key drivers for the businesses to comply with law. The Commission is quite sensitive about its advocacy role and it encourages the companies to adopt their own internal competition compliance programs. The Commission officials have been meeting company executives to lay emphasis on this issue.

2. Leniency Programs

The Commission runs a structured leniency program that prescribes conditions for the cartel members and whistleblowers seeking full or partial immunity from sanctions for their disclosure and cooperation with law. Leniency programs are kind of incentive mechanism for the cartel members to encourage them reveal

vital information on the existence and operation of cartels. Leniency programs are recognized worldwide as effective tools for cartel detection and they have contributed immensely to the rise in cartel investigations in many countries.

It is evident from the orders of the Commission of its honest efforts to combat the cartels. However, there are several other issues, if addressed effectively, will enhance the capacity and efficacy of the Commission in combating the cartels.

Suggestions/Issues to Address

1. Evidentiary Standard

There is no guidance in the Act or in its regulations as to the kind of evidence acceptable by the Commission from the whistle blowers desiring to bust cartels. How can a potential leniency applicant then know that the evidence he has is enough for the Commission to form its *prima facie* opinion on violation of the law? What he should do in case his evidence is not enough for the Commission or he does not file for leniency due to lack of adequate evidence?

In advanced cartels, the members are too cautious to leave trace of evidence ensuring that they are immune from prosecution. Though the Commission accepts the circumstantial evidence in such cases, it should be consistent in dealing with them. Interestingly, while dealing with the cement and tyre cartels, in which the facts and circumstances were largely similar, the Commission treated the circumstantial evidences differently and gave completely opposite verdicts raising questions over its rationale. Analyzing these two cases makes it apparent that the Commission failed to establish a uniform principle that constitutes cartelization. The Commission therefore must define well the standard of circumstantial evidence and provide formal guidance on the matter in order to eliminate inconsistent treatments that raise questions and create litigation. Acceptance of the circumstantial evidence should also be subject to the condition that the objectives of the leniency program are fulfilled.

Furthermore, since the Commission has ruled that price-parallelism does not necessarily prove the existence of cartel, it has to decide firmly the acceptable additional factors that can be used to corroborate with price parallelism as substantial evidence.

2. Procedures of Investigation

The Commission must formulate the standard operating procedures for investigations, collection and examination of evidences, depositions etc. This would reduce the use of discretionary powers of the investigating officers, curtail uncertainty, enhance the level of comfort of the leniency applicants and ensure adherence to the law.

The investigation architecture has to be robust to detect all suspicious instances in the vast commercial market of the country which is a formidable challenge.

3. Appropriate Penalty

During the last few years, the Commission has been levying heavy fines within the limit prescribed in law and sending a strong message to the errant businesses. Although within the ambit of the law, imposition of heavy fines has raised concerns over lack of guidelines for computation of the amount and lack of logical explanation justifying the penalty. Levying exorbitant fines has also become the subject of litigation as it is imposed without any basis of calculation. This has defeated the purpose of the lesser penalty regulation of the Commission and its leniency program. More so, fines not commensurate with the magnitude of the violations lose the desired deterrent effect and give undue advantage to the competitors of the erring organization. Though section 27 of the Act gives discretionary powers to the Commission for levying fines but the discretion should not be absolute and arbitrary. The Commission has to follow a fair, transparent and

logical process to levy fines. The fines should be appropriate enough that they would not be contested and even if they are contested, the appellate body would not hesitate to uphold the same penalty exactly.

Furthermore, there are many small and mid-sized companies in India, who are till date unaware of the nuances of competition law, its extent of applicability, line of violations etc. particularly related to allocation of market share, price fixation and so on. Even, those organizations that are aware of the law do not have the mechanism at the grass-root level to verify their agreements or documents to ensure that they do not contravene the provisions of competition law. Therefore, the Commission should consider levying reasonable penalty for the violations especially in these early years of its growth by learning from the experience of its counterparts in other jurisdictions.

4. Confidentiality

The issue pertains to confidentiality of the leniency program applicant and the information he provides to the Commission. While the Lesser Penalty Regulations provides confidentiality to the leniency applicant and his absolute protection, the Competition Commission of India (General) Regulations 2009 gives discretionary power to the Commission in granting confidentiality. It is to be noted that limiting the confidentiality and protection of the leniency applicant only defeats the very purpose of the leniency program. Confidentiality of information and whistle blower's protection are absolutely necessary to encourage everyone to come forward for the disclosure of the cartels.

5. Regulation of Discretionary Powers

Though the Commission is a new enforcement agency, it is active to fulfill its mandate assigned by law. Over the last couple of years, the Commission has been levying heavy penalties on businesses for the violations. While the consumers are happy with this, it has confused the industry and the business community. In many instances, levying of penalties has been inconsistent as the Commission has used its discretionary powers within the limit. To be fair, the Commission has acted judiciously in several instances and reduced the fines, yet it is imperative that it needs to provide strong logical or economic reasons and its considerations while levying the fines. This will apparently reduce the blanket use of its discretionary powers.

Furthermore, the legal experts contend that the Commission, in many ways has acted like the investigator, the prosecutor and the judge with unreasonable discretionary powers. Therefore, they advocate for procedural fairness and transparency in the decision making process of the Commission. In the course of the investigations and sentencing, the rights of the accused viz. right to cross-examine witnesses, right to be heard before sentencing etc. should not be limited and to be clearly prescribed. The discretionary powers of the Commission have to be regulated to reduce litigation and to enhance its credibility.

6. Anti-cartel Policies

The Commission ideally should formulate and adopt unambiguous *ex ante* and *ex post* anti-cartel policies which would minimize the probability of formation of cartels in sectors where such possibilities exist. Few examples of *ex ante* policies could be discouraging cross-ownership between organizations, making cartelization a criminal offence etc. and examples of *ex post* policies could be according strong legal powers for search and seizure to investigating officers, establishing a robust leniency program etc.

7. Interpretation of Law/Rulings

The Commission ruled in *Steel Manufacturers Case* that mere price-parallelism among various organizations does not necessarily indicate existence of a cartel unless it is corroborated by additional evidence conveying conscious parallel behavior. Similarly, interdependence among various parties in an oligopolistic market also does not indicate the presence of a cartel. Additional proof has to be produced in the form of circumstantial evidence that indicates conscious parallel behavior to prove the existence of a cartel.

However, it is unclear whether the Commission has followed the above rule on price-parallelism consistently as in *Cement Cartel as well as in Diesel Loco Modernization Works cases,* price-parallelism was used as evidence and penalties were imposed on the defendants.

The Competition Appellate Tribunal has upheld most of the orders of the Commission but with regard to interpretation of law, in some cases, it has delivered different conclusions. There are also instances where the Tribunal completely or partly set aside the orders of the Commission as the Commission failed to adhere to the principles of natural justice and administrative law.

The orders of the Commission have also been criticized by the legal experts for subjective reasoning and lack of coherence. Many of the orders of the Commission are also under appeal due to inconsistencies in the rulings.

To solve this, the Government has to develop a comprehensive framework for implementation of competition law across the country and the Commission has to apply and interpret the provisions of law and the rulings consistently based that overall and unambiguous policy framework.

Conclusion

Legally and practically, detecting and busting of cartels is a monumental task. It requires special skill that is different from the skill of investigation and prosecution. To prove cartelization, the Commission has to confirm the presence of certain arrangements in the business aiming to fix price and to distort competition. Since cartels are secretive and illegal, therefore the investigator has to make special efforts to collect substantial evidence from the obstructive and uncooperative cartel members. The Commission therefore has to depend heavily on its leniency program which is designed encourage the cartel members to disclose the violations.

It indicates that the leniency program has to be robust and fair. The procedures, guidelines, and the processes of the leniency program have to be so transparent that it would instill confidence of the whistle blowers to reveal vital information on cartels without any conditions.

Clear guidelines have to be framed, as discussed above, related to the standard of evidences, quantum of penalty, requirement of confidentiality, power of the investigating authority, and the procedure of investigation.

For high-quality investigation and cartel busting, the Commission has to set up special cells to build expertise on covert surveillance, search and raids, witness interviews etc. Close coordination among the specialized agencies like police, tax authorities, regulatory authorities and government departments dealing with business organizations has to be established to ensure smooth exchange of vital information. The investigative arm of the Commission needs to build its capacity. They need to use sophisticated tools of investigation.

On advocacy front, the Commission has to regularly encourage businesses and trade association members to run competition compliance programs. The Commission needs to run training and awareness programs emphasizing the benefits of healthy competition and the detrimental effects of unethical business practices. It should invite feedback from experts for positive changes.

As the competition law is nascent in India, the Commission should learn from the experience of its counterparts in the matured jurisdictions and should unhesitatingly embrace the global best practices related to its enforcement and advocacy functions. This is how the overall capacity of the Commission would be reinforced and in turn, its cartel detection and busting efforts would be further strengthened. It would also slow down the pace of the formation of cartels and bring about healthy business practices.

Limitations

This is a brief study on the nature of cartels in India, some of the pertinent legal provisions available in the Competitions Act, 2002 and a short review of the role and efficacy of the Competition Commission to deal with the cartels. The study does not cover the international cartels and even those having effect on competition

in India. It does not cover the areas where the Commission failed to exercise its powers due to competition distortions or impediments caused by government policy and practices in various areas of governance. The study covers *cartelization only* and does not cover any other type of anticompetitive agreements. The subject of cartelization is vast and it is possible that the study might not have covered all the relevant aspects. Therefore, the study does not claim to be an all-inclusive one.

References

(Endnotes)

1. The Competition Act, 2002 with Allied Rules & Regulations, Universal Law Publishing Company Ltd., New Delhi.
2. India- Law & Practice: Prepared by J. Sagar & Associates.
3. Leniency Program Document of the Competition Commission of India.
4. Warsha Kale, Cartel Busting in India, the Elephant in the Room?
5. Rudresh Singh, Cartels & Whistle blowing: the Importance of Establishing a Robust Leniency Regime in India.
6. Provisions related to Cartels Document (Advocacy series 2) of the Competition Commission of India.
7. G. R. Bhatia, Combating Cartel- Issues & Challenges (served as the Additional Director General of Competition Commission of India).
8. Nishith Desai Associates, Competition Law in India- A Report on Jurisprudential Trends, April 2013.
9. Nishith Desai Associates, Competition Law in India- A Report on Jurisprudential Trends, June 2015.
10. M.M.Sharma, Predicting Business Cartels (served as the Additional Registrar of the Competition Commission of India).
11. Priya Urs & Rishi Shroff, The Cement and Tyre Cartels: What India Can Learn from the US and EU.
12. Nisha Menon & Joywin Mathew, India's Competition Act takes Shape with Enforcement Actions and Appeals: Key Cases, Key Points for International Companies.
13. Vishakha Singh Deshwal, Combating Cartels in India.
14. Anti-Cartel Enforcement Template of the International Competition Network.
15. Competition Commission of India through the Eyes of the Media: Doing Well!, prepared by CUTS International.
16. The Interface between Business Strategy and Competition Law, prepared by Cuts Institute for Regulation and Competition.
17. Approach Paper on Competition Advocacy http://www.competitioncommission.gov.in/advocacy/Approach_Paper_on_Advocacy_11_04_07[1].pdf.
18. Sanjay Lalit, Cartel Issues and Challenges, Cartel Enforcement and Settlement, SKL & Company, Practicing Company Secretaries, Mumbai.
19. Zia Mody, The Competition Commission of India's Approach to Penalties: The Need for Guidelines, Founding Partner of AZB & Partners, Mumbai.

❑❑❑

CHAPTER

19

Competition Law and Intellectual Property Rights: A Balanced Equilibrium

Dr. Reeta Garg*

Abstract

Intellectual Property Right (IPR) is a term coined to provide legal entitlements to a variety of exclusive rights with regard to the subject matter of the Intellectual Property. They entitle the creator an exclusive right over the use of his creation for a period of time due to high investments in research and development (R&D), short product cycle, rapid changes in technology, high innovation risks, and global competition. IPRs, due to exclusive right, create a form of monopoly or, in other words, a degree of economic exclusivity. Competition law, on the other hand, comprises of provisions that promote or seek to maintain market competition by regulating anti-competitive conducts, curbing monopolies to protect the interest of consumers. One of the most important aspects of Intellectual Property Rights is related to abuse of dominance including Monopoly pricing. The problem is severe in developing countries as the dominant players of foreign countries charge more price while the consumers have to pay a very high price due to this monopoly. In the absence of adequate safeguards, enterprises might undermine the market by resorting to unfair practices for their short term gains. Hence, during the exercise of a right, if a prohibited trade practice is visible to the detriment of competition in the market or consumer interest, it ought to be assailed under the Competition Law. The research paper shall throw light on the idea of 'Abuse of Intellectual Property Rights', when Competition law should interfere for consumer welfare and the way in which a harmonized balance between the Intellectual Property Rights and Competition Law can be created.

Introduction

Economic theory clearly explains the benefits that arise from a competitive market while unregulated markets, sometimes, assume monopolistic or near monopolistic character adversely affecting the welfare of consumer, thereby, concluding the role of markets in an economy be it developed or developing. Competition law essentially comprises legislations, rules and regulations that promote competition in local and national markets restrict concentration and abuse of dominant power and regulate combinations. Competition law has always been instrumental in eliminating anti-competitive practices, preventing abuse of dominant position, enforcing optimum allocation of resources and ensuring benefits to consumers. IPR protection laws promote innovation benefitting consumers by development of new and improved technology, thereby, improving quality of goods and services and drive economic growth. It confers the right on creator to legitimately

* Assistant Professor (Law), Amity Law School, Delhi.

exclude others for a limited period of time from the benefits arising from the creation and, more specifically, from the commercial use of innovative products and processes based on that new knowledge. As a result, IPR holders earn rightful and reasonable profits so that they have incentives to engage in further innovation.

Competition Act, 2002 in Relation to Competition and IPR Policy

The objective of Competition Act, 2002 is to prevent abusive practices in the market, promote and sustain competition in the market and ensure that the consumers get the products at a reasonable price and better quality. Section 3 of the Act prohibits any agreement which causes or is likely to cause an appreciable adverse effect on competition within India in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services. Presence of horizontal agreement, that is agreement between enterprises who are engaged in trading with similar or identical goods is said to have an appreciable adverse effect on competition.[1] An agreement is said to have an appreciable adverse effect on competition if the agreement has a force of limiting or controlling product or services at any stage and which directly or indirectly results in bid rigging or collusive bidding.[2] Anti-trust law also prohibits vertical agreements which might result in having an appreciable adverse effect on competition. Vertical agreements are the agreements between enterprises at different level of production, distribution, etc.[3] Competition Law also prohibits abuse of dominant position of an enterprise. Dominance over a specific area of market can be earned by any enterprise through monopoly power, this is not *per se* violation of anti-trust law but abuse of this position is illegal and has a detrimental effect on the market.[4] When alternative technologies are available, their dominant position gradually comes to an end due to the choices in the market. A firm/ enterprise/person is said to be in dominant position when they have,[5]

1. The ability to operate independent of the market forces.
2. Affect the competitors and consumers of the relevant market.

Though, enterprises do not have control over the market in a perfect market, the reality is otherwise. The above mentioned two qualities are more aptly applicable for the IPR holders. Often, there is abuse of dominant position by these patent holders. This would eventually lead to refusal of granting license, locking up of patents, pooling and practices to evict other competitors out of the market.

The law also regulates mergers and acquisitions. The focus of Competition Law is primarily on three areas, agreements among enterprises, abuse of dominant position and mergers or combination among enterprises, in nutshell, prevention of unfair competition and promotion of consumer welfare.

Section 3(5) of the Act bestows a blanket exception on IPR which shows Section 3 of the Act will not be applicable to IPR holders to restrain any infringement or to impose reasonable conditions. But, Section 4 of the said Act deals with abuse of dominant position which interferes with IPR rights, when violated. In the case of *Aamir Khan Production v. The Director General*,[6] Bombay High Court has clearly pointed that the CCI has jurisdiction to deal with cases involving IPR and Competition issues. In *Kingfisher v. Competition Commission of India*,[7] it was also held that the CCI has the jurisdiction and power to deal with cases which arise before the Copyright Board. These leading cases have put to rest as to jurisdiction of CCI on cases involving issues relating to Competition and IPR policies.

Dominant Position of IPR Holders and Essential Facility Doctrine (EFD)

Domination position by itself is not illegal. Most of the IPR holders, especially, patent holders enjoy dominant position in the market as patents are granted for their innovations. *"It is a longstanding topic of debate in economic and legal circles: how to marry the innovation bride and the competition groom."*[8] *United States v. Microsoft Corporation* is one of the landmark cases in relation to this issue of competition and IPR policy during the TRIPS regime.[9] The case originated in the year 1998, where Microsoft was alleged of abusing its monopoly power by tying its operating system and web browser and selling. This restricted the market for

other web-browser competitors since Windows operating system users already had a copy of Internet Explorer (the browser Windows tied with its browser). The opposition stated that Internet Explorer was a different and separate entity altogether, since a separate version is found for other Operating Systems. Judgement was given that Microsoft had abused its dominant position and it wanted to crush other operating systems and Microsoft had committed monopolization, and tying in violation of section 1 and 2 of the Sherman Anti-Trust Act. Microsoft had appealed this decision and judgement was given that Microsoft would have to be broken into two different components, one for the browser and the other for the operating system. Apart from it, barrier to entry is another major restrain to the working of the market. When a patent holder holds up a technology that is necessary for the entry into the market or which cannot be reproduced at reasonable cost or where there is no alternatives provided, the solution is gained by applying the "*Doctrine of Essential Facility*", where the patent holder is obliged to share the standard with other competitors with reasonable amount as royalty. The doctrine often comes to play in the case of standard essential patents. Patents based on standards are given the recognition as Standard Essential Patents (SEP). Such recognition is been given to the standards which do not have an alternative technology nor duplicated. Generally granting of patents promotes technological growth. By the very nature these SEP holders are dominant in their relevant market, they tend to involve in fixing predatory pricing, withhold of technology, unfair terms in the licensing agreements, refusal to grant license. In the recent years, cases relating to abuse of dominant position by SEP holders scores high.

Fair Reasonable and Non- discriminatory (FRAND) terms, was evolved to put an end to the unfair prices fixed by the SEP licensors with their licensees. The two main objectives of the FRAND terms are,

1. To ensure that the SEP holders get reasonable royalty.
2. To ensure there is no abuse of dominant position with their licensees.

There is an interface of Competition law especially with SEP. It makes sure that it does not exit other participants from the market or act in detriment to the working of the market. These terms have been fixed by the Standard Setting Organizations (SSO), which frames rules to govern the ownership of patent rights. Some examples of SSO are ETSI, ANCI etc. By the word FAIR, it means not to practice any anti- competitive act to obtain dominant position. REASONABLE, refers to the licensing rate to be appropriate to the standard. NON- DISCRIMINATORY, requires to treat each and every individual licensees equally. Article 31 of the TRIPS agreement refers to compulsory licensing which is to be provided by the patent holders to uphold public welfare such as pharmaceutical industry. Similar licensing technique has been adopted for SEP, where the willing persons approach the licensor for license to be granted to them according to FRAND/RAND terms. In such a situation the SEP holders have been forced to license at reasonable rate to enable diffusion of technology.

TRIPS in Relation to Competition and IPR Policy

TRIPS (Trade-Related Aspects of Intellectual Property Rights) is an international agreement formed by the WTO (World Trade Organization) that sets down minimum standards for many forms of IP regulation as applied to nationals of other WTO members.[10] The purpose of drafting and the objective of the TRIPS agreement were to protect the tangible or the intangible property which was the innovation of persons. It is the most comprehensive international agreement suggesting government standards and actions in the sphere of intellectual property. It is a treaty regulating intellectual property and prescribing minimum standard protection for patents, trademarks, copyrights etc. It provides exclusive rights to patent holders, conditions to impose exceptions on exclusive rights, compulsory licensing, parallel import, allowing member states to decide the conditions to qualify as innovation and entitlement as to patent on the innovation. During the negotiation of the agreement, many countries expressed their concern on the regulation of unfair competition and abusive power of the IP rights holder. Article 40 connotes IPR and competition law are *pari materia* and competition law is the second layer protecting the rights and fulfilling the rights of the IPR holders. Article 40 states that licensing practices or conditions pertaining to the IPR's may have an adverse effect in trade and may

impede the transfer of technology. Article 40.2 permits the members to specify any abuse of IP rights having an adverse effect and adopt measures to counter them. Some of the anti-competitive practices are mentioned in Article 40.2 of the agreement but it should be noted that this list is not exhaustive. The most important characteristic of TRIPS is the flexibilities provided for developing countries in their implementation which was also reaffirmed by Doha Declaration on November 14, 2001. Article 30 of TRIPS allows member States to provide exceptions to the exclusive right of the patent holders which are not prejudicial to the legitimate interests of the patent holders. Article 31 allows other users to use the patents without authorization of the patent holder in member States, if law of that state provide so and the efforts to get license from patent holder were unsuccessful or in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use and subject to the condition of sale in the domestic market and adequate royalty to the patent holder. The flexibilities provided by TRIPS against abuse of monopoly right over IPR are explained below:

- **Compulsory Licensing**

  The policy of compulsory licensing is a statutory measure to deter concentration of IPR in the hand of right holder arising out of his refusal to part with the right without ostensible reason or parting with right in commercial consideration which is incompatible to existing market practice. It is a statutory mechanism in the hand of state for effecting non-voluntary transfer of copyright from its owner to such a person who applies to the state to republish such work to the public in lieu of paying royalty to the owner. Article 31 of the TRIPS agreement provides for the grant of compulsory licensing under certain situations such as national emergency or other circumstances of extreme urgency or inadequate exploitation of the patent in the country.[11]

- **Parallel Import:** Parallel Import is the import of patented product from the country where it is already marketed. Patent owner in a particular market may have to sell the product at a price (due to competition with generic drugs manufacturers) lesser than other countries' market due to which licensor of the other country import the drug from the country where it is sold at low price and the patent owner cannot contest the same. For example, 100 units of Bayer's ciprofloxacin (500 mg) cost 740 US dollar in Mozambique while Bayer sells the same drug for 15 US dollar (owing to local generic competition) in India. Mozambique can import the product from India without Bayer's consent.[12] India is a great exporter of generic drugs especially to South Africa and other least developed countries. Theory of exhaustion applies to Parallel imports, according to which a patent holder has got his right to import the protected product exhausted once the product is first introduced in the market. TRIPS clearly bars a suit of international exhaustion to be tried under the WTO dispute settlement system.[13] Article 6 plays a vital role under competition law. It facilitates the balancing of rights, duties and liabilities under the two domains.[14]

- **Anti-competitive practices:** As already discussed, Article 40 of TRIPS deals with anti-competitive practices and allows member states to specify any abuse of IP rights having an adverse effect on the competition and adopt measures to counter them. Some of anti-competitive practices mentioned in Article 40.2 are exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing.

- **Patent Evergreening:** Patent evergreening is the phenomenon, whereby, patent holders make minor alterations in the patented product and demand for a new patent for the altered product and enhance the patent period of the product. As the patented product has got extension of the patent term, patent won't come in public domain and prevents the creation of generic drugs. Article 8 of TRIPS specify that a country can frame patent laws to protect public health and nutrition, and to promote socio-economic and technological development interest[15] and also to prevent the abuse of intellectual property rights by right holders.[16] In other words, a country can address the issue whenever the abuse of monopoly takes place.

The Hard Core Reality in Developing Countries

When it comes to the balance between intellectual property law and competition law, developing countries are mostly affected and strive to uphold both. The flexibilities provided by the international treaties and agreements one way be a saviour for their interest and, on the other hand, end them in confusions pertaining to standards and different standards adopted by the member country. Apart from it, the worrisome fact is the external pressure exerted by developed countries on developing countries to implement stringent IPR norms encroaching upon their autonomy leading to a check on preparation of generic drugs. Developing countries lack in proper infrastructure to spend on research and innovations and depend much on developed countries for the innovations which result into monopolization of product especially in case of pharmaceutical innovations, thereby, resulting into arbitrary pricing. The costly drugs supplied to patients, being beyond the purchasing power, leads to dilemma of imbalance between protection of IPR and right to public health, thereby affecting consumer welfare. Generic drugs provide a low cost remedy to poor population of developing countries manufacturing of which developed countries try to prevent and try to retain the monopoly over the patented drugs, protect their own interests instead of safeguarding the competition in the market.

Indian Stance in Balancing IPR and Competition in Compliance with TRIPS

TRIPS agreement has obligated member states to enact higher standards of patent protection like provision of patent term of 20 years, for both product and process patents. Before TRIPS, Countries had more freedom to enact IPR laws such as excluding entire field of technology from IPR protection, limiting the term of patent, production of generic drugs leading to exclusion of pharmaceutical products from patent production. India was staunchly against inclusion of IPR in trade framework which was evident from the statement of V. R. Krishna Iyer, "The GATT treaties, including the TRIPs with which we are directly concerned here, gave biting teeth to conquest by patent, hiding the bleeding operation with dubious promises of latest technology and benefits of benign global competition for the third world."[17] Indian had enacted Patents Act, 1970 to protect innovations; however, the protection was not a blanket protection. With regard to food, medicines, drugs etc., the patent protection was accorded to process not to the product, thereby, allowing competitors to produce end product such as generic drugs. Patent holders can legally stop them from using the patented process not the product if produced with the different process. This section was based on the report of Ayyangar Committee that found 80-90% control over patents by foreigners creating monopoly over the market, thereby, eliminating competition. However, being signatory to TRIPS, India, being bound, made amendments to patents Act, 1970 in 2005, thereby, deleted section 5 allowing patents for product as well. The amendment has given more protection to innovation, however, put a ban on new generic drugs. The generic products already in the market can continue but not new as it is violation of patents (Amendment) Act, 2005 and only patent holders will supply them for the period that they held for the patent. In the countries lacking scientific and technological infrastructure for research and development as well as the capital, patent acts as levy not a stimulus for research and development. Another problem with product patents is of evergreening on which Indian Judiciary has very rightly decided in Gleevec case. *Novartis v. Union of India*[18] is a landmark case in which claim was with regard to the novelty of drug 'Gleevec' which was for the treatment of leukemia. Novartis claimed that it was an improvement of original drug as body absorbs 30% more of the drug. However, the Supreme Court refused patent on the ground that it did not have 'enhanced and superior efficacy' than the previous drug having the same chemical base 'Imatinib', thereby, advocated promotion of true innovation by preventing the phenomenon of evergreening and allowed market for generic drugs.

Similarly, Indian Judiciary has also upheld the compulsory licensing in its first ever *Bayer vs. NATCO*[19] case and refused to entertain Bayer's appeal to set aside the compulsory license (CL) on Sorafenib (Nexavar). Sorafenib tosylate is a drug for kidney and liver cancer patients. Bayer was selling Nexavar for Rs. 2,84,000 per patient per month which is exorbitant for Indian patients. On 9 March 2012, the Patent Controller granted a compulsory license to Natco Pharma to market a cheaper generic version of Nexavar at around Rs. 8,800

per person per year at royalty rate of 6% as the Patent Controller had noted the drug was supplied to less than 200 patients after more than three years of the grant of the patent as against 8842 patients in the year 2011. Bayer appealed before the IPAB that upheld the license, but increased the royalty rate to 7%.[20] Bayer filed writ in Bombay High court which was dismissed who in turn filed SLP in Supreme Court. During pendency of trial before Supreme Court, 17000 patients needed the drug, corroborating the need for compulsory licensing. With regard to royalty, Bayer couldn't produce the audited account of expenses, the Bench dismissed Bayer's SLP.

Conclusion

Competition law and IPR laws are both to promote consumer welfare, one by enhancing competition and other by monopolization to promote innovation, thereby, better quality product at lesser price. However, Monopolization, sometimes, when abused leads to violation of competition law. It is essential for the innovators to be motivated and provided with incentive and resource backup, however, regulated rights provided to them would serve the actual purpose. India has always had the vision of having a healthy competition and harmonization at the international level for its intention was clearly spoken at the WTO ministerial conference laying down the proposals regarding the transfer of technology to developing countries and developing the approach in utilization of the resources for the common good. India, through its various judicial pronouncements, has indicated its stance to balance the need to protect IPR along with promotion of competition, thereby, serving best to the consumers. However, India is still in its infant stage and requires much deeper prospective on this issue. Like the TRIPS, India can advocate more strongly the policies such as Compulsory Licensing in case of excessive pricing of a product, parallel import of generic drugs. CCI should come up with more stringent principles and guidelines to tackle with Abuse of dominant position, tying in arrangement or other activities having adverse effect on the competition. The courts have now come up with the view that the 'interest of consumer are of supreme importance' and cannot be sacrificed at the cost of the right holder. Other nations should also take advantage of TRIPS flexibilities to counter abuse by patent holders. Measures that India and other developing countries can adopt to mitigate the impact of monopoly rights, promote competition and facilitate access to products as well as to ensure right of patentee to remuneration, is the system of parallel imports covered under the principle of international exhaustion.[21]

References

(Endnotes)

1. Competition Act, 2002, Section 3(3).
2. *Id*.
3. *Supra* n. 1, Section 3(4).
4. *Supra* n. 1.
5. http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf, last viewed on 11 April, 2016.
6. 2010 (112) Bom L R 3778.
7. Writ petition no 1785 of 2009.
8. Mario Monti, European Commissioner for Competition Policy, January 2004, also available at http://europa.eu/rapid/press-release_SPEECH-04-19_en.htm?locale=en (Last viewed on 5th March, 2016).
9. *United States v. Microsoft Corporation,* 253 F.3d 34.
10. TRIPS Agreement, Article 1(3).
11. *Supra* n. 10, Article 31(b).
12. http://www.who.int/trade/glossary/story070/en/ visited on 15th April, 2016.
13. Article 6.

14. A.K. Koul, *The General Agreement on Tariffs and Trade (GATT)/ World Trade Organization (WTO): Law, Economics and Politics* (2005) at 460; also available at http://www.ijra.in/uploads/41952.2878249653FULLPAPER_NIHARIKA%20KUMARI%20%20&%20A.ASHWIN%20KUMAR.pdf (last visited on 5 May, 2016).
15. Article 8(1).
16. Article 8(2).
17. Iyer, V.R. Krishna: *Off the Bench*, p. 103.
18. (2007) 4 MLJ1153.
19. First Case of Compulsory Licensing in India.
20. Order No. 45/2013 (Intellectual Property Appellate Board, Chennai), available at http://www.ipabindia.in/Pdfs/Order-45-2013.pdf (Last visited on 6th May, 2016).
21. Carlos Correa, 'Health and intellectual Property rights', 2001 WHO Bulletin vol. 79 n.5, available at, http://www.scielosp.org/scielo.php?script=sci_arttext&pid=S0042-96862001000500002 (Last visited on 2nd May, 2016).

❑❑❑

CHAPTER

20

Abuse of Dominance and Competition Law

Ranjana Dubey*

Introduction

In the pursuit of globalization, India has responded to opening up its economy, removing controls and resorting to liberalization.[1] The natural corollary of this is that the Indian market should be geared to face competition from within the country as well as from outside. Raghavan Committee was appointed to look after the working model of the MRTP Act. The Committee concluded that the MRTP Act was beyond repair and could not serve the purpose of the new competitive environment and proposed the enactment of a new Indian Competition Act.[2] The MRTP Act has become obsolete in the light of international economic developments relating to a competition laws. There is a need to shift the focus from curbing monopolies to promoting competition.

The Competition Act, 2002 seeks to ensure fair competition in India by prohibiting trade practices, which cause appreciable adverse effect on competition in markets within India. To promote and sustain competition in market, to promote the interest of consumer and to ensure freedom of trade carried on by other participant in market in India.[3]

Understanding Competition

The history of competition law is usually traced back to the enactment of Sherman Act in 1890 in the United States.[4] This act was directed against the power and predations of the large trusts formed in the wake of the Industrial Revolution where a small control group acquired and held the stock of competitors, usually in asset, and controlled their business.

Gradually, competition law came to be recognized as one of the key pillars of a market economy. Competition law deals with market failures on account of restrictive business practices in the market.[5] Restrictive business practices can be of many kinds and include inter-alia agreements to restrict competition, cartelization, predatory pricing, tie-in sales, re-sale price maintenance, abuse of dominance etc.[6] But one needs to understand what is actually meant by competition, Competition refers to a situation in a market place in which firms/entities or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, such as profits, sales, market share, etc. By responding to demand for goods and services with lower prices and higher quality, competing businesses are pressured to reduce costs, innovate, invest in technology and better managerial practices and increase productivity.

* Assistant Professor, Amity University, Noida, U.P.

This process leads to achievement of static, dynamic as also allocative efficiencies and increased choices and lower prices for consumers.

Importantly, competition is not automatic, and requires to be promoted, protected and nurtured through appropriate regulatory mechanism, by minimizing market restrictions and distortions and access to related productive inputs as markets, capital, technology, infrastructure services, human capital etc.[7]

Understanding Dominant Position

In the era of consumer sovereignty, interest of consumer is paramount. In order to achieve the goal of consumer welfare maximization, every existing as well as new participant in the market ought to have a level playing field to ensure market sustainability and development. However, in reality the markets are imperfect and hence not always necessarily favor consumer's interest.[8] Consequently, we require an external regime to maintain contestability and fairness in markets. Almost all modern competition regime across globe incorporated provisions prohibiting abuse of monopolistic and dominant behavior of an enterprise.

The European Court of Justice (ECJ) in United Brands Case[9] had made an attempt to interpret definition of dominant position as given under Article 82[10] of European Union Treaty. Dominant Position of an enterprise or firm or undertaking has direct link with the economic strength enjoyed by such which enables it to prevent effective competition in being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[11]

Under Competition Act, 2002 'dominant position' means a position of strength, enjoyed by an enterprise in the relevant market which enable it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.[12]

The opening clause of Sec 4 completely prohibits abuse of such dominance.[13] However, it is to be noted that what is prohibited under the Act is not the dominance but the misuse of such position by an enterprise.[14] There was an arithematic requirement under MRTP Act, 1969 to label an undertaking as "dominant" which is 25 per cent market share to label an undertaking as "dominant."[15]

Abuse of Dominant Position (AoD) Competition Act, 2002

There are primarily three stages involved in determining whether an enterprise has abused its dominant position.

The **first** stage is defining the relevant market.

The **second** is determining whether the concerned undertaking/enterprise/firm is in a dominant position/ has a substantial degree of market power/ has monopoly power in that relevant market.

The **third** stage is the determination of whether the undertaking in a dominant position/ having substantial market power/monopoly power has engaged in conducts specifically prohibited by the statute or amounting to abuse of dominant position/monopoly or attempt to monopolize under the applicable law.

Relevant Market

The first and foremost requisite to determine whether an enterprise had abused its dominance is the determination of relevant market. The Act, has defined such market with reference to:

Product Market relating to goods or services or;

Geographic Market describing the location of producers and sellers in the market or both.[16]

Relevant Product Market is defined in terms of "interchangeability and substitutability of product or services by the consumer due to characteristic of such product or services."[17] 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 (SSNIP).[18]

The CCI in its recent judgement[19] held that relevant product market is to be looked at form both demand and supply perspectives based on the characteristics of the product, its price and intended use. The relevant market was decided on the consideration of demand substitutability of various forms of entertainment. It was held that a cricket match could not be held to be substitutable by any other sport based on neither characteristics nor the intention of the viewer to watch a cricket match.[20]

A Relevant Geographical Market is that part of the territory where the conditions of competition for supply of goods or services are distinctively homogeneous and can be distinguished from the conditions prevailing in neighboring areas.[21]

Relevant geographic market is defined in terms of "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."[22]

Factors Determining Dominant Position

As against the traditional requirement of certain fixed proportion of market share to be in dominant position had been done away under the present Act. Now, various other factors came into play to determine the influence of an enterprise in the prevailing market. These include:

- a market share,
- a the size and resources of the enterprise;
- a size and importance of competitors;
- a economic power of the enterprise;
- a vertical integration;
- a dependence of consumers on the enterprise;
- a extent of entry and exit barriers in the market; countervailing buying power;
- a market structure and size of the market; source of dominant position viz. whether obtained due to statute etc.;
- a social costs and obligations and contribution of enterprise enjoying dominant position to economic development.

The Commission is also authorized to take into account any other factor which it may consider relevant for the determination of dominance.[23]

Abuse of Dominance

Following acts of an enterprise will be taken as relevant while establishing an abuse with regard to its dominant position:

- When it imposes directly or indirectly an unfair or discriminatory condition in purchase or sale of goods or service or price in purchase or sale (including predatory price) of goods or service; or[24]
- When it limits or restricts production of goods or provision of services or market there for or technical or scientific development relating to goods or services to the prejudice of consumers; or[25]
- Indulges in practice or practices resulting in denial of market access in any manner ; or[26]
- Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or[27]
- Uses its dominant position in one relevant market to enter into, or protect, other relevant market.[28]

To establish AoD explanation attached to Section has provided that if discriminatory or unfair prices were imposed to meet the competition there shall be no AoD on the part of an enterprise[29] So, it is clear that while considering whether an act has resulted in AoD or not one has to consider the effect it causes on the competition. If it distorts the competition than only it will be regarded as an abuse. Competition is said to be affected only when there is either reduction of output when numbers of players in market become less or when there is distortion of price.[30]

Abuses as specified in the Act fall into two broad categories:

- ***Exploitative*** (excessive or discriminatory pricing) and
- ***Exclusionary*** (for example, denial of market access).[31]

The "**predatory price"** under the Act 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 goods or provision of services, with a view to reduce competition or eliminate the competitors"*[32]

Role of Commission Competition of India

The commission has all powers to inquire into the alleged commission of AoD under the Act.[33] the commission has to consider the factor enumerated under Sec 19 (4) of the Act. The concerned authority to carry out an investigation is Director General who shall forthwith furnish the report regarding same. The commission has bestowed upon the power of Civil Court in respect of matters given the Code of Civil Procedure, 1908.[34]

On the completion of an inquiry the Commission has power to pass orders such as prohibiting the parties to continue and not to re-enter into such agreement, direct to modify the contract, any other order as it deem fit.[35] it can further impose penalty which can be can be up to 10% of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to bid-rigging or collusive bidding.[36]

Further the Act has provided for interim order during the pendency of an inquiry into abuse of dominant position.[37] With regard to hearing of appeals The Competition Appellate Tribunal (COMPAT) is established under Act, to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under specified sections of the Act.[38]An appeal has to be filed within 60 days of receipt of the order/direction/decision of the Commission.[39]

Comparative Analysis

A. The U.S.

The legislation governing completion law in U.S. is Sherman Act. Sec. 2 provides for AoD.[40] The basic statement of monopolization had two elements:-

(a) The possession of monopoly power in the relevant market. To demonstrate attempted monopolization there must be engagement in predatory or anti competitive conduct coupled with specific intent to monopolize with a dangerous probability of achieving monopoly power.[41] Monopoly power is inferred from very high market shares in a well defined product and geographic market and evidence that entry is difficult. Courts seem to consider 70 percent share sufficient to establish a prima facie case of monopoly power.[42]

(b) The willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. The Sherman Act was succeeded by the Clayton Act and the Robinson-Patman Act that made price discrimination and tying explicitly illegal.

B. The EU

The abuse by one or more undertakings of a dominant market position infringes Article 82[43] if there is an effect on trade between EC member states. In determining whether a dominant position exists, the Commission will consider a number of factors, including the market share of the undertaking(s) and its competitors and its customers' market power as well as other characteristics of the market.[44] A market share of 50 percent or greater, in the absence of exceptional circumstances, generally give rise to presumption of dominance.[45]

C. The U.K.

Competition Act of the U.K. defines dominant position as a position within the U.K; and "the U.K" means the U.K or any part of it".[46] Section 60 (1) of the UK Competition Act provides that the purpose of this section is to ensure that so far as is possible questions arising under this Part in relation to competition within the U.K are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community. Sub section (2) provides that at any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between-

(a) The principles applied, and decision reached, by the court in determining that question; and

(b) The principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

Further, sub section (3) states that the court must, in addition, have regard to any relevant decision or statement of the Commission. In the U.K. also, the main factors to be considered in the determination of whether an undertaking is in a dominant position includes market shares, barriers to entry and the conduct of the parties.

Conclusion

Being a recent piece of legislation regulating fair competition in the market, the Competition Act, 2002 had underwent several changes in light of changes happening both at domestic as well as at international level. Earlier the Monopolistic and Restrictive Trade Practices Act, 1969 had little and restricted application to the abuse of dominance situation. Thus, the prevalent competition law jurisprudence in India has ages barely seven years, and may not be as thorough as the US jurisprudence, which has been evolving since 1901. In spite of that, it is a progressive bit of legislation whose success depend on how it would be interpreted and applied to matters coming before the adjudicatory bodies.

References

(Endnotes)

1. K.S. Anantharaman. Lectures on Company Law and Competition Act: (Including Secretarial Practice).385 (10th edn. 2010).
2. S.V.S. Raghvan Committee .Report of High Level Committee on Competition Policy and Law. CCR (April 8, 2016, 10:34 p.m.). http://www.ccr.org.in/uploads/2/1/9/6/21961628/report_of_high_level_committee_on_competition_policy_and_law.pdf.
3. The aims and objective as stated: "An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."
4. George Kaufman. Bank Failures, Systemic Risk, and Bank Regulation 16 Cato J.1. 39. (1996).
5. Amitabh Kumar. Competition Law at a Glance. CCI. (April 8, 2016, 11:25 p.m.). http://cci.gov.in/images/media/articles/competition_lawglance_20080409115746.pdf .

6. *Hereinafter* AoD.
7. Ministry of Corporate Affairs. National Competition Policy 2011. MCA. (April 8, 2016, 11:46 p.m.). http://www.mca.gov.in/Ministry/pdf/Revised_Draft_National_Competition_Policy_2011_17nov2011.pdf (Visited on October 4, 2013).
8. Stuart M. Chemtob. The Role of Competition Agencies In Regulated Sector. CASS (April 8, 2016, 09:00 p.m.). https://www.justice.gov/atr/file/519376/download.
9. United Brands Co. v. Commission. 1 CMLR 429 (1978).
10. Article 82 of ECJ states: *"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States."*
11. *Supra* 9.
12. The Competition Act. 4 (a) (i-ii).*Explanation* (2002).
13. *Ibid*, 4(2002).
14. *Id*, 4(1) (2002). states that: "*no enterprise shall abuse its dominant position"*.
15. G.R. Bhatia. Assessment Of Dominance: Issues And Challenges Under The Indian Competition Act, 2002. Manupatra. (April,8th,2016, 7:45 p.m.). http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=8de19f8a-5bbd-42b6-a96a-692a0f376625&txtsearch=Subject:%20Commercial.
16. The Competition Act.2(r) (2002).
17. *Ibid*, 2(t) (2002).
18. Competition Commission of India. Provision Relating to Abuse of Dominance. CCI.((April,9th,2016, 7:25 p.m.). http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf.
19. Surinder Singh Barmi v BCCI, Case 61 of 2010. *See also* Kapoor GlassPvt Ltd v Schott Glass, Case 22 of 2010.
20. *id.*
21. T Ramappa. Competition Law in India Policy, Issues and Development, (2nd Edition. 2009).
22. The Competition Act.2(s) (2002).
23. *Ibid*, 19(4) (2002).
24. *Id*, 4(2) (a) (2002).
25. *Id*, 4(2) (b) (2002).
26. *Id*, 4(2) (c) (2002).
27. *Id*, 4(2) (d) (2002).
28. *Id*, 4(2) (e) (2002).
29. *Id*, 4(2) (a) *Explanation*(2002).
30. Sharda Girijesh Sharma. An Examination of Abuse of Dominance Under Indian Competition Act. SSRN.(April. 6th, 2016, 5:15 a.m.). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865811.
31. *Supra* 18.
32. The Competition Act.4 *Explanation* (b) (2002).
33. *Ibid*, 19 (2002).
34. *Id*, 26(1) (2002).
35. *Id*, 27(2002).
36. *Id*, 27(b) (2002).
37. *Id*, 33 (2002).
38. *Id*, 53A (2002).

39. *id.*
40. Section 2 of Sherman Act states that: "*Every person, who shall monopolize , or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.*"
41. Spectrum Sports Inc v. McQuillan 506 US 447 (1992).
42. The U.S v. E.I.du Pont de Nemours & Co. 351 U.S. 377 (1956).
43. *Supra* 10.
44. *Supra* 9.
45. Akzo Chemie BV v. European Commission 1986 ECR (1965).
46. The Competition Act. 18 (3) (1998).

❑❑❑

CHAPTER

21

Challenges in the Path of Competition Law and Provisions Available for the Anti-Competition Activities

Pradeep Kumar*

Abstract

Competition no doubt plays an important role in the attainment of the sound economic system. The legislation of competition laws targeted to achieve the promotion and sustenance of competition in the markets and the control of activities that are anti competitive. This research paper attempts to provide and discuss the issues before Indian Economy and the role of Competition Commission of India established under the Competition Act, 2002 for Competition activities.

Keywords: competition, law, cartel, policy, economy

Introduction

At persent there are in existence the competition laws within 90 states of the world. It was only 50 when WTO was established in the year 1995. There is a noticeable increase in number of the prevalence of competition law. This is due to the assessment by the countries that for liberalization competitive regime is very much essential. There are competition laws which are appropriate but problems are there in the course of their implementation. The problems include lack of political will, resource constraints, and absence of skilled staff and so on. Circumstances are different in different countries. In country like Zambia, there is efficient competition regime but its authority is personality it's influenced. In Pakistan there is high degree of political intervention and in India there is lack of interest in competition cases and their dealing.

Discussion

There is also lack of awareness. Moreover nothing has been done on International cartels in India. The popular case is vitamin cartel case. There provided all the essential information and data required by CUTS to Director General (Investigation and registration) of MRTP but despite nothing is done. There are 3 cases given. First is the merger of Coca Cola and Cadbury Schwepps. Second is the cement sector and the American Soda Ash export cartel. Conducted during the second phase of India. There was little effect of the merger of Coca Cola and Cadbury Schweppes as the share of Cadbury was almost negligible. But inspite this no action has been taken. The cement industry has been affected by the cartelisation in the cement industry in India for

* Assistant Professor, LHP College of Law, Sirsa, Research Scholar, JJT University, Jhunjhunu, Rajasthan.

many years. But no action has been taken yet. One case is subjudice in Supreme Court and the investigation is going on.

Whereas the case of Soda ash gain some speed and had many new relevant findings. There is problem for cross border competition cases due to the absence of any kind of cooperation mechanism between the MRTP and other competition authorities. There must be given concentration on the building capacity of the competition authorities and for stake holders of the nation like consumer organization, trade union and the like. The issue of competition policy has its importance both in national and international context.

The Competition Law of India, Monopolies and Restrictive Trade Practices Act 1970 was affected by several foreign laws like Sherman Act Clayton's Act, etc. The aim of these laws were the prevention and control of concentration of economic powers, control of monopolies, prohibition of monopolistic trade practices and prohibition of restrictive and unfair trade practices and prohibition of restrictive and unfair trade practices. The amendments were made from time to time, in the year 1980, 82, 84, 85, 86, 88 and 1991. The amendment done in the year 1984 and 1991 are more vital. The amendment made in the year 1984 introduces provisions to deal with unfair labour practices and also a new authority was created as DG (I&R). While in 1991 amendment, the public sector was included in the purview of this Act. But the provisions related to concentration of economic power were removed. The powers provided to the MRP commission is the same as that of civil courts under the civil procedure code 1908. The main thing which is prime worthy to discuss here is that competition authorities is typically staffed by the retirees from judiciary or government or government officials deputation. Two out of 4 members are from background of general administration and there is no training programme of staff at any phase. The total yearly budget includes 15-20 millian rupees out of which 2/3 goes on salary, wages and the residual goes spent on the establishment costs. Out of the total office space of 16000 square feet only 450 sq. feet is given to library and there is absence of database on industries, scanner and international publications. The commission attains 17 newspapers and 21 periodicals. It has 17 telephone lines and 10 computers joined printers and only one single training programme on computer course. There are thousands of pending cases which are majourily of compensation cases. In India, specifically in cartel cases, the few investigations that were initiated were stayed by the High Courts or the Supreme Court. India has competition law but without proper implementation. The general know–how about the competitive law is high but very few people know beyond that and about the anticompetitive activity in India. The awareness on cross border competition is also low. People do not know much about the international mergers. Only 40% of them know about vitamins cartel & 30% know about soda ash cartel. There is a little awareness on shipping cartel. This is one of the huge trade barriers. India was greatly affected by the heavy electrical equipment cartel and flat rolled steel cartel but no action was done for that. Perhaps the authority did not know about the existence of such cartels.

This is confusion between dumping and predatory price with reference to soda ash case. Predotary price is difficult to prove. Some acceptable definitions are there for dumping but nothing much available for predatory pricing. Moreover the services of WTO are slower with less access to the developing states. There is mixed feeling on the requirement of competition policy and it is not sure that the strengthening the institutional framework for implementation of competition regime is the solution for all problems. Competition law should be used a mechanism and instrument to regulate the consolidation of bio-tech industry and the competition in this area. To low down the trade barriers are not sufficient and it may be supported by a multilateral policy to enhance competition internationally. Cartels can take higher or lower prices as per the situation. Developed countries and multilateral agencies which includes WTO, UNCTAD, the world bank and regional development banks like the ADB be provided with technical assistance to developing states so that the developing states may be at ease to implement competition laws.

Moreover there is legislation the competition Act, 2002 that provides for provisions for controlling and regulating Competition in the sphere of competition and the available legal provisions related to competition. Following are few of those:

Section 3. Anti-competitive agreements –

1. No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
2. Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.
3. Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of similar trade of goods or provision of services, which –
   (a) Directly or indirectly determines purchase or sale prices;
   (b) Limits or controls production, supply, markets, technical development, investment or provision of services;
   (c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
   (d) Directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

   Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.
4. Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including –
   (a) Tie-in arrangement;
   (b) Exclusive supply agreement;
   (c) Exclusive distribution agreement;
   (d) Refusal to deal;
   (e) Resale price maintenance, shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.
5. Nothing contained in this section shall restrict –
   (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:
      (a) The Copyright Act, 1957 (14 of 1957);
      (b) The patents Act, 1970 (39 of 1970);
      (c) The Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
      (d) The Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
      (e) The Designs Act, 2000 (16 of 2000);
      (f) The Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);
   (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Section 4. Abuse of dominant position –

1. No enterprise shall abuse its dominant position.
2. There shall be an abuse of dominant position under sub-section (1), if an enterprise:
   (a) directly or indirectly, imposes unfair or discriminatory –
      (i) condition in purchase or sale of goods or services; or
      (ii) price in purchase or sale (including predatory price) of goods or service; or

   Explanation: For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or

   (b) limits or restricts:
      (i) production of goods or provision of services or market there for; or
      (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
   (c) indulges in practice or practices resulting in denial of market access; or
   (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

Section 6. Regulation of Combinations – No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

Section 7. Establishment of Commission –

1 With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India."

2. The Commission shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.
3. The head office of the Commission shall be at such place as the Central Government may decide from time to time.
4. The Commission may establish offices at other places in India.

Section 13. Financial and Administrative Powers of Member Administration – The Central Government shall designate any member as member Administration who shall exercise such financial and administrative powers as may be vested in him under the rules made by the Central Government.

Provided that the member Administration shall have authority to delegate such of his financial and administrative powers as he may think fit to any other officer of the commission subject to the condition that such officer shall, while exercising such delegated powers continue to act under the direction, superintendence and control of the Member Administration.

Section 18. Duties of Commission – Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India.

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country.

Section 19. Inquiry into certain agreements and dominant position of enterprise –

1. The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on –
   (a) Receipt of a complaint, accompanied by such fee as maybe determined by regulations, from any person, consumer or their association or trade association; or
   (b) A reference made to it by the Central Government or a State Government or a statutory authority.
2. Without prejudice to the provisions contained in sub-section 1, the powers and functions of the Commission shall include the powers and functions specified in sub-section 3 to 7.
3. The commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely :
   (a) Creation of barriers to new entrants in the market;
   (b) Driving existing competitors out of the market;
   (c) Foreclosure of competition by hindering entry into the market;
   (d) Accrual of benefits to consumers;
   (e) Improvements in production or distribution of goods or provision of services;
   (f) Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.
4. The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors namely:-
   (a) Market share of the enterprise;
   (b) Size and resources of the enterprise;
   (c) Size and importance of the competitors;
   (d) Economic power of the enterprise including commercial advantages over competitors;
   (e) Vertical integration of the enterprises or sale or service network of such enterprises;
   (f) Dependence of consumers on the enterprise;
   (g) Monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
   (h) Entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
   (i) Countervailing buying power;
   (j) Market structure and size of market;
   (k) Social obligations and social costs;
   (l) Relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition;
   (m) Any other factor which the commission may consider relevant for the inquiry.

5. For determining whether a market constitutes a "relevant market" for the purposes of this Act, the Commission shall have due regard to the "relevant geographic market" and "relevant product market".
6. The Commission shall, while determining the "relevant geographic market", have due regard to all or any of the following factors, namely:
   (a) Regulatory trade barriers;
   (b) Local specification requirements;
   (c) National procurement policies;
   (d) Adequate distribution facilities;
   (e) Transport costs;
   (f) Language;
   (g) Consumer preferences;
   (h) Need for secure or regular supplies or rapid after-sales services.
7. The commission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:
   (a) Physical characteristics or end-use of goods;
   (b) Price of goods or service;
   (c) Consumer preferences;
   (d) Exclusion of in-house production;
   (e) Existence of specialized producers;
   (f) Classification of industrial products.

Section 21. Reference by statutory authority –

1. Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.
2. On receipt of a reference under sub-section (1), the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it deems fit:

   Provided that the Commission shall give its opinion under this section within sixty days of receipt of such reference.

Section 26. Procedure for inquiry on complaints under section 19 –

1. On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter.
2. The Director General shall, on receipt of direction under sub-section 1, submit a report on his findings within such period as may be specified by the Commission.
3. Where on receipt of a complaint under clause (a) of sub-section 1 of section 19, the Commission is of the opinion that there exists no prima facie case, it shall dismiss the complaint and may pass such orders as it deems fit, including imposition of costs, if necessary.

4. The Commission shall forward a copy of the report referred to in sub-section 2 to the parties concerned or to the Central Government or the State Government or the statutory authority, as the case may be.
5. If the report of the Director General relates on a complaint and such report recommends that there is no contravention of any of the provisions of this Act, the complainant shall be given an opportunity to rebut the findings of the Director-General.
6. If, after hearing the complainant, the Commission agrees with the recommendation of the Director General, it shall dismiss the complaint.
7. If, after hearing the complainant, the Commission is of the opinion that further inquiry is called for, it shall direct the complainant to proceed with the complaint.
8. If the report of the Director General relates on a reference made under sub-section 1 and such report recommends that there is no contravention of the provisions of this Act, the Commission shall invite comments of the Central Government or the State Government or the statutory authority, as the case may be, on such report and on receipt of such comments, the Commission shall return the reference if there is no prima facie case or proceed with the reference as a complaint if there is a prima facie case.
9. If the report of the Director General referred to in sub-section 2 recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

Conclusion

The national legal provisions must be drafted in such a way so as to make them acceptable in international community which would in turn check anti competitive practices. The competitive policy must be effective appropriate. Due to lack of coordination among the competition authority, there may be inefficient implementation of the competition policy. Lack of internal coordination among these authorities is a barrier in implementation properly. The cases of competition nature must be dealt with proper care and caution and that too within a speedy trial. The will power of the administrative and competitive authorities are required for just and speedy disposal of these kinds of litigation. There are ample competition laws in India. These have to be implemented wisely and effectively.

References

(Endnotes)

1. Report on Competition Challenges in a Globalising Economy : Issues before India, 4th October, New Delhi, The Competition Act, 2002 (12.0.2003).
2. Albaek, S., Mollgaard, P. and Overgaard, P.B. (1997) "Government-assisted oligopoly coordination? A *concrete* case." *Journal of Industrial Economics*, 45, 429-443.
3. Buccirossi, P. (2000) "Demand Rigidity with Search or Switching Costs. Some Unpleasant Results". Mimeo, LEAR, Rome, September.
4. Competition Commission (1999) Summary of *The Supply of Petrol*, www.competitioncommission. org.uk/ reports/265.htm#The State of Competition.
5. Cruickshank, D. (2000) *Competition in UK Banking: A report to the Chancellor of the Exchequer*. London, The Stationery Office.
6. Department of Trade and Industry (2000), *Switching Suppliers; a research study commissioned by the Consumer Affairs Directorate*. London, November.

7. Giulietti, M., Waddams Price, C. and Waterson, M., (2000) "Redundant regulation? Competition and consumer choices in the residential energy markets", Centre for Management under Regulation Research Paper 00/4, University of Warwick, November.
8. Insurance Statistics Yearbook, (2000) 1989-1999. London, Association of British Insurers.
9. Klemperer, P. (1995) "Competition when consumers have switching costs: An overview with applications to industrial organization, macroeconomics and international trade." *Review of Economic Studies*, 62, 515-539.
10. Lynch, J.G. and Ariely, D. (2000) "Wine Online: Search Costs Affect Competition on Price, Quality,and Distribution" *Marketing Science* 19, 83-103.
11. Monopolies and Mergers Commission (1975) *Contraceptive Sheaths.* HC135, 1974-75, London, HMSO.
12. Monopolies and Mergers Commission (1982) *Contraceptive Sheaths*. Cmnd 8689, London HMSO.

❑❑❑

CHAPTER

22

Intellectual Property Rights and Competition Policy

Himani Sagar*

Abstract

Intellectual property and competition law have divergent intellectual cultures. The former creates monopolies while the later battles monopolies. Thus, the question which arises is whether they are in balance or in conflict? In light of this question the paper examines the present literature with respect to both the laws. The paper also focuses on the traditional and existing views regarding intellectual property rights and competition policy. The paper suggests that the existing friction between the two can be reduced if competition agencies are constrained either by statutes or administrative policy from seeking to fine tune the IPR protection. The paper also explores how competition and innovation both increase output whether measures by quality or quantity. The researcher also proposes some recommendations by which "sweet spot" where the aggregate effect of IP & competition policy is optimized. And thus, concludes as have been said by Chief Seattle "All things are connected."

Keywords: Competition Policy, Intellectual Property, Innovation, Monopolies.

Introduction

Today intellect itself is assuming the qualities and attributes of the property. Earlier knowledge itself used to be source of property, but now knowledge and property are getting inseparable. The people also comprehend this new property. This realization is reflected in steady increase in patent filing in India and world over. Property, as an enforceable interest is assuming different dimensions in the contemporary knowledge-society, with information technology shrinking borders of different nations and linking virtually every one with another, irrespective of oceans and distances.[1]

Competition law and Intellectual Property Rights (IPRs) policies are bound together by the economics of innovation and an intricate web of legal rules that seek to balance the scope and effect of each policy. IPRs protection is a policy tool meant to foster innovation, which benefits consumers through the development of new and improved goods and services, and spurs economic growth. It bestows on innovators the rights to legitimately exclude, for a limited period of time, other parties from the benefits arising from new knowledge, and more specifically from the commercial use of innovative products and processes based on that new knowledge. In other words, innovators or IPRs holders are rewarded with a temporary monopoly by the law to recoup the costs incurred in the research and innovation process. As a result, IPRs holders earn rightful and reasonable profits, so that they have incentives to engage in further innovation.

* B.A., LL.B. (Hons.) 4th Year, Vivekanand Institute of Professional Studies (VIPS), Pitampura, New Delhi.

Competition law, on the other hand, has always been regarded by most as essential mechanism in curbing market distortions, disciplining anticompetitive practices, preventing monopoly and abuse of monopoly, inducing optimum allocation of resources and benefiting consumers with fair prices, wider choices and better qualities. It, therefore, ensures that the monopolistic power associated with IPRs is not excessively compounded or leveraged and extended to the detriment of competition. Besides, while seeking to protect competition and the competitive process, which, in turn, prods innovators to be the first in the market with a new product or service at a price and quality that consumers want, competition law underscores the importance of stimulating innovation as a competitive input, and thus also works to enhance consumer welfare.

Indeed, the relationship between IPRs and competition law has been a complex and widely debated one. It is not just one of balances between Competition Law and Intellectual Property Rights conflicting or complementary systems/principles, but also one of different levels of market regulation[2] as well. Errors or systematic biases in the interpretation or application of one policy's rules can harm the other policy's effectiveness.[3] A challenge for both policies is to find the proper balance of competition and innovation protection.

What is IP Law?

Our legal system provides certain rights and protections for owners of property. The kind of property that results from the fruits of mental labour is called intellectual property. It essentially covers trademarks, copyrights, patents, designs, lay-out designs, protection of plant varieties, geographical indications& confidential information.[4] Thus, intellectual property is a term referring to creations of intellect for which a monopoly is assigned to destined owners by law.[5] The main motivation of its protection is to promote the progress of science and technology, arts, literature and other creative works and to encourage and reward creativity.[6] The contribution of intellectual property is sine qua non for the industrial and economic development of nation. The prosperity archived by nations is, to a great extent, the result of exploitation of their intellectual property.[7] Intellectual property relates to pieces of information which can be incorporated in tangible objects at the same time in unlimited number of copies at different locations anywhere in world. The property is not in those copies but in the information reflected in those copies.[8]

According to Article 2(viii) of the convention establishing the World Intellectual Property Organization (WIPO) 1967, intellectual property includes rights relating to (i) literary, artistic and scientific works; (ii) performance of performing artists, phonograms and broadcasts; (ii) performance of performing artists, phonograms and broadcasts; (iii) inventions in all field of human endeavor : (iv) scientific discoveries; (v) industrial designs; (vi) trademarks, service marks and commercial names and destinations ; (vii) protection against unfair competition; and all other rights resulting from intellectual activity in industrial, scientific, literary and artistic fields.

All these are products mainly of intellect and hence called intellectual property rights. In India there are legislations covering the above mentioned rights.[9]

Evolution of IP Law

The intellectual property regime is managed by many conventions and agreements in the world and TRIPs Agreement is the last one in the series of agreement. They are-

(i) Paris Convention for Protection of Industrial Property, 1883(revised in 1967 & 1979).

(ii) Berne Convention for Protection of Literary & Artistic Works, 1886(last revised in 1971).

(iii) Madrid Agreement,1891.

(iv) Universal Copyright Convention,1882.

(v) Lisbon Agreement, 1891.

(vi) Rome Convention, 1961.
(vii) Convention Establishing the World Intellectual Property Organization, 1961.
(viii) Geneva Convention.
(ix) Treaty on Intellectual Property In Respect of Integrated Circuits, 1989.
(x) The TRIPs Agreement, 1995.

During the late 19th century, the demand for Intellectual property rights increased due to high-tech development and expansion of international trade. Meanwhile Intellectual Property transactions in the international market increased which gave rise to contradictions regarding IPRs and regional restrictions. In order to resolve these contradictions, various international conventions were enacted. The convention of "Paris convention for protection of Industrial Property" was the first convention came up in 1883 established by Germany, France, Belgium and 10 other countries for the protection of Industrial Property, followed by "Berne Convention for the protection of Literary and arts" first of its kind for the protection of Copyright. It was in 1993 when WTO adapted these international conventions. WIPO (World Intellectual Property Rights Organization) was established in 1970 and it was in charge of 20 international conventions relating to protection of intellectual property rights. TRIPS (Trade Related Aspects of Intellectual Property Rights) agreement in 1994 achieved the goal to link international trade with people's intellectual property rights. It succeeded in providing a more unified higher platform.[10]

Competing Rationale for Protection

The purposes for which intellectual property rights are utilized and the role they play in industry and trade today, brought them to the forefront in all plans of economic, social and cultural development in modern world. Promotion and protection of the rights in intellectual protection and their enforcement have contributed greatly to the industrial development in every state. Intellectual property rights opened new horizons in all fields of human activity, helped inventions, promoted technology, multiplied production of goods, globalised markets and spread better living standards across the world. As knowledge spreads, transfer of technology becomes easier.[11]

Laws on intellectual property have two dimensions. On one side, the law assures protection to authors and inventors to commercially exploit their rights for a limited period. On the other side, the law is enforced against all others engaged in the same art preventing them from infringing upon those rights by imposing stringent punishments and heavy penalties it is here the competition comes into play. Economic theory proves that countries where intellectual property protection was ensured to all those who were diligent, hardworking and intelligent, industrial production and trade have increased manifold. Negligence and laxity in this regard rendered many society lag behind.[12]

The conventional economic rationale for IPRs protection is that they promote innovation, including its dissemination and commercialization by establishing enforceable property rights for creators of new and useful products; ensuring more efficient processes and original work of expression; and preventing rapid imitation from reducing the commercial value of innovation and eroding incentives to invest to the detriment of consumers.[13]

Thus, the existence of intellectual property rights is based on following reasons:[14]

- Incentive To Invent
- To Encourage Disclosure
- Commercialization Of Technology
- To Increase Dynamic Efficiency

Abuse of Intellectual Property

Intellectual property laws confer exclusive rights on the owners of intellectual property. These are not absolute but subject to such conditions which have been laid down in the law. The intellectual property laws and other laws such as competition Act, 2002 ensures that the owners of such intellectual property do not abuse their exclusive rights.

The TRIPs Agreement also recognizes the fact that some licensing practice or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

In India, section 3 of the Competition Act, 2002 prohibits anti-competitive agreements. Section 3(4)[15] prevents enterprises or persons at different stages or levels of the production chain in different markets, to enter into agreements in respect of production, supply, distribution, storage, sale of price of, or trade in goods or provisions of services, if such agreements causes or is likely to cause an appreciable adverse effect on competition in India

These agreements shall include the following:

(i) Tie-in arrangement
(ii) Exclusive supply agreement
(iii) Exclusive distribution agreement
(iv) Refusal to deal
(v) Resale price maintenance.

CCI has imposed penalty of ₹ 1773.05 crore on Coal India Ltd. (CIL) for abuse of dominance under section 4 of the Competition Act, 2002. India recently changed its FDI policies in order to avoid abuse of dominance by companies.[16]

The definition of relevant market is important to determine abuse of dominance with specific reference to that market. Section 2(r) of the act[17] defines relevant market.

In, In Re M/s. SRS Real Estate Limited, the competition commission of India held that if there is more than one equal player in the same geographical area, there is no infringement of sections 8 & 4 of the Act.[18]

Delhi High Court in the case of Hawkins Cookers Limited v Murugan Enterprises held that a well-known mark cannot be permitted to create a monopoly in the market on the basis of being a well known trade mark by controlling the ancillary and incidental market. This is considered as abuse of dominant position and is prohibited.[19]

According to section 27 of the Act,[20] the Competition Commission of India has the authority to penalize IPR holders who abuse their dominant position. Further under section 4 of the Act the commission is also authorized to penalize the parties to an anti-competitive agreement, which is in contravention of section 3 of the Act.[21]

Competition Law and Policy

What is Competition Policy?

It basically promotes efficiency and maximizes welfare. Competition policy essentially comprises in place a set of policies that promotes competition in local & national markets, which includes a liberalized trade policy, openness to foreign investment& economic regulations.

What is Competition Law?

Completion law not only ensures competition in market, it also actively checks practices that are harmful to the competitive process.[22] It basically comprises of legislations, judicial decisions & regulations specifically

aimed at preventive anti competitive business practices& unnecessary government intervention and abuse of market power and thus preserving the competitive structure of, markets.

Why Competition?

During the nineteenth century, both law and economics began to develop theories of competition as well as ideological defenses of competition as a social good. In both classical law and classical economics, "competition" carried a very different meaning. Competition was not a theory about price/cost relationships, as it came to be IN neo classical economics, nor was it a theory about the "struggle of survival", as it was for some Social Darwinists during the Gilded Age.[23]

Competition was defined by the court as a process that required numerous participants and decentralization.[24] Competition laws have been defined as the magna carta of free enterprise. They are important for the preservation of economic freedom and free enterprise system.[25]

The need for completion arises because market can suffer from failures and distortions, and various players can resort to anti-competitive activities such as cartels, abuse of dominance etc. Which adversely impact economic efficiency and consumer welfare.[26] Thus, there is a need for respect to competition law to provide a regulative force which establishes effective control over economic activities. Competition is the engine of free enterprise. Market economy performs better when there is competition in the market.

Apart from free market system, competition aw also has social purposes. The social purpose rationale for competition law finds its introduction in the passage of justice hands in United States vs. aluminum Co. of America,[27] where he preferred the preservation of small businesses over the preservation of free market. He noted that:

"it is impossible , because of its, indirect social and moral effects, to prefer a system of small producers, each dependent for his success upon his own skill and character , to one in which the great mass of those engaged must accept the direction of a few."

Evolution of Competition Law

History of competition law can be traced back to Roman Empire: the modern day competition law has its genesis in the American antitrust statutes like Sherman Act of 1890 and Clayton Act of 1914. But it was only after the Second World War that the American concept of Competition law became widely accepted. European Community incorporated the provisions of Competition law in Articles 81 and 82 of Treaty of Rome, signed in 1957. Subsequently most of the major countries, like China, Brazil, Russia, Singapore, South Korea and Japan established their own competition regimes. Today, over hundred jurisdictions have their competition regimes in place and any enterprise having aspirations to go multinational cannot afford to ignore this law.

The Indian Parliament passed the Competition Act in 2002 and it received the President's assent in January, 2003. To fulfill the objectives of the Act, government established CCI with effect from October 14, 2003. Certain provisions of the Act were challenged in the Hon'ble Supreme Court and Hon'ble Chennai High Court. In response, the Government promised to carry out certain amendments to the Act. This amendment bill was introduced in Parliament in 2006 and was adopted in 2007.[28]

Objectives and Scope of IPR & Competition Law

It is a common fallacy that competition law and IPRs have conflicting goals. It has emerged from the traditional notions behind the subject matter of the two domains without deep scrutiny of its background. IPR is usually taken as a tool to confer exclusive monopoly thereby preventing others from participating and offering products in the market. This can be directly equated with an adverse impact on competition in the market. It can also be understood simply in the light of the formation of monopoly by licensees of different

products in the market. IPR seems to narrow down the free and competitive market while competition law revolves on the pivot of promoting efficiency and preventing distortions in the market.

Analyzing IPR in the background of reward theory also clarifies the situation of the endless conflict between competition law and intellectual property law which derives its color from the policy of reward theory i.e. reward to the inventor.[29] The law was inclined to reward the creator for disclosure of his work to the public and thereby granting access to everyone else to something that would otherwise remain in abyss. Protection of such nature was impliedly the cost for the disclosure to the society at large. Thus, IPR was always focused on individual rights and thereby led to the initiation of conflict with the confinement of individual rights with the advent of competition law.

However, a close observation reveals that both IPR and Competition Law work towards a common objective. There is a unanimous consensus on the fact that both aim towards promotion of innovation and consumer welfare.[30] This can be witnessed from other jurisdictions as well. According to the U.S. Department of Justice & the Federal Trade Commission-

"… [Competition] laws aims towards protection of robust competition in the market, while IP laws work to protect the necessary ability to earn a return on the investments that is necessary to innovate. Both lead to enter the market with production of desired technology, service or product."[31]

Legal Monopoly Versus Economic Monopoly

Not every use of intellectual property needs interference from competition authorities. A legal monopoly does not necessarily lead to an economic monopoly. The mere ownership of IP does not lead to a dominant position in the market.[32] By extension the mere use of IPR does not constitute an abuse of the dominant position.[33] Further, monopoly power which is legally acquired is not unlawful.[34] The goal of competition law is not to prohibit monopoly; but to prohibit anti-competitive conduct.[35] It accepts the achievement of an economic monopoly by means of research and development and consequent IPRs as valid and legitimate conduct, which amounts to competition on merits.[36] It recognizes the right to prevent copying even if it results in the denial of access to others. Pricing of IPRs even by dominant firms is allowed to ensure adequate return on investments. The uses that are regulated by competition law are those which are *not considered to be legitimate*, i.e. unjustifiable behavior after taking account of the factors listed above.

Critical Analysis in the Light of Judicial Precedents

Since the emergence of MRTP Act and Competition Act, 2002, plethora of cases have emerged, laying down principles related to the subject matter of competition law and IPR. Anti-competitive agreements[37] and abuse of dominant position[38] along with other subheads form the framework of Competition Act that determines the regulation of IPR pertaining to competition law.

There have been various landmark judgments pertaining to the conflict between IPR and the competition law. Various authorities and agencies are continuously deliberating and debating over this contentious issue.

***Aamir Khan Productions Pvt. Ltd.* v. *Union of India*[39]** is a landmark judgment delivered by the Bombay High Court wherein the Court while dealing with a matter pertaining to the issue of IPR held that CCI has the jurisdiction to deal with all cases concerning competition law and IPR.

In ***Kingfisher* v. *Competition Commission of India*[40]** also, the Court reiterated that the CCI is competent to deal with all the issues that come before the Copyright Board. Such cases enumerate the fact that the Indian Courts are ready for dealing with emerging cases of competition law involving IPR. Competition law has provided S. 3(5) as a provision that highlights interface between competition and IPR issues. It is a blanket provision incorporated in the competition law. However, there is no provision under S. 4 on the ground of IPR abuse or public policy for interference in such cases. It specifically enumerates that action can be taken only in cases where there is abuse of dominant position leading to appreciable adverse effect on the competition.

Cartel is yet another issue that is dealt elaborately under the competition law. Formation of cartels is a prevalent practice among industries and firms. Recently the proprietors owning IPRs have indulged in formation of cartels and thereby causing distortion of competition in the market. An evident example of the same can be traced from the film industry as it involves both IPR issues i.e. copyright along with competition law provision affecting the industry.

In the case of ***FICCI Multiplex Association of India* v. *United Producers/Distributors Forum (UPDF)*,**[41] the petitioner (FICCI) filed a complaint against the UPDF alleging the formation of market cartels in the film industry. This was deliberately done by UPDF to boost their revenue, and thus, it had refused to strike deal with the multiplex owners. This has direct and drastic effect on the multiplexes as their business is wholly dependent on the film industry.

Consequently, this resulted in anti-competitive practice of refusal to deal leading to distortion of competition adversely for gaining profits. Further, defendants held 100 per cent share in the industry and thus indulging in limitation of supply of films in the market qualifies as an anti-competitive practice. It qualified as a violation of S. 3(3) the Competition Act too. The parties on delivery of the show cause notice filed a petition in Bombay High Court on the pretext of lack of jurisdiction of CCI to decide a matter pertaining to IPR. The Court citing S. 3(5) of the Competition Act 2002 read with S. 3(1) held that the latter section cannot curtail the right to sue for infringement under IPR, and further CCI has jurisdiction to entertain all matters that can be presented before the Copyright Board.

Recently, CCI also held that copyright is not an absolute right but is merely a statutory right under the Copyright Act, 1957.62 Further, in ***Microfibers Inc* v. *Girdhar & Co.***, the Court observed that: "The legislative intent was to grant a higher protection to pure original artistic works and lesser protection to the activities that are commercial in nature. Thus, the intent of the legislature is explicitly clear that the protection provided to a work that is commercial in nature is at lower pedestal than and not to be equated with the protection granted to a work of a pure Article."63 It can, therefore, be safely concluded that the precedents enumerate greater protection to original artistic works as compared to the furtherance of commercial interest. CCI has come out with a landmark decision as it undoubtedly moved towards checking the abuse of dominance by forming cartels in the market of the film industry.

In ***Hawkins Cookers Limited* v. *Murugan Enterprises,***[42] The Delhi High Court held that a well-known mark on the pretext of being prominent and well-known cannot be left unchecked to create a monopoly in the market by indulging in practices of controlling the incidental market. The same would fall under the category of abuse of dominant position in the market and is prohibited.

The status of law in U.S. is no different. In ***Twentieth Century Music Corp* v. *Aiken,***[43] the Court reiterated that the immediate aim of the copyright law is to make sure that the author gets a fair return; however, the ultimate aim is to stimulate artistic work for public good. Thus, the aim and objective of both IPR and Competition law is to promote innovation and interest of the public along with furtherance of competition in the market for common good. A similar approach is adopted by the ECJ which can be inferred from the case of *Hoffmann-La Roche 66* and *United Brands* 67.

In ***Entertainment Network (India) Limited* v. *Super Cassette Industries Ltd*,**[44] Hon'ble Supreme Court in length stated the interface between competition law and effect of IPR on competition in the market. Refusal to deal is one such limb of anti-competitive practices that is covered under the competition law. The Court observing the same held that, though the proprietor of a copyright exercises absolute monopoly over it, but the same is limited in the sense that any transaction with unreasonably tainting or limiting competition would amount to refusal. Undoubtedly, IPR owners can enjoy the fruits of their labour via royalty by issuing licenses but the same is not absolute.

The jurisdiction of other countries also highlights the fact that exercise of rights under IP laws is subject to the competition law/anti-trust law. Dealing a case pertaining to refusal of license, a U.S. Court in ***Kodak II***[45]

and in *re Independent Service Organizations*,[46] held that IPR does not grant an unfettered right to violate the anti-trust law.

Further, in ***United States* v. *Microsoft,***[47] the Court held that the IP laws are not immune from anti-trust laws and all the general laws are equally applicable on IP laws and exclusive right holders.

Excessive pricing and predatory pricing is yet another problem that competition law is grappling with. It is also closely associated to refusal of license.

In ***Union of India* v. *Cyanamide India Ltd. and another*,**[48] the Hon'ble Court held that overpricing of lifesaving drugs is also prohibited, and the same does not fall beyond the ambit of price control. Competition law is currently facing a lot of trouble in keeping the branded agencies and patented products under the ambit of price control. In case of lack of substitutes, there's always a potential danger hovering in the form of monopolies. The domain of life saving drugs in relation to high pricing is a major concern in developing nations. Competition law is enacted to promote fair practices prevent abuse of dominant position and completion in the market that is prevalent in the form of tie-in arrangements, excessive pricing, exclusive licensing etc.

In the case of tying arrangements, a highly usable product or service is tied with a less marketable product or service and the seller agrees to sell both together irrespective of the choice of the buyer. Practicing illegal, tying arrangements is against the competition law or anti-trust law.

In ***Tele-Direct* case**,[49] it was observed that the selective refusal to license a trademark constitutes an abuse of the dominant position. Recently, the ***Microsoft* case** is yet another example that dealt with the issues of abuse of dominant position and refusal to deal with third parties and inclusion of tying arrangements.[50]

Recommendations

1. The concept of abuse of dominance is not defined in IPR clearly and hence a proper definition should be formulated which should be like" unjustified use of IPR which is detrimental to the interests of the society and which is proved beyond any reasonable doubt."
2. Using licensing as a strategy to expand IPRs and restrict or eliminate competition for improper benefit should also be considered as abuse of dominance.[51]
3. A clear cut demarcation should be made between abuse of IPRs and exploitation of IPRs.
4. Refusal to license should be considered as abusive only in exceptional circumstances.
5. Compulsory licensing should be resorted to only for the welfare of the society.
6. Restriction through IPR protection and putting any barrier to entry should be considered as abuse of dominance.[52]

Conclusion

The incentive theory for the protection of intellectual property rights rewards the inventor by giving her/him a monopoly rights for a limited period of time. The competition policy on the other hand acts against monopoly rights which are abusive in nature.[53] The interaction between intellectual property and completion policy is neither conflicting nor replacing the legislations for each other. The monopoly rents granted to an innovator is for a limited period of time and the competition law intervenes whenever it crossed that limit of monopoly in the market. Now the courts settled the principle that "interest of consumer and market" is of supreme importance.

There is a difference between economic and legal monopoly which must be maintained. The former falls within the domain of competition authorities, while the latter with IP authorities. It is not the existence of a dominant position that threatens competition in a market, but its abuse and competition law must be

concerned only with the latter. When there is abuse of dominant position, it is irrelevant what property right allowed the enterprise to attain such a position.[54]

Thus, it can be concluded that competition law and IPR are not in conflict and thus it is not IPR versus Competition law but IPR and Competition law. They are two different means to attain one goal that is welfare of the consumers by means of development.

The woods are lovely,
dark and deep. But I
have promises to
keep, and miles to go
before I sleep……

References

(Endnotes)

1. Lecture by: Prof. Dr. Madabhushi Sridhar on 05-10-2009 at NALSAR University of law, Hyderabad.
2. US Federal Trade Commission (2003), To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy, Chapter 1, p. 2.
3. The definition of welfare in regard is the sum of consumer's surplus and producer's surplus.
4. Prof. A. Chandrasekaran: A textbook on IP Law. 2004, Competition law today Concepts, Issues, And The Law in Practice edited by Vinod Dhall (Oxford University Press), at pg. 129.
5. Arai, Hisamitsu "Intellectual Property Policies for the twenty first century: The Japanese Experience in wealth creations", WIPO Publication Number (E). 2000.wipo.int.
6. V. K. Ahuja-law relating to IPR second Edition 2013(lexis nexis), at pg 3.
7. Supra note 3, at para 1.
8. Supra note 3 at Para 2.
9. N.K. Acharya text book on intellectual property rights 6th edition 2012, at pg. 1.
10. Jayashree Watal, Intellectual Property Rights in WTO and Developing Countries, 2001 (Oxford University Press), at 12-13.
11. Supra note 6 at pg. 2.
12. Supra note 6, at pg 2 & 3.
13. Pham, Alice (2008), 'Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?' CUTS International, Jaipur, India.
14. Abir Kumar & Jayant Roy, Competition Law in India, 2014 (Eastern Law Publication), at pg. 503, 504 & 505.
15. The Competition Act, 2002.
16. In case No. 39/2013 against DIPP foreign direct investment policy on civil aviation.
17. Supra note 13.
18. Case No. 65/2010 decided on 01.01.2011.MANU/CO/0001/2011.
19. 2008(36)PTC 290(del.).See also Hawkins cookers Ltd. V Murugan Enterprises 2012 (50) PTC 3.
20. Supra note 13.
21. K.D. Raju The Intellectual Property Rights & competition law a comparative analysis(eastern book publication), at pg. 188.
22. Supra note 13 at pg. 1.
23. Hovenkamp, The Political Economy of Substantive Due Process [198]40 Stan L Rev 379(417-419).
24. United States v Philadelphia Natil Bank[1962]374 US 321 (369).

25. United States v Topco Associates Inc.[1972]405 US596 (610).
26. Supra note 14, at pg. no. 2.
27. 148 F2d 416(2D Cir 1945).
28. Adv. Vishnu S**,** Conflict Between Competition Law And Intellectual Property Rights (August 13, 2010).

    http://www.articlesbase.com/intellectual-property-articles/conflict-between-competition-law-and-intellectual-property-rights- 3106578.html#ixzz0yxtT0wdR.
29. Holyoak & Torreman, *Intellectual Property Law*, Oxford University Press, 2008.
30. *Atari Games Corp* v. *Nintendo of Am Inc,* 897 F.2d 1572, 1576 (Fed Cir 1990).
31. US Department of Justice and Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting innovation and competition (2007), *at* http://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s. Department-justice-and-federal-trade-commission/p040101promotinginnovation andcompetitionrpt0704.pdf, (Last accessed 9 April 2016).
32. Mihir Naniwadekar, *Intellectual Property Rights and Competition Law: Friends or Foes?* September 1, 2009, available at http://spicyipindia.blogspot.com/2009/09/intellectual-property-rights-and.html (Last visited on February 14, 2011) quoting Herbert Hovenkamp*et al*., IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law (2009).
33. Steve Anderman and Hedvig Schmidt, *EC Competition Policy and IPRs*, in the Interface between Intellectual Property Rights & Competition Policy 40 (2007).
34. Mihir Naniwadekar, *supra* note 34.
35. *Id.*
36. Massimo Motta, Competition Policy: Theory and Practice 19 (2004). ; Mihir Naniwadekar, *supra* note 34.
37. The *Competition Act*, 2002, s. 3.
38. *Ibid*, s. 4.
39. *Aamir Khan Productions* v. *Union of India*, 2010 (112) Bom L R 3778.
40. *Kingfisher* v. *Competition Commission of India*, Writ petitions no. 1785 of 2009.
41. *FICCI Multiplex Association of India* v. *United Producers Distribution Forum (UPDF)*, Case No. 1 of 2009, CCI order dated 25 May 2011.
42. *Gramophone Company of India Ltd.* v. *Super Cassette Industries Ltd.*, 2010 (44) PTC 541 (Del).
43. *Microfibers Inc* v. *Girdhar & Co.*, RFA (OS) no. 25/2006 (DB), decided on 28 May 2009.
44. *Hawkins Cookers Limited* v. *Murugan Enterprises*, 2008 (36) PTC 290(Del).
45. *Twentieth Century Music Corp* v. *Aiken*, 422 US 151(1975).
46. *Hoffmann-La Roche & Co AG* v. *Comm'n*, Case C-85/76, 1979 ECR 461.
47. *United Brands Co & United Brands Cont'l BV* v. *Comm'n*, Case C-27/67, 1978 ECR 207, 63-66.
48. *Entertainment Network (India) Limited* v. *Super Cassette Industries Ltd.*, MANU/SC/2179/2008, 2008(5) OK, 719.
49. *Image Technical Serve* v. *Eastman Kodak Co.*, 125 F. 3d 1195 (1218) (9th Cir 1997).
50. *CSU LLC* v. *Xerox Corp.*, 203 F. 3d 1322 (1326) (Fed Cir. 2000).
51. K.D. Raju the intellectual property rights and competition law : a comparative analysis(Eastern Law House) 2015 at pg. 231.
52. Supra note 51 at pg. 232.
53. Supra note 51, at pg. 217.
54. Intellectual Property and Competition Law: Divergence, Convergence, and Independence *Gitanjali Shankar and Nitika Gupta.*

❑❑❑

CHAPTER

23

Cartelization and Role of CCI

Deepshikha Chauhan and Nikhil Rajput*

Meaning of Cartel

Cartel is prior horizontal arrangement which is formed among the companies or persons who are indulged in identical or similar trade of goods or provision of services.

HORIZONTAL AGREEMENT AMONG THEM LEADING TO CARTEL

MANUFACTURER	⟷	MANUFACTURER	⟷	MANUFACTURER
WHOLESELLER	⟷	WHOLESELLER	⟷	WHOLESELLER
RETAILOR	⟷	RETAILOR	⟷	RETAILOR

Definition of Cartel as Provided under Competition Act, 2002

According to section 2(c) of the competition act, 2002, Cartel is an association of producers, sellers, distributors, traders or services provider who by an arrangement among them limit or control or attempt to control production, distribution, sale or price of, trade in goods or provision of services.

Provision Under Competition Act, 2002 Mentioning Cartelisation

Section 3(3) provides that: Any arrangement entered into between enterprises or association of enterprises, persons or association of persons engaged in identical or similar trade of goods or provision of services is called cartel which–

(a) Directly or indirectly determines purchase or **sale prices.**

(b) **Limits** or control **production, supply**, market, technical development, investment or provision of services.

(c) Share the market or sources of production or provision of services by way of allocation of geographical area of market, or type of goods or services or number of customers in the market or any other similar way.

(d) Directly or in directly result in **bid-rigging**.

It is presumed to have **adverse appreciable effects** on **competition**.

* B.A. LL.B (Hons.), 6th Sem., Chanderprabhu Jain College of Higher Studies & School of Law.

Explanation of Section 3(3) of Competition Act, 2002

Cartel is a prior horizontal agreement formed among enterprises indulged in similar or identical trade of goods or provision services by performing these activities as stated below:

(a) By directly or indirectly determining the sale price of any good for the purpose of the reducing competition in the market.

Builder Association of India vs. Cement Manufacturers

In the case, cartel was being formed among the cement industries. They increased the price of cement in the same proportion by having a prior agreement among themselves even when their cost of production went down.

CCI Held: CCI found that there was a prima facie view case of the cartelization and thus imposed a penalty of ₹ 6.317 cr. On the 11 cement industries.

(b) By limiting the supply of the production, supply of any product in the market, consequently the demand of the product increases in the market then the enterprises increases the prices of the product and earns profit.

(c) By sharing in the market by way of allocation of geographical area of the market for the purpose of their trade of goods by having the prior agreement among themselves.

(d) Directly or indirectly results in bid rigging as it basically means reducing the equal probability of the bid riggers to win the auction.

Case: Goa Lottery Case

M/s Jupitar Gaming Solution vs. Government of Goa and M/s Martin Lottery Agency

In this case an agreement formed between government of Goa and m/s martin lottery agency which resulted in the bid rigging.

Government of Goa issued tender for organizing the lottery competition and the imposed condition that only that service provider could apply for the tender whose turnover is more than 4000 core and only one company in Goa was able to fulfill this condition which was m/s martin lottery agency ltd.

CCI held that government of Goa and m/s martin lottery agency was guilty of bid-rigging which lead to cartelization.

Other Cases Related to Cartel

Expressway Industry Council of India vs. Jet Airways Ltd., Indigo Airlines, Spicejet, Airindia, Goa Airlines Ltd.,

Informant Express industry council of India alleged that cartel is being formed among these airlines as they fixed the fuel surcharge rates uniformity, commission noted this and imposed fixed in jet airways, indigo and spice jet of 257.91 crore.

Objects of Cartelization

(a) To cause **appreciable adverse effect** on competitive.

(b) To **increase profit** by rising of goods or by decreasing there output in the same proposition.

(c) So that the **competitors do not have to complete against each other**.

Role of CCI in Regulating it

CCI has important role to play in diminishing the anti-competitive practices including cartelization.

Section-18: duties of the commission

1. To eliminate practices having adverse effects on the competition including the cartel.
2. To protect and sustain competition.
3. To protect the interest of the consumers.
4. To ensure the freedom of the trade.

Section-19 CCI has the power to inquire in to the case after receiving the complaint from the information about cartelization.

And as per section 19 of the case CCI may inquire into the alleged contravention of section 3(3) leading to its contravention.

Under **section-26:**

1. CCI on the receipt of the reference from the central government or the state government or statutory authority or in its own knowledge or information received u/s 19, if the commission is of the opinion that there exist a prima facie case, and then it shall direct the director general to cause an investigation to be cause into the matter.

Section-26(3) DG will submit the report on his finding to the CCI.

Section-27: Order by the Commission After Inquiry into Such Cartel (Agreement).

CCI will direct the enterprise involved in the cartel **to discontinue** and **not to re-enter such agreement**.

It also have the authority to impose the **penalty upto-3 times of its profit** for each year of the continuance of such agreement or **10 % of its average turnover** for each year of its continuance of such agreement **which ever is higher** is imposed on the enterprises involve in cartel.

Section 33-Power to Issue Interim Order

CCI may pass an interim order, during the pendency of the inquiry into cartel. CCI may restrict the party involved in cartel from continuing the offending act until the inquiry concludes.

Other Important Provisions

Leniency provision (section-46).

Lesser penalty if cartel member provides if vital information.

In case a cartel is formed between a domestic co. and a foreign co. having adverse effect on the competition prevailing in India

Then in such a case, CCI has a power to pass an order imposing penalty under Sec. 27 but such a decision will be binding on the domestic co. of India. Now this research paper raises an issue that whether CCI's decision is binding on the foreign co. and if not then what is the remedy for that?

Researchers of the research paper would like to give a solution to this problem.

No the decision of the CCI is not binding on the foreign co. in the case of the cartel.

So the solution is that an **International compact** shall be established at an international level including the provision of levying penalty on enterprises involved in the cartel at an international level.

Such an act should be established by UNO and it shall be binding on all its members as such as an act is for the protection of the interest of the consumers and for sustaining competition at international level.

References

(Endnotes)

1. K.S. Anantharaman. Lectures on Company Law and Competition Act: (Including Secretarial Practice). 385 (10th edn. 2010).
2. T. Ramappa. Competition Law in India Policy, Issues and Development, (2nd Edition. 2009).
3. Collins Wayne Dale, *Issues in Competition Law and Policy* (ABA Section of Antitrust Law, 2008).
4. Czinkota Michael R. et.al., *Global Business* (3 ed. 2001).
5. Goodhart Charles, Philip Hartmann, et.al., *Financial Regulation: Why, how and where now?* (Routledge, 1998).
6. Holmes William C., Antitrust Law Handbook (Anti Trust Law Library, Clark Boardman Callaghan, 1995).
7. Swann Dennis, *Competition and Consumer Protection* (Penguin Books Ltd., 1979).
8. Whish Richard, *Competition Law,* (Oxford University Press, 5th edn., 2005).

❑❑❑

CHAPTER

24

Emerging Competition Issues and Prospects in the Indian Civil Aviation Industry

Rupal Marwah*

Introduction

Transportation sector of a country plays a vital role in the augmentation and development of an economy. According to the–Indian Aerospace Industry Analysis in terms of passenger traffic, India is currently the ninth largest aviation market in the world. In the recent years mergers and acquisitions like Jet-Etihad merger, Jet Airways-Air Sahara merger, Air India-Indian Airlines became frequent in India's civil aviation industry.

The recent trends globally are indicative of the fact that the civil aviation industry is becoming an oligopoly market. Some of the characteristics of India's civil aviation sector include a larger number of consumers (passengers and cargo), a relatively small number of airlines with significant market share, significant cost barriers to market entry, and competitive firms affecting each other's business. In the current situation competition commission of India (CCI) has been very active in ensuring the application of competition laws in this industry. In the recent past CCI has been involved in a number of investigations against the domestic air travelers for practices, which suggested existence of anti-competitive consequences such as formation of cartels, abuse of dominant position and predatory pricing resulting into penalty being levied on these enterprises.

This paper is an attempt to investigate into the nature of competition law violations by the domestic airline companies and the role of the regulatory authorities in checking anti-competitive behaviour of these airline companies in India.

Challenges Faced by the Civil Aviation Industry

The Civil Aviation industry is dependent on three chief components for its functioning namely the airlines, airports and the ground handling services.

For operation of air services between any two areas two corresponding inputs are necessary- aircraft services like flights and airport services like take-offs, landings and ground-handling service. Thus there must be adequate and healthy competition between the market players in the civil aviation industry and for such adequate competition some serious issues need to be resolved.

* Assistant Professor, Amity Law School, Delhi (Affiliated to GGSIP University, Delhi).

Some issues with respect to the Airline industry, which adversely affect the competition, are:[1]

1. Technical Issues
2. Cartels
3. Abuse of Dominance.
4. Barriers to entry into the market for new players.
5. Mergers and acquisitions.

These issues are analysed in the next section of the paper.

Technical Issues

1. Fleet and Equity Criterions for Domestic Passenger Air Service and International Air Service

Section (3) Part-II of the India's Civil Aviation Requirements (CAR) specifies the minimum requirements on the basis of which permits to operate Schedule Passenger Air Transport Services may be granted. DGCA require scheduled service operators who are having aircraft with a take-off mass of 40000 kg or more must have minimum 5 aircrafts and the start-up equity should be atleast INR 500 Million. A further equity investment of INR 200 Million is essential in case up to five aircrafts are added.[2] Those scheduled service operators who are providing services using aircrafts with a take-off mass of less than 40,000 kg must have a minimum of 5 aircrafts. For such operators start-up equity of INR 200 Million is mandatory. If of up to five aircrafts are added, a further equity investment of at least INR 100 Million is required. There are similar pre requisites for a domestic service carrier who intends to commence services in international aviation sector. Such operator should have at least 20 aircrafts and must have an experience of minimum 5 years in providing services to the domestic consumers.[3]

If we analyse these regulations, they unnecessarily create obstacles for new entrants in the market when the entry cost into this sector is already high. Therefore, fleet and equity requirements set up by these regulations restrain not only the number of potential entrants in the market, but also the size of firms that enter, as they should have adequate funds to meet these prerequisites.

2. Route Dispersal Guidelines

Order No. AV 11012/2/94-A issued by the government of India enumerates how fleets should be apportioned by the scheduled carrier operators to the different parts of the country. For the purposes of this regulation civil aviation routes are divided into three classes. Class I covers the most frequently service routes generally the metropolitan and the other big cities. Classes II and III are likely to be the inaccessible, distant and comparatively small service routes. Indian airlines as a result of this regulation are bound to provide their services to all regions of the country irrespective of the fact that they are remote and small service routes.[4]

As a result of this regulation domestic airlines in the country tend to face financial problems since they have to compulsorily fly to remote service routes and divert a large portion of their limited resources to these routes that face minimum passenger traffic in comparison to popular routes experiencing heavy passenger traffic. Thus this acts as a barrier for potential carriers to enter into civil aviation industry and thereby impeding competition in this sector.

3. Slot Allocation

Since 1990s the Indian civil aviation sector has seen a huge growth in the terms of air transport and passenger traffic. This has led to an enormous pressure on the concerned authorities to make slots available for efficient

aircraft movement. Therefore, it is need of the hour to regulate the allocation of slots. The term slot allocation means an authorisation given to an airline for the purpose of using the ample range of airport infrastructure indispensable to operate an air service on the fixed date and time for landing or take-off.

In India, slots are allotted as per the IATA worldwide slot guidelines by the Airport Authority of India (AAI) and Director General of Civil Aviation (DGCA). The IATA principles of slot allotment 7.1.1 Sections (e) and (f) provide that an airline is allowed to hold a group of slots on the basis of past precedence, if the slot coordinator allots the slot to a passenger air carrier and such slots have been used in the previous season for atleast 80% of the entire time period. Section g of the IATA principles further provides that the new players in the industry shall not be allocated slots out of slots already utilized by the air carrier fulfilling the above-mentioned criterias. New entrants can utilize slots only up to 50 % from the group of slots available. This principle is known as the grandfather type of allocation of slots. Also the AAI in compliance with the IATA guidelines in case of merger of two airlines applies the use it or lose it rule which means that allocated slots should be used by the airlines for atleast 80% of the time and if they fail in doing so they shall lose the slots allocated to them in the subsequent years. Additionally, the merged entity is entitled to use all infrastructure, including slots, which were under the control of the pre-merged airline.

These rules act as a deterrent for the potential entrants and thus restrict the number of service providers which intend to provide carrier services to the passengers adversely impacting healthy competition in this sector. Furthermore, the regulatory overlap in India also hinders the new players in the aviation sector to compete because allocation of slots in our country are controlled by various authorities such as DGCA, AAI, Bureau of civil aviation. They all coordinate with the airports for the slot allocation. This may create an environment of uncertainty posing another problem for the new entrants.

4. Taxation and Pricing of Air Turbine Fuel (ATF)

India has a complex system of levying taxes on Air Turbine fuel. On one hand the central government imposes central excise duty on the fuel and on the other hand state government levies sales tax on the Air Turbine fuel. Thus there is no uniformity in the process of determining how much taxes are to be levied on the ATF at the central as well as the state level. In addition to this another point to be noted here is that only a small number of suppliers determine the pricing of ATF in our country which may lead to conditions which are conducive to cartelisation. Such high fuel cost not only increases the operating cost of the carrier service providers but also adversely affects the interest of the consumers because the airlines tend to shift this burden on to the passengers by increasing airfares.[5]

Legal Barriers

1. Cartels

One of the notable features of our civil aviation industry is its high level of transparency with regard to prices because the passengers can check the expected fares of the airlines instantaneously through the computer reservation system. The competitors also have access to this information. This transperancy may have positive as well as negative impact. Transparency to such a great extent can facilitate collusion leading to cartels being formed.

In a recent case *Uniglobe Mod Travels Pvt. Ltd* v. *TFAI, TAAI, IATA and others*[6] CCI found the travel agents indulging in cartelisation having adverse impact on the competition. Travels agent were acquiring considerable market power in the civil aviation industry because of the fact that 3/4th of the tickets were being booked through them. Thus the Commission initiated inquiry into the activities of the Travel Agents Association. In the inquiry it was found that the association acted in contravention of Section 3(1) and 3 (3) (b) of the Act. The Commission imposed a fine of 1 Lakh Rupees each on the travel agent associations' and

issued a direction to the associations that they shall cease and desist from carrying on such activities having adverse effect on the competition in future.[7] The Competition Appellate Tribunal[8] (COMPAT) also upheld the decision of the commission in appeal made against the order passed by the CCI.

2. Mergers in Civil Aviation Industry

Sections 4 and 5 of the Competition Act, 2002 govern combinations, mergers and acquisitions which have adverse effect on the competition. The section provides such mergers and acquisitions having harmful effect on the competition are void.

In the last few years Indian aviation sector has witnessed some of the major mergers namely Kingfisher-Deccan, Indian Airlines-Air India and Jet-Sahara. This trend has major connotations for competition issues on the civil aviation market. Mergers may raise some serious issues like predatory pricing and unhealthy competition in the passenger air transport sector. Therefore the CCI should be very cautious while approving any combination under section 31 of the Act. Recent Jet-Etihad merger[9] has attracted the attention of many competition regulatory authorities including the Competition Commission of India.

Jet Airways (India) Limited and Etihad Airways PJSC ('Etihad') the national airline of UAE filed a joint notice with CCI for acquiring 24 per cent equity share holding and certain other rights in Jet Airways by Etihad. For fulfillment of this objective they entered into three agreements namely Investment Agreement ('IA'), a Shareholders' Agreement ('SHA') and a Commercial Cooperation Agreement ('CCA').

The Commission approved this combination under section 31 sub-section (1) of the Act by passing an order on November 12, 2013 based upon the information furnished by the parties under section 6 sub-section (2) of the Act. The merger is viewed as having a long term impact on the competition in the civil aviation industry but the CCI has observed that if the parties commit violation of any provision of the Act this approval shall not save them from any subsequent proceedings for contravention of the provisions of the Act.

3. Abuse of Dominance

The airlines usually adopt practices which promote healthy competition in the market but there may be practices which may lead to players having substantial market power in the sector abusing their dominant position. These airlines may adopt various strategies like loyalty programs, multi contact programs and code sharing agreements in such a manner whereby they are able to further their own interest harming healthy competition in the market. These practices are explained below:

Airlines initiate various schemes like frequent flyer programs, loyalty-rewarding pricing schemes to attract the consumer but under pretense of attracting the consumer airlines actually promote their selfish motive at the cost of consumer welfare by strengthening their market power. One such practice is multi-contact program. When enterprises interact and compete with each other in many markets there is a likelihood of these enterprises entering into agreements having adverse effect on the competition due to mutual restraint.

A code-sharing agreement[10] is another such practice whereby one carrier service operator permits another air carrier to promote its flight and issue tickets for it as if such flight was being operated by that air carrier. Such code-sharing agreements between airlines may also involve collaboration between them with regard to coordination of their marketing strategies, sales, and other incentive schemes for the consumers etc. Such agreements help airlines to grow and lead to more efficient working as they reduce operational costs of the airlines ultimately benefiting the consumers but in some cases they may also adversely affect competition in the sector since they are horizontal agreements.

Suggestions

1. Indian Fleet and Equity requirements to assess air carrier's financial potential are very stringent and therefore act as barrier to new entrants in the market. Thus as an alternative to fleet and equity requirements can be making it compulsory for new air carrier service providers to furnish their financial information. UK, United States, Europe and Australia have a similar requirement which is suggested in our country also. This will help the air carriers in proving their financial worth and demonstrate their future plans of growth and expansion within the civil aviation sector.
2. With regard to Government's policy of making it compulsory for the airlines to fly to remote areas it is suggested that this regulation should be dispensed with and the civil aviation stakeholders should be asked to give their inputs regarding various incentive schemes that will act as an inducement for them to fly to distant and remote areas. In the United States' Essential Air Service Program provides that incentives like subsidies shall be given to the air carrier service providers that fly to distant and remote areas. European Union also has a similar model which provides for giving incentives to air carriers that fly to remote and under serviced airports. The Indian government may adopt any of the models which is suitable for its economic structure as well as the Indian civil aviation sector.
3. The Government makes ask for inputs from the stakeholders regarding reworking the slot allocation procedure in the country. The current system of allocation of slots is quite complicated and inefficient.

   The UK model of slot allocation provides for trading and auctioning of underutilised slots. Though this model of slot trading has not been efficient in all ways but it has helped relieve some of the congestion encountered in busy airports of the EU, UK, and United States. The funds raised from the auctioning of slots may utilized by the Indian government in providing financial assistance to the airport developers who invest in airport infrastructure.
4. There is a need for better coordination between the central and the state government in formulating the policy with regard to imposing taxes on the ATF as it effects the financial health of the Indian civil aviation industry and the ability of the air carrier service providers to compete at the regional and the global level. The government may consider reducing ATF taxes at the state level which may lead to overall economic development and growth particularly in this sector by creation of more job opportunities within the civil aviation sector.
5. Over the years the Indian civil aviation industry has witnessed more agreements between the dominant market players which are in the nature of cartels. In order to check cartel behaviour barriers for potential entrants into markets need to be reduced and proper framework for finding out such anti-competitive behaviour should be in place. This framework should also determine as to what pricing is to be considered anti-competitive. This determination should be based on practical challenges confronting the industry, not typical 'text-book 'definitions. There should be efficient deterrent machinery for those intending to indulge in such anti-competitive practices through imposition of stricter punishments and penalties on them and through other ways that may be easily implemented. Though CCI acting as regulatory body has been efficiently performing its role in checking such anti-competitive behaviour and imposing substantial amount of fines on the guilty parties.

Conclusion

The Indian Civil Aviation Sector has witnessed remarkable growth over the years. With the adoption of LPG policy by the Indian government and the pro-active role played by the CCI in resolving several issues faced by the industry and looking into the complaints made against some of the topmost players in this industry with respect to the agreements being entered into by them having adverse effect on the competition has had a positive impact on the market structure of the civil aviation sector. CCI has constantly endeavoured to promote competition in different sectors through enforcement of its rules and through competition advocacy. A study

of the recent cases in the civil aviation industry indicates that this sector has acquired prime importance for CCI in aggressively pursuing its policies with regard to some major competition concerns in the sector. This has led to an efficient air services being provided to the passengers at lower fares which in turn has accelerated employment and economic growth.

These pro-competitive policy measures are evident of the fact that the principles of competition are slowly and firmly finding their roots in the India's civil aviation industry.

References

(Endnotes)

1. Steven Truxal, *Competition and Regulation in the Airline Industry-Puppets in Chaos*,1st Ed., Routledge Publication, New York, 2012, p. 35.
2. See Section 3 of the Civil Aviation Requirement Section 3- Air Transport Series 'C' Part II.
3. *Ibid.*
4. *http://www.dgca.nic.in/cars/d3c-c2.pdf*last accessed on 9th April 2016.
5. Supra No. 4.
6. This order was passed by Competition Appellate Tribunalon 10th July 2013 Appeal No. 08 of 2012 I.A. No. 08/2012.
7. *http://www.cci.gov.in/index.php*last accessed on 8th April 2016.
8. See Section 53B of the Competition Act, 2002.
9. *http://www.jetairways.com/en/in/jetexperience/strategic-alliance.aspx* last accessed on 11th April 2016.
10. *https://en.wikipedia.org/wiki/Codeshare_agreementlast accessed on 11th April 2016.*

❑❑❑

CHAPTER

25

Abuse of Dominant Position by Enterprises

Tesu Gupta*

Introduction

The Competition Act, 2002 (herein after referred to as Act) directs and maintains the markets in India with the aim of encouraging and sustaining competition in the market.

Since, fair play and level playing for all the participants in the markets are absolutely essential for its sustainability and development. When there is perfect competition in the market, the consumer is sovereign, as his welfare is maximised. But, in reality the markets are imperfect which is something that goes against the welfare of consumers.

To overcome all these imperfections the Competition Commission of India (CCI) is entrusted with an obligation to regulate and eliminate practices having adverse effects in India. The Act has been modelled according to the European Union (EU) competition law and governs the three main extents:

1. Anti-competitive conduct;
2. Abuse of dominance;
3. Combinations.

The substantive test and benchmark for analysis under the Act is to prohibit practices that have an appreciable adverse effect on competition in India. Section 4 of the Act also lays down the regulations for the abuse of dominance.

The Act prohibits the abuse of dominant position by any 'enterprise'[1] or 'group'.

What is Dominance ?

The Act[2] defines dominant position as a position of strength enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of the competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. In India, the dominance is measured on the basis of qualitative assessment of the prevalent market dynamics and the relative position of strength enjoyed by the market partakers.

Section 4 of the Act[3] describes that there would be abuse of dominant position if an enterprise or a group impose any unfair or discriminatory condition in purchase or sale of goods[4] or services[5] or imposes unfair or discriminatory price in purchase or sale including predatory price of goods or service. In other words we

*. B.A., LL.B. 4th Semester, Department of Law, Jagan Nath University, Haryana.

can say that if any dominant enterprise or dominant group tricks consumers or lays barriers for new entrants in the market by any unfair means and malpractice(s) then it will amount to the abuse of dominant position.

What Amounts to Abuse?

Abuse of the dominant position occurs when a dominant group or an enterprise engages in a conduct that intends to eliminate its competitor(s) or deter future entry of a new competitor(s) in the relevant market.

The following actions will constitute abuse:

- Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions.
- Limiting production markets or technical development to the prejudice of consumers.

  Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

Some of the examples of abusive practices by dominant enterprises are:

- Predatory pricing
- Loyalty rebates
- Tying and bundling
- Refusals to deal
- Margin squeeze
- Excessive pricing

CCI by its order dated November 17, 2015 dismissed a case against DIAL[6] for alleged abuse of dominant position by charging high rentals for office space from some of the airlines and stated that mere increase in rental for fresh agreement cannot be viewed as per se unfair, particularly when license fee appeared to be rationalized in a uniform manner. The case was filed by the Airline Operators Committee (AOC) alleging that increase of license fee to more than 100% was arbitrary and should have been to 7.5% as per the terms and conditions. But CCI observed that the increase of 7.5% was only during the subsistence of the agreement on annual basis.

Relevant Market[7]

The definition of the relevant market is pivotal to any abuse of dominance analysis. Dominance of an enterprise always determined with respect to a particular relevant market. The definition of relevant market is necessary in analysing the anti-competitive effects of the dominant entity's behaviour. Relevant market is determined by both 'relevant product market' and 'relevant geographic market.''

The European Commission's Notice on the Definition of relevant market for the purposes of Community Competition Law prescribes three methods for defining relevant market, these methods are:

- Demand substitution

  In this method Commission tries to find out that whether or not the consumers of the product can opt for other substitutes by preparing a list of products that can be substituted as alternatives. After that, if Commission finds that products can be substituted then Commission substitutes those products with other alternatives.
- Supply substitution

  In this method, those product substitutes are brought in the relevant market whose suppliers are able to shift production to those substitutes and supply them into the market in a short span of time without encountering noticeable additional consequences in response to such substitution. But, if this method will require noticeable modifications and adjustments (like additional investments, etc.) then these substitutes will not be included in the relevant market.

- Potential Substitution

  This type of substitution is not taken into consideration. But, if needed, this process is carried out at subsequent stage.

  The Relevant Product Market[7] is defined as all those products or services that are regarded as interchangeable or substitutable by the consumer.

  Relevant Geographic Market[8] is defined as the market comprising the area in which there exists distinct homogenous competitive conditions in the form of demand and supply of goods and services, which can be distinguished from the conditions prevailing in the neighbouring areas.

  In the case of Belaire Owner's Association v.DLF Ltd.,[9] the CCI has restricted the relevant geographic market to particular suburbs. However, in Mr. Om Dutt Sharma v. M/S Adidas AG and Ors.[10] CCI, without any specific differentiation defined the relevant market.

Assessment of Dominance

As mentioned in Section 4 of Act CCI reaffirmed the view in the case of Dr. Hiranandani Hospital, Powai, Mumbai[11] while assessing the dominance of Hiranandani Hospital in the relevant market for provision of maternity services by super specialty and high-end hospitals within a distance of 12 kilometers from the Hiranandani Hospital, the CCI clarified that the market shares of an entity is 'only one of the factors that decides whether an enterprise is dominant or not, but that factor alone cannot be decisive proof of dominance.'

Also, in the case of Re M/S ESYS Information Technologies Pvt. Ltd. and Intel Corporation (Intel Inc) and others,[12] in addition to the market shares of Intel, the CCI's assessment of Intel's dominance was based on other relevant factors such as the consumer preference owing to the brand name, the existence of strong entry barriers in the relevant market, the significant intellectual property rights of Intel and the scale and scope enjoyed by Intel.

Assessment of abusive conduct

The practices mentioned under Section 4 can be broadly classified into two different kinds of abuses:

- Exclusionary abuses, which include the practice of dominant entity for excluding other players in the relevant market; and
- Exploitative abuses, which includes imposition of unfair or discriminatory conditions on new entrants and consumers by dominant firm(s).

In the case of Coal India Limited,[13] the CCI fined Coal India Limited for having abused its dominant position in the market for the production and sale of non-coking coal to thermal power generators. Also, CCI imposed a penalty of 10 million rupees on M/S Google Inc. and Google India Pvt. Ltd.[14] for failing to comply with the directions of the director general seeking certain information with respect to the on-going investigation against Google.

CCI by its order dated November 17, 2015 dismissed a case against DIAL[15] for alleged abuse of dominant position by charging high rentals for office space from some of the airlines and stated that mere increase in rental for fresh agreement cannot be viewed as per se unfair, particularly when license fee appeared to be rationalized in a uniform manner. The case was filed by the Airline Operators Committee (AOC) alleging that increase of license fee to more than 100% was arbitrary and should have been to 7.5% as per the terms and conditions. But CCI dismissed the case and observed that the increase of 7.5% was only during the subsistence of the agreement on annual basis.

It is very important to note that Section 4 of the Act lays down that prohibition is on abuse of dominant position and not being in a dominant position.

Examples of abusive practices include:

- Predatory pricing
- Refusals to deal
- Loyalty rebates
- Margin squeeze
- Tying and bundling
- Excessive pricing

Penalties and Sanctions

To penalise an enterprise or a group for abusing its dominant position, the commission can do several things -

- Direct the enterprise to continue such acts that amounted to abuse.[16] One of the example of this is the case like in Re Shamaher Kataria & Atos,[17] where the dominant parties were ordered to cease and desist from indulging in activities that have been found to be in contravention of Section 4.
- Impose penalties of up to 10% of the average of the turnover for the last three preceding financial years.[18] There has been some concern about this provision as it provides the upper limit; it gives no guidelines for the calculation of penalties. The Commission, too, is yet to come up with guidelines of its own.
- Commission has complete discretion in calculation of penalties to be imposed upon each of such person or enterprises which are parties to such abuse.

Bibliography

- Cyril Shroff & Nisha Oberoi, India: Abuse of Dominance, Global Competition Review. Available at http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2749/india-abuse-dominance/
- http://www.oecd.org/dataoecd/8/61/2376087.pdf
- cis-india.org
- www.cci.gov.in
- https://india.gov.in
- Avtar Singh, Competition law,109(2012)

References

(Endnotes)

1. Section 2(h), The Competition Act, 2002.
2. The Competition Act, 2002.
3. *Ibid*.
4. Section 2(i), The Competition Act, 2002.
5. Section 2(u), *Ibid*.
6. Case no. 75 of 2015.
7. Section 2(t),The Competition Act, 2002.
8. Section 2(s), *Ibid*.
9. Case no. 19 of 2010.
10. Case no. 10 of 2014.
11. Case no. 39 of 2012.
12. Case no. 48 of 2011.
13. Bijay Poddar v. Coal India Ltd., Case 59 of 2013.
14. Case no. 68 of 2010.
15. Case no. 75 of 2015.
16. Section 27(a) of The Competition Act, 2002.
17. Atos Worldline v. Verifoneindia, Case No. 56 of 2012.
18. Supra 16 at 5.27(b).

❑❑❑

CHAPTER

26

Role of Competition in the New Economy

Kumar Shantnu Jakhar*

In the new economy, Growth is the most important aspect for all the nations. Every nation wants to grow and stand tall in the world market in respect of the Economy. India is also a developing country and one of the fastest growing economies in the world. The graph of Indian Economy has improved over the past years. India is the fastest growing major economy in the world by overtaking China with the growth rate of 7.3% at the end of 2015.[1]

The nineteenth century belonged to Europe and the twentieth century to America. It is said that the 21st century will be dominated by Asia. Earlier the focus in Asia was on Japan, Taiwan, Singapore and South Korea. Today much the attention is paid to the world's two largest countries in respect of population i.e. India and China. These are the two countries on which eyes of everyone are focused. Since, India has overtaken China in growth rate, and due to projects like 'Make in India' it is at the focus point of everyone.

The Asian century concept is basically focused on the economic arena. It talks about rising national incomes, rising share of world trade of its countries, the growing numbers of billionaires etc.

It is in this backdrop that analysts and policy-makers have been talking of a $20 trillion Indian economy in, say, 15 years from now. Aspirational goals are necessary to usher a spirit of "will do"; however, setting goals is not enough. A large and complicated matrix of macro and micro economic policies and effective implementation strategies have to be worked to achieve that goal.[2]

The economic growth of any country is driven by several factors. The productivity and innovation are such factors which are closely linked with competition. It is the competition only that steers the markets towards efficient equilibriums. As it is seen by various theories of economics that competition acts as a disciplining device for businesses to be more efficient in their use of resources which leads to lower costs, lower prices, and higher output. This effect is further enhanced with competition reallocating market shares from low to high productivity firms. Competition helps create an environment that enhances efficiency. This is possible due to competition only that the most productive firms survive leading to make the entire sector more productive. Competition is a tool to maintain the quality of the products. It is the competition only that the companies are trying better and customers are getting better.

Without competition there is usually no need to innovate. No company will even try to give a better product if it is making profit from the usual one only. There will be monopoly in the market. A monopolist would be using costly innovation to out-compete its own existing products.

Competition has a positive impact, not only on the wellbeing of consumers, but also on a country's economy as a whole. Competition bolsters the productivity and international competitiveness of the business sector and promotes dynamic markets and economic growth.[3]

*. B.A., LL.B. 4th Semester, Department of Law, Jagan Nath University, Haryana.

Research has shown that deregulation helped the British economy to grow.[4] In the United States, deregulation has reduced prices by as much as 30-75 % in many key sectors as it forced those industries to restructure in order to become more efficient.[5]

If you are running alone in a race, then you know that you will win. So why there is need to run faster. So is the scene with the market. If there will be no competition then there will be no innovation. Competition creates the best incentives for innovation that brings about dynamic efficiency.

As a corollary, the strength of competition will also affect a country's competitiveness. In the era of globalisation, it is not possible for any nation to achieve its full economic potential if it is not able to compete globally. If a country wants compete globally then it has to work with its full potential. If a country is not even in the competition with other countries then how will it stand in the global market. For a country to be a strong economy, it needs that the country develops competitiveness. Competitiveness of a country is the key to unlock its way into international trade as well as in attracting foreign investment. If the country will receive foreign investments then it will further help the country to grow faster. So the competition becomes necessary for the country. Michael Porter, among others, has long taught that strong domestic rivalry is a key element of international competitiveness and economic progress.[6]

There is now important empirical evidence that competition contributes to growth in developed countries. Research in developing countries has also shown the importance of this link.

So, it can be concluded that competition plays an important role in the growth of a country in New Economy.

References

(Endnotes)

1. http://www.telegraph.co.uk/finance/economics/12146579/India-overtakes-China-as-worlds-fastest-growing-major-economy.html.
2 Keynote Address by Ashok Chawla, Chairman, Competition Commission of India 40th Skoch Summit, June 12, 2015. 'The Role of Competition in A Growing Economy'.
3. The Role of Competition in Promoting Dynamic Markets and Economic Growth, Address by William J. Kolasky Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice Before the Tokyo America Center Tokyo, Japan November 12, 2002.
4. David Card & Richard B. Freeman, *what Have Two Decades of British Economic Reform Delivered?*, Working Paper 8801, National Bureau of Economic Research (Feb. 2002).
5. Clifford Winston, *U.S. Industry Adjustment to Deregulation*, 12 J. Econ. Persp.91-100 (1998).
6. Michael E. Porter, *The Competitive Advantage of Nations* 117-22 (1990).

❑❑❑

CHAPTER

27

Competition Law, Cartels and Restrict of Trade: A Desideratum

Matthew Adefi Olong*

Abstract

The article examines the trilogy of competition laws, cartels and restrict of trade and argues that the hallmark of the market place is that the markets are free and the driving force at enhancing competitiveness to break whether government or private monopolies in the various sectors is that private investors would drive up their capitals, But such would not be possible if monopolies are wrestled from one sector only to empower the other sector and thus continue the vicious cycle to constitute a clog in the wheel of progress. Reforms are therefore absolute to avoid blockage that will prevent further development from the government to the private sector.

Introduction

Globally, the world and Nigeria as a country has witnessed a number of government agencies or entities that have been privatized or opened up for competition. The scenario ensures that government opens up where it feels that it has constituted a clog in the wheel of progress so as to enable private enterprises to ensure private sector investments. There is therefore the need for a serious legal framework to ensure competition by government, companies or entities so that companies as we have seen from experience would not just simply repeat monopolies as people who buy these companies would not further block further development of the sectors. So the necessity for a treatise on the abuse of trade practices, antitrust and monopolies.

Where there is no anti trust or effective and implement able competition laws, what happens is the sordid fact that one or two companies could quickly take over and monopolies sectors of the economy and prevent other people from coming in and this reduces the capacity of the economy to prosper. In the absence of legal framework, to achieve competition and enforce good trade practices, consumers and the larger economy is doomed as people will engage in restrictive trade practices or dumping such as preventing other people from selling in the economy.

The Federal Competition and Consumer Protection Bill,[1] and the Nigerian Postal Bill[2] aimed at enhancing competitiveness and breaking government monopolies in the various sectors of the Nigerian economy to ensure fairness. Let us argue that such legislation modernize the economy to unleash its full potencies but the trilogy of competition laws, restraint of trade and cartels must be fully examined so as to prevent legislation that would eventually became a clog in the wheel of business progress in the 3rd millennium.

* Associate Professor, Department of Business Law, Faculty of Law, University of Benin., Edo State, Nigeria.

Conceptual Clarifications

Competition Laws

Arguably, competition exists to protect competition in a free market economy, that is, an economic system in which the allocation of resources at whatever level is determined solely by supply and demand in a free market devoid of direction by government regulation.[3] As utopian as it may sound it is the hall mark of a pure market economy. The basics of a free market is competition between firms because such is believed to deliver efficiency, low prices and innovation.

The term is the branch of law that promotes or maintains market competition by outlawing anti-competitive conduct by businessmen and companies engaged in business.[4] Competition law therefore, seeks to ensure that competitors do not agree to fix prices, rig bids or manipulate consumers by dictating prices to them. In the absence of competition law in any jurisdiction, as well as the necessary legal and institutional framework to protect competition in the economy, high prices will result when competitors agree to fix prices, such prices will defect the essence of any economic and the people for whom the reforms are targeted will lose at the end.[5] In enacting a competition law the legislature ought ton adopt a public policy towards preserving and promoting free competition as the most efficient means of allocating social resources.[6] It is generally acceptable that a free economy promotes the public good as goods and services stand the acid test of competition.[7] In this wise, firms that acquire monopoly power in a given market defect the very essence of competition law whose objective is the promotion of competitive market structures without necessarily outlawing monopolies but seeks to check abuse of same to dictate the economic fortunes of such sector of the economy.[8] Competition law becomes relevant when two or more business enterprises conspire to monopolize a relevant market. The conspiracy may take the form of restrict of trade in an unreasonable way.[9] Competition law does not foreclose mergers, takeovers and acquisitions but the must be equitably regulated not to culminate in an unnecessary monopoly, so also with respect to contracts, arrangements and restrictive practices lessening competition.[10] Competition laws may be used to service other policies, such as social, employment, industrial, environmental or regional policies.[11]

In India, the Competition Commission of India draws its powers and authority from the Competition Act,[12] its prominent function includes the complete execution, compliance of the Competition Act, 2002 and administration of the same.[13] The Competition Commission attempts to guarantee maximum customer satisfaction with proper functioning of market players. It is also assigned with the task of creating awareness/ conducting training sessions and taking up competition advocacy under section 49 of the Act. Basically, there are three elements which are dealt with under the Act, specifically with the help of sections 3, 4, and 6 read along with sections 19, 26, 27, 28 and 29 of the Act. The three elements are (1) Anti- Competition agreements, (2) Abuse of dominant position and (3) Regulation of combinations which are likely to have an appreciable adverse effect on competition.[14] The Competition Act has overriding powers and provides for having jurisdiction in addition to and not in derogation of any other law. In this wise, strong powers are given to the Competition Commission in terms of enhanced authority, penalizing provisions and a committed appellate authority[15]. The extent and jurisdiction of the Competition Act is justly broad. Section 3 (1) of the legislation ,forbids anti- competition agreements based on production, supply, distribution, storage, acquisition or control of goods or provision of services, which result in high unfavourable repercussions on the competition in India. Any agreement which is signed in violation of the terms of section 3 (10 shall stand void. Competition Act revokes the Monopolistic and Restrictive Trade Practices Act,1969. As per the provisions of the Act, it is necessary for the Competition Commission of India to knock out such practices that has a negative impact on competition in India, and to ensure healthy and fair terms between the parties.[16]

Understanding Carter

Recourse would be held to the Blacks Law Dictionary,[17] that defines the term as a combination of producers or sellers that join together to control a product's production or price. An association of firms with common interest, seeking to prevent extreme or unfair competition, allocate markets or share knowledge. However, a concise and explicit definition of the term was given by the Competition Act of India,[18] as including an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or trade in goods or provision of services. Carters have corrosive effects on economic efficiency as it is capable of raising prices above the competitive levels and reduces output. Cartels shelters its members from market forces to control cost. The objective of cartel is the maintenance of the parties respective positions on the market and to achieve pricing stability by an increase in price. The parties internationally set up to interfere with competition and to act instead to protect the prosperity of the group.

The treaty of Rome,[19] prohibits the creation and operation of cartels. It equally prohibits all agreements between undertakings and concerted practices which both affect trade between member states and have as their object or effect the prevention, restriction, or distortion of competition. In the words of Monti, cartels do not occur with the same frequency in all sectors. Indeed, some sectors have been particularly prone to carterlization. These sectors are generally characterized by a relatively high degree of concentration, significant barriers to the entry, homogenous products, similar cost structures and mature technologies.[20]

In the United Kingdom it is an offence for an individual to dishonestly agree with one or more other persons that two or more undertakings would engage in specified cartel arrangements such as price fixing, limiting production or supply, sharing markets or rigging bids. The offence even extends to agreements concluded outside the United Kingdom if implemented within it.[21] So also the European Union adopted numerous cartel decisions.[22] So too in the United States of America where hard core cartel is vehemently prosecuted as criminal and interestingly, the Department of Justice has concerted its enforcement resources in international cartels that victimize American consumers and businesses.[23]

An example of a world renowned cartel is the Organization of Petroluem Exporting Countries where members voluntarily restrict their output following negotiation quotals.. As a result of output restrictions, world price of oil nearly quadrupled in 2015. But as at 2016, the price is remained low, in qatars capital of late, the worlds biggest oil producers failed to reach an agreement at a meeting aimed at freezing output and reassuring markets that a recent recovery in prices could be sustained.[24]

Restrict of Trade

The term refers to activity that obstructs limits or eliminate market competition. The doctrine renders provisions, which impose restrictions in a persons freedom to engage in trade or employment illegal and therefore, unenforceable at common law unless they are demonstrated to be reasonable both in the interest of the parties and in the interest of the public In Petrofina (Great Britain) Ltd v. Martin,[25] defines the term as a contract in which a party (the convenentor) agrees with any other party (the convenentee) to restrict his liberty in the future to carry on trade with any other person not party to the contract in such a manner as he chooses.

A wide range of interest may be considered legitimate including protecting trade secrets and protection of business goodwill and even the creation and maintenance of an even sporting competition.[26] However, mere protection against competition does not constitute a legitimate imterest.[27]

A recourse to the provisions of the restrict of trade Act,[28] of New South Wales provides that a restrict of trade is valid to the extent to which it is not against public policy to any extent by reason of , a manifest failure by a person who created, or joined in creating a restrict to attempt to make the restrict a reasonable restrain, the court, having regard to the secondant in which the restraint was created, may, in such terms as the court thinks

fit other that the restrict be, as regard its application to the applicant, all together in valid or valid to such an extent as it deems fit, were under the rules of an association.

Government Monopolies

Hitherto, sectors like power in Nigeria were solely managed by the National Electric Power Authority. The Electricity sector envisages the establishment of an independent regulator called the Nigeria Electricity Regulatory Commission which would have power to regulate the entry of all participants in the sector through a licensing regime.[29] Again the Telecommunications was managed by the Nigerian Telecommunications whilst the oil and gas sector by the National Petroleum Company and the rail sector by the Nigerian Railway Corporation. The absence of competition arguably gave them a god like status. Incidentally, the Nigerian Regulatory Commission by virtue of the Power Sector Reform Act,[30] the tariff mechanism of the operations was regulated. The structure of the Nigerian energy sector deserves special mention as the sector is a monopoly model where Government is involued in gas production through its upstream interest whilst it operates as a transporter of natural gas, infrastructural developer and a regulator. This multiple role has created a monopoly in transmission, a duopoly in distribution and dominant power in gas purchase. Therefore, market forces do not operate within the sector.[31]

Nigeria has been undergoing significant market reforms and market liberalization such as the deregulation of the oil and gas sector, the aviation and public sectors. This has become instrumental in the elimination of all forms of barriers to entry and resulting in the opening up of the market.[32]

In Europe many state owned monopolies were wholly or partly privatized and put into the private sector, whilst liberalization might be welcomed it may lead to private monopolies replacing pubic ones.[32]

Private Sector Monopolies

A few example of private monopoly rights can be seen in the rights held by Multi choice, a south African satellite television broadcast firm which hitherto held exclusive right to broadcast English premier league to all viewers in Nigeria. The direct satellite television lost exclusive bid for the exclusive right to a Nigerian company, entertainment highway.[33]

The open bidding for license through the Bureau of Pubic Enterprises and the National Commission gave birth to private operators such MTN Nigeria, celtel and Globacom limited. The monopolistic tendency of MTN Nigeria was checked as all other players adjusted their rates. The consumers in the long run became the better as value- added services in the sector became possible because of competition.[34]

Necessity for Strict Framework for Preventing Monopolies

Monopoly as an economic concept had thrived. Competition law gained prominence in the aftermath of the firs world war, when most European countries started to enact anti-cartel laws to curtail the territorial influence of Germany. It was assumed that Germanys towering economic influence in Europe precipitated its political expansionist moves.[35] Accordingly, between 1923 and 1926, Sweden and Norway adopted a wide range of anti-cartel laws. However, with the economic depression of 1929, competition law experienced a downward turn only to be revived after the 2nd world war, with Britain and Germany playing a leading role by becoming the first European countries to evolve a comprehensive competition law. Presently, the treaty of Lisbon is the prevailing legal framework on competition law in Europe. This treaty has broadened the scope of competition law by introducing far reaching measures to curb anti-competitiveness amongst member states who are signatories to the treaty.[36] Article 101(1) made provisions against price – fixing and any agreement based on premeditated price adjustments, such agreement would be deemed null and void.

Again, Article 102 prohibited the use of dominant position such as price discrimination and exclusive dealing to undermine the interest of the consumer. However, member states were given the leverage to

enact domestic regulations governing mergers between firms so long as such mergers would not significantly impede effective competition.[37]

Globally, therefore, there exists a robust legal framework especially in Europe and the United States of America for competition law as it discourages monopolies, dominant trade practices, illegal price fixing or adjustments. So too in India and South Africa but it is so in Nigeria.

It could be said that in Nigeria, there exist salient provisions under some Acts like the Investment and Securities Act,[38] aimed at regulating mergers and acquisitions, with the sole aim of preventing dominant positions of some companies in the country.[39] The apex regulatory body can prevent any merger or acquisition scheme that is likely to create a dominant position in the market.

Conclusion

The article having examined the trilogy of competition law, cartel and restrict of trade it becomes imperative and arguably so that globally the hallmark of any competition law is to prevent the abuse of dominant position and introduce controls over how participates in a market can collaborate. The goal of competition law is that all sectors of the economy whether government or private are free from abuses in the form of monopolies, cartel, or restrict of trade. Any competition law that does not include the variables would unlikely stand the tide of market place in this millennium. Removing monopolies from the government to the private sector is like robbing peter to pay Paul. So global competitiveness should take into cognizance the pitfalls of striking a viable legal framework that would create a safe, viable and free market that would be conducive to all market players.

References

(Endnotes)

1. 2014. Competition law in Nigeria is still a novel concept which has never operated wholly in the country although ironically there have been many initiatives to adopt and implement competition law legislation . Some of the laws passed to promote healthy competition include the Competition & Practice Regulation 2007 made pursuant to the Nigerian Communications Act,2003, the Investment & Securities Act, 2007, the Public Enterprises (Privatization & Commercialization) Act, 1999 and the Nigerian Investment Promotion Act, 1999.
2. 2014.
3. L. Ani, Rethinking Competition law and Policy: Building A Framework for Implementation in Nigeria, *NIALS, Journal of Business Law* at 1.
4. *Id.*
5. *Id*.
6. B. Akinola, Nigerian, Sectoral Economic Reforms in the Absence of Competition Law : A Critique at 4.
7. *Id.*
8. *Id*.
9. See Spectrum Sports INC v. Mcquillan, 506U.S.S447(U.S. Sup.Ct1993).
10. Akinola supra note 6 at 4.
11. The Unite States of America was the first ever jurisdiction to adopt a proper modern system of competition law. The Unites States of America passed the Sherman Act in 1890 which is still in force to date . As a preamble to that Act , it states an act to protect trade and commerce against unlawful restraints and monopolies. It was supplemented by later statutes like the Clayton Act, 1914, the Federal Trade Commission Act, 1914, the Robinson-Patman Act, 1936, the Celler-Kefauver Act, 1950 & the Hart-Scot-Rodino Anti trust Improvements Act of 1976. It is instructive to note that section 2 of the Shermans Act provides that every person who shall monopolies, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations, shall be deemed guilty of a felony.

12. 2002(amended in 2007).
13. A. Shukla and P. Agarwal, " Unfair Terms in Indian Contracts and Their Regulation in S. Bhat, Contracts, Agreements and Public Policy in India (National Printing Press, 2015) at 189.
14. *Id.*
15. *Id.*
16. *Id.*
17. B. Graner, Blacks Law Dictionary, (9th edn. 2009) at 243.
18. 2002 (amended 2007).
19. Article 8(1).
20. M. Momti, Fighting Cartels Why and How? At http://europa.eu/rapid/pressreleaseaaction.do.do? (Last visited on 16th April, 2016).
21. Ani, supra note 3 at 7.
22. See Carton board (1994) OJL l2431 and Polypropylene(2001) OJL 5224.
23. See Hottman-La Rouche v. Commission(1979) ECR, 461.
24. See Meetings Ends Without Deal on Oil Output in The Punch Newspapers of April, 18, 2016.
25. (1966) Ch. 146, 180.
26. See Adamson v. New South Wales Rugby Leaque Ltd(1991) 31.FCR, 242.
27. See Vancourer Malt & Sake Brewing v Vancourer Breweries (1934) AC.181.
28. (1976) Cf. sections 4(1) (2) (3) (4) & (5).
29. A. Adeniji Anti trust imperatives for an Energy Sector in Transition. Washington D.C. May 2002 at 15.
30. Section 76.
31. Adenij, supra note 29 at 15.
32. Ani, supra note 21 at 7.
32. *Id.*
33. *Id.*
34. Akintola supra note at 9.
35. J. Odion, Competition Law as a Platform for Consumer Protection: A Nigerian Perspective, New Media & Mass Perspective, Vol 33, 2015 at 30.
36. *Id.*
37. *Id.*
38. 2007.
39. Section 121(1)(A) of the investment & Securities Act provides that whenever it is required to consider a merger, the commission shall initially determine whether or not the merger is likely to substantially prevent or lessen competition.

❑❑❑

CHAPTER

28

Relationship between Competition and IP Law: A Philosophical Perspective

Bharat Jumrani*

Introduction

One of the greatest proponents of property rights – John Locke emphatically articulated that the right to property (including intangible property) is the natural right of a person. This approach is embedded in the moral principle that "*one must own what he produces*"[1]

Philosophical Basis of the Conflict

The Interdependence: In general

The general meaning of the interface is simply a point where the two subjects and branches meet or clash with each other. Moreover, the rights of the person under two branches of law intersect each other.[2] The IP laws have never been enacted to provide protection for the inventor, because he is doing something for the public good, but rather by an economic value that is the reward for his own creation has economic value, which tend to motivate the inventor to start new paths.[3]

The need for the enactment of the Competition Act is not to infringe the rights of the holders of intellectual property rights, but to avoid practices that have harmful effects on competition and for consumer welfare. It is in this light that both goals collide in the middle.[4]

Competition law does not invade the essential functions of intellectual property rights. No question the intellectual property aspects of others, because this right itself promotes competition fee only. The Competition Act, the main task is to check whether these holders of intellectual property rights tend to abuse these rights, which may have adverse effects on competition in the country.[5] The celebration of intellectual property and misuse is a problem in the case causes an adverse effect on competition. Competition law is not concerned here with theme of being in the dominant position, but the abuse of position.[6]

The foundation of Intellectual Property Rights is that it fosters a vibrant economic structure. To elaborate on IPR in greater detail and can be noted that the contemporaries as "*driven knowledge economy*" thrive on innovation, business and industrial spirit - technical progress and therefore it is considered appropriate to grant innovators, creators and entrepreneurs certain "*exclusive rights*" to further encourage investment, invent and innovate.

* LL.M. (Business and Corporate Laws), Gujarat National Law University, Gujarat.

Meaning of the term Innovation: According to Schumpeter[7]

Schumpeter identified innovation as a meaningful measure of economic change. He argued that economic change revolves around innovation, entrepreneurship and market power. According to him, the argument is based on the creation of temporary monopolies, which are washed in the last stage by rivals in these temporary monopolies. He said that these temporary monopolies were needed to provide the necessary incentives for companies to develop new products and processes to provide the economy with dynamic efficiency.[8]

Since in an economic analysis, we value competition because it promotes efficiency i.e., as a means and not an end, it seems that every time the monopoly increase efficiency must be tolerated, indeed encouraged Schumpeter identified innovation as the critical dimension of economic change. He argued that economic change revolves around innovation, entrepreneurship and market power. He tried to show that market power originated innovation could provide better results than the invisible hand and price competition. He argues that technological innovation often creates temporary monopolies, allowing abnormal profits would soon be completed by rivals and imitators. He said that these temporary monopolies were needed to provide the necessary incentives for companies to develop new products and processes.

It should be understood in the light of the opinion of the Schumpeter, that development conducted by the entrepreunual activities are the only reason why the economy is changing and developing. The sole credit is attributed to entrepreneurs. Therefore, they should be given sufficient opportunity to break new grounds, to carry out their innovation activities.

Essential Facilities Doctrine: A Tool for Harmonizing between IP and Competition law.

After highlighting the issue of the overlapping and the conflict between the two branches it is significant to discuss as to how the essential facilities doctrine helps in harmonizing the two branches of laws.

Essential Facilities Doctrine: U.S. Perspective

Current '*essential facilities doctrine*' imposes such an obligation on a dominant firm to meet its competitors if it controls an essential facility that makes it impossible or extremely difficult for an actual or potential competitor to compete with the company or you want to be desperate to enter the market.[9] The traditional concept of refusal to deal with the fact that a company refuses to deal with the other must be differentiated with doctrine of essential facilities. The first requires a previous relationship of two companies, in which the latter needs no such relationship.[10]

Conditions for the application of the doctrine

This doctrine is applicable only in certain special circumstances, leading to a control only be done with the monopoly, an installation that is under the control will be essential, there is more potential for duplication and no denial of such facilities.[11] The items listed above are ingredients that help to invoke that doctrine and are examined in detail with the laws of decided cases.[12]

Judicial Pronouncements

The US Supreme Court in the case of Otter Tail[13] decision in which the Court noted its concern that Otter Tail's market power in the transmission market was utilized to create a monopoly in another market. Therefore, the doctrine of essential facilities is intended to restrict a firm from extending "*monopoly power from one stage of production to another, and from one market into another.*" The Ninth Circuit stated that unless the facility "*is used to improperly interfere with competition, it cannot be called essential facilities doctrine.*"

According to Professor Hovenkamp[14] "*a properly defined essential facility must define a relevant market*".[15] If a "*facility does not constitute or control a relevant market, then competitive alternatives are available and the facility can hardly be characterized as 'essential'*". Some courts have defined an essential facility by that facility's market power as to what power is that facility providing the monopolistic firm in the market.[16]

In the case of *Blue Cross*,[17] the court held that the Clinic was not an essential facility because it did not even control fifty percent "of any properly defined market. Similarly, in *Castelli v. Meadville*[18] Medical Center the Third Circuit held that a hospital was not essential because of the existence of other hospitals in the market.

Section 1 of the Sherman Act[19] prohibits '*every contract, combination…or conspiracy, in restraint of trade or commerce*'. Under this provision some agreements in restraint of trade, such as price fixing cartels and market allocation agreements are treated as illegal per se.[20] Most agreements, however, are judged under the rule of reason,[21] which calls for evaluation of purpose, power and competitive effects. Section 2 of the same Act prohibits conduct that '*monopolizes, or attempts to monopolize any part of trade or commerce*.'[22]

However, under this provision, claims of monopolization and attempts to monopolize are always judged under rule of reason rather the per se rule. Purpose is inferred from a limited set of conduct identified as predatory, including certain pricing below cost and unjustified refusals to deal.[23]

Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property 1995 :U.S.[24]

The guidelines stated are as follows:

Protected innovation and different types of property ought to be set on an equivalent stage, without being oblivious of the inborn contrasts in the middle of IPRs and other property the extent that the "simplicity of misappropriation" is concerned.

The licenses that mix the corresponding elements of generation create expert focused result.[25]

It ought not be assumed that the presence of IPRs present market power upon the manager. Rivalry arrangement and IP laws are trapped with the basic goal of advancing advancement and shopper welfare.[26]

The licenses that blend the complementary factors of production produce pro-competitive results.[27]

The first landmark case of *United States v. Terminal Railroad Servicing,*[28] wherein, a group of railroads which jointly owned the only railroad switching yard across the Mississippi River at the central city of St. Louis prohibited competing railroad services from offering transportation to and through that destination. The Supreme Court directed the railroads group to give access to non-members; and concurrently held that such conduct constituted both an illegal restraint of trade and an attempt to monopolize.[29]

Further the celebrated case of *Lorain Journal,*[30] wherein the defendant was the only local newspaper circulating news and accepting advertisements in Northern Ohio, refused to accept advertising from businesses that placed advertisements with a small radio station, hence amounted to violation of the Sherman Act. The Court held and passed an order requiring the newspaper to accept advertisements as it was considered an "*indispensable medium*" of advertising.

In another instance in the milieu of IP monopoly, the federal circuit in *Intergraph Case*,[31] discussed the ambit of "*essential facilities*" doctrine by stating that, the doctrine would only apply in those circumstances, wherein there is a scope of vertical integration. In this case, the Plaintiff Intergraph argued that Intel had an obligation to continue supplying it with chips, technology and interoperability information because Intel products were the *de facto* industry standards as it was used by everyone and thus essential facility to do business in the industry. Intel dominated the market with well over 80 percent share of microprocessor chip sales, thus Intergraph argued that the refusal to deal was in violation of Sherman Act.[32] The court held that Intel and Intergraph were not competitors and also they did not compete in downstream market, a compulsory license could not be granted.

Another important case is that of *Eastman Kodak Co. v. Image Tech. Inc.,*[33] the Supreme Court laid emphasis on power gained through some natural or legal advantage such as patent, copyright or business expertise can give rise to liability if a seller abuses dominant position in one market to expand his domain into the next. The court also stated the relevance of market as significant aspect, for abusing its dominant position.

Another significant case in the history of U.S antitrust law was the case of *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,*[34] the U.S. The case included a legal claim affirming that Verizon by declining to impart its neighbourhood trade offices to different suppliers as needed under the Telecommunications Act of 1996, occupied with anticompetitive behaviour i.e. "refusal to arrangement," and made imposing business model force further bolstering its good fortune.[35]

The Supreme Court held and made a distinction stating that Verizon's obligations under the 1996 Act did not mean that those obligations were enforceable under the Sherman Act, but the issue was whether Verizon's conduct violated Section 2 of the Sherman Act to deal with rivals. The court stated that, the Sherman Act does not restrict a trader's right to deal with whomever he pleases.[36]

The most vital prerequisite for a restraining infrastructure guarantee as the court expressed was that the opposite party ought to hold syndication control in the significant business sector and willfully secure or keep up that power in a way not the same as the typical advancement of restraining infrastructure control, and such imposing business model might prompt the misuse. Accordingly, the court discovered no hostile to trust infringement on a piece of Verizon and kept up that against trust laws can't go past the motivation behind ordinary statutory obligations to arrangement.[37]

Essential Facilities Doctrine: India Perspective

Essential facilities Doctrine under Indian Competition Act:[38]

A brief History

The presence of the EFD in India is closely linked with infrastructure provision (in addition to Indian Patents Act's compulsory licensing regime), although not as a doctrine upheld by Indian courts but rather in the regulatory statutes associated with certain infrastructure goods, in particular in the Telecom Regulatory Authority of India (TRAI) Act, 1997, the Electricity Act, 2003 and the Petroleum and Natural Gas Regulatory Board (PNGRB) Act, 2006.

Under The Competition Act, 2002 the '*essential facilities doctrine*', though not clearly, is covered under:

(1) Section 4(2) (c) of the Act which states that there shall be an abuse of dominant position if an enterprise or a group indulges in practice or practices resulting in denial of market access in any manner; and (2) Section 3(4) (d) which prevents "refusal to deal" agreement and deem them to be anti competitive agreements holding them to agreements that cause an appreciable adverse effect on competition in India.

Explanation (d) to s. 3(4) defines "*refusal to deal*" in an inclusive manner to include any agreement which restricts or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are to be bought. It should be noted that since the definition of "*refusal to deal*" is an broad one it is not limited to only sale and purchase of goods but would also cover right to use to services. Section 3 (5) of the Act provides an explicit exception to the owner of the property rights intellectual, as long as they are exercised in a reasonable manner, without adverse effects on competition. Section 3 of the Competition Act in India prohibits anti-competitive agreements between companies and lists the behaviour that is considered to have a detrimental effect on competition. Such conduct includes - the pricing of purchase or sale, limiting production or supply, allocation of geographic markets or product market, bid rigging or collusive tendering, etc.[39]

However, except as created by clause (5) of section reflects the policy of achieving a balance between the legitimate interests of the holders of intellectual property rights and competition in the market. Section 3 (5) of the Indian Competition Act expressly provides copyright exception, provided they are exercised reasonably, within the limits of the rights granted under the Copyright Act.[40]

Further, discussing the doctrine of essential facilities in India, it should be understood that the application of such doctrine in India has not been much used by the tribunal. In the landmark case of *Bayer v. Natco*[41] a right cannot be absolute. Whenever conferred upon a patentee, the right also carries accompanying obligations towards the public at large. These rights and obligations, if religiously enjoyed and discharged, will balance out each other. A slight imbalance may fetch highly undesirable results. It is this fine balance of rights and obligations that is in question in this case." The cancer drug Nexavar is now available at market at ₹ 8800 instead of ₹ 2.8 Lakh.[42] The reason of compulsory licensing is that, of a great need and can be linked to essential facilities doctrine.

Denial of Market Accesses

The doctrine finds its genesis in the Indian Competition Act 2002 under 4 (2) (a) of the Act of 2002, though jurisprudence of denial of market access and essential facilities doctrine is different, but to Indian context such doctrine has been placed under the same head.[43]

The competition commission of India have dealt in many cases, regarding denial of market access, one of the recent case to which the commission for the first time imposed, essential facilities doctrine was of *Shamsher Kataria v Honda Siel Cars India and others,*[44] in this case automobile manufacturers operating in India were alleged to have been indulging in anti-competitive practices by not making genuine spare parts for these automobiles freely available in the open market. Instead, those manufacturers operated or regulated authorized workshops which sold such spare parts in addition to rendering after-sale maintenance services.[45]

The commission stated that, even the technological information, diagnostic tools and software programs required providing such services efficiently were not freely available to the independent repair workshops. As a result, only authorized workshops were able to sell spare parts or provide maintenance services at higher (or even monopolistic) price, this would lead the customers to service their cars in the authorized service centre, and this would lead to high costs, the manufacturers argued that, since the spare parts involved protection under IP rights and was protected by 3(5)[46] of the Act of 2002.

The commission concluded in its analysis on whether there is a '*refusal to deal*' leading to a violation of s 4(2), and held that, since there is no equivalent to s 3(5) under s 4, there is no IP defence against an alleged abuse of dominance. Also in the case of in the case of *FICCI Mhdtiplex case,*[47]" the CCI was confronted with a situation wherein parties claimed their rights under *§3(5)* and wanted to be exempted from the application of the Act. The CCI, however, noted that "intellectual property laws do not have any absolute overriding effect on the competition law. The extent of the non-obstante clause in Section *3(5)* of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours of competition law only to protect his rights from infringement. It further enables the right holder to impose reasonable conditions, as may be necessary for protecting such rights.

Conclusion

The paper has examined the interface between the two laws and highlighted the issues regarding the overlapping of the two branches in the light of EFD. The issue over here after examining the overlapping of the two laws is that, of how to create balance between the two considering the issue of dynamic efficiency. Also striking a reasonable balance over here will help to ascertain the scope of both the laws and also determine the border of their operation. There is no second doubt, that the objectives of both the laws are consumer welfare, but at times the means or the end of achieving it becomes different. The paper has also examined the essential facilities doctrine as to how does the doctrine takes approach of harmonizing the approach in various jurisdictions with decided case laws. Also the scope and its application have been discussed with regards to India.

References

(Endnotes)

1. Richard W. Leema, African-American Orators: A Bio-critical Sourcebook 403 (Greenwood Press, 1st ed. 1996).
2. Available at http://midtownblogger.blogspot.in/2015/02/born-today-austrian-economist-joseph.html, last viewed on 05/12/2014.
3. Pham, Alice (2008), 'Competition Law & Intellectual Property Rights: Controlling Abuse or Abusing Control?', CUTS International, Jaipur India.
4. *Id.*
5. Dr. S Chakravarthy, *Intellectual Property Rights and Competition Law*, Competition Law Review, Vol. 1, pp. A62-A75, 2008.
6. Shubha Ghosh, *Intellectual Property Rights: The view from Competition Policy*, Northwestern University Law Review Colloquy, Vol. 103, pp. 344-351, 2009.
7. Govindan Parayil, Conceptualizing Technological Change: Theoretical and Empirical Explorations 97 (Rowman & Littlefield Publishers, Inc. 1st ed., 2002).
8. Thomas K. McCraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction*, Cambridge: Harvard University Press, 719 available at http://www.princeton.edu/~tleonard/papers/McCraw.pdf, last viewed on 17/01/2014.
9. Abbot B. Lipsky, Jr and J. Gregory Sidak, *Essential Facilities*, 51 Stan. L. Rev. 1187, 1998-1999.
10. *Id.*
11. Norman W. Hawker, *Open Windows: The Essential Facilitates Doctrine and Microsoft*, 25 Ohio N.U.L. Rev. 115, 1999.
12. *Id.*
13. Otter Tail Power Co. v. United States, 410 U.S.
14. *Supra* note 12.
15. *Ibid*.
16. *Id.*
17. Blue Cross, 65 F. 3d at 1413.
18. 702 F. Supp. 1201.
19. § 1 Sherman Act 1872, 15 U.S.C. § 1

    Trusts, etc., in restraint of trade illegal; penalty.

    Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
20. *Id.*
21. § 2 Sherman Act 1872, 15 U.S.C. § 2

    Monopolizing trade a felony; penalty.

    Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
22. *Id.*

23. T. Ramappa, Competition Law in India: Policy, Issues, and Developments 75 (Oxford University Press 2nd ed. 2011); Also see, Board of Trade of City of Chicago v. US 246 US 231 (1918);
24. Available at http://www.usdoj.gov/atr/public/guidelines/0558.pdf last visited on 10/12/2014.
25. U.S. Antitrust Guidelines §2.1 "The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property.
26. U.S. Antitrust Guidelines §2.0 (b) "The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner". IP Guidelines, 1995.
27. *Id.* at § 2.0.
28. 224, U.S., 383 (1912).
29. *Id.*
30. 342. U.S. 143, 146-49 (1951).
31. 3 F. Supp. 2d 1255 (N.D.Ala. 1998), reversed, 195 F.3d 1346 (Fed. Cir. 1999).
32. § 2 of Sherman Act makes any attempt to monopolize any part of interstate or foreign trade a criminal offence.
33. 504 US 451, 482-3 (1992)
34. 540 U.S. 398, (2004)
35. *Id.*
36. *Id.*
37. *Id.*
38. James R. Ratner, *Should there be an Essential Facility Doctrine?* 21 U.C. Davis L. Rev. 327, (1987-1988).
39. Dr. D. Chakravathy, *Intellectual Property Right and Anti-competitive Practices*, Competition Law Review, pp. B31-B43, Vol. 1, 2010).
40. Miland V. Sathe, Compulsory Licensing in Knowledge Economy-It is Now or Never- What, Why and When about CL 71 (Satyam Law International 1st ed. 2012).
41. C.L.A. No. 1 of 2011, Order pronounced on March 9, 2012.
42. Available at :

    http://www.pharmatimes.com/article/12-03-12/India_s_first-ever_compulsory_license_-_a_game-changing_move.aspx, last viewed on 27/01/2015.
43. Michael Braulke, *Price Responsiveness and Market Conditions*, Econometrica, Vol. 51, No. 4, pp. 971-980, (Jul., 1983).
44. Case No. 03/2011.
45. Amitabh Kumar, *Competition Assessment*, Competition Law Reports pp. A-246-249 (Oct-Dec) 2008.
46. The Competition Act 2002 § 3(5) contains the following provision: Nothing contained in this section shall restrict – (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under – (a) the Copyright Act, 1957 (b) the Patents Act, 1970, (c) the Trade and Merchandise Marks Act, 1958 or the Trade Marks Act, 1999, (d) the Geographic Indications of Goods (Registration and Protection) Act, 1999, (e) the Designs Act, 2000, (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000.

    (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

    Such conduct includes – determining purchase or sale prices, limiting production or supply, allocating geographic markets or product market, bid rigging or collusive bidding etc.
47. Available at http://www.cci.gov.in/May2011/OrderOfCommission/FICCIOrder260511.pdf, last viewed on 05/01/2015.

❑❑❑

CHAPTER

29

Issues and Challenges Relating To Competition Law in New Economy

Dr. Aqueeda Khan*

Competition can be defined as a situation in which people or organization competes with each other for something that not everyone can have.[1] So in business it is to attract more buyers or customers and to enhance profit or both. Competition is considered the blood of market for flourishing any businesses or services. Presence of competition is necessary for efficient working or markets as it provides the consumers free choice of selecting or purchasing goods according to their needs at a congeal price. Further it also encourages efficiency and innovation in the market.

The history of competition law can be traced back to Roman Empire, but in modern time it has come only after the Second World War. Presently the American antitrust statutes like Sherman Act of 1890, Clayton Act of 1914 widely used as a model act and followed by more than hundred nations in drafting their own competition law. The definition of competition changed from time to time. In classical economy it was about the role of individual self-determination in directing the allocation of resources. It was a theory about the limits of state power to give privileges to one person or class at the expense of others. In neo classical economy competition was regarded as a theory of price, cost relationship. For some social Darwinists during gilded age it was regarded as struggle for survival.[2]

The globalization and liberalization supplemented by technological innovation led to free flow of market and diminished trade barrier, business entity started unfair trade practices or mal practice in course of trade and businesses. Big corporation or business entity started monopolizing the trade and services by resorting to anti-competition activities so the fear of concentration of wealth (profit) in the few hands resulting in to the emergence of capitalist society on the one hand and distrust of power, concern for consumer, equal opportunity for enterprise compelled the government to regulate the market and prohibit the market failure on account of restrictive business practices in the market.

The main reason for protecting competition in the market was also to uphold the core principle of Constitution i.e. socio economic and political justice as laid down in the preamble[3] part III[4] and part IV.[5]

If we scan the Indian economic history, then since last 30 years it has transformed from the communism to market economy. The need for a competition law was become need of the hour for well-functioning of the market and to create a market situation which leads to greater welfare of the people. So to function the market optimally and to compete with the international trade and business law the Indian government passed MRTP Act,1969[6] and in the year 2002 Competition Act by repealing the MRTP Act.

* Principal, Monad School of Law, Monad University, Hapur,

This paper is an attempt to explore the circumstances and causes which led the government to repeal the MRTP Act and substitute it by competition act of 2002. Further the paper also tries to indicate silent features of the new act[7] and lastly seeks to come to conclusion that the said act being an important step to maintain the competition in the market needs some more efficient steps to run with existing market situation.

Soon after independence in 1947, the biggest task before the Indian government was to secure its people economic, political and social equality. The government adopted the economic policies that were socially oriented and fully controlled by the state. The main concern was to develop heavy industries and the government started rapid industrialization under its control in a planned way. So the country followed a mixed economic pattern.

A careful study of India's economic history since its independence shows that in starting India followed the strict economic policy i.e. license-permit-control. The first five year plan (1951-55) called for the planned development of only a few industries, the ones that private industry had not developed for one reason or another. In the first five year plan the other industries were left to the market. The second five year plan (1956-1961), the product of P.C. Mahalanobis' work, was more interventionist. It tried to implement the elements of British socialism and combine them with the tenets of Mahatama Gandhi. Licenses were required for starting new companies, for producing new products or expanding production capacities. This is when India got its license raj, the bureaucratic control over the economy. Not only did the Indian government require businesses get bureaucratic approval for expanding productive capacity, businesses had to have bureaucratic approval for laying off workers and for shutting down. When a business was losing money the government would prevent them from shutting down and to keep the business going would provide assistance and subsidies. When a business was hopeless an owner might take away, illegally, all the equipment that could be moved and disappear themselves. In such cases the government would try to keep the business functioning by means of subsidies to the employees. One can imagine how chaotic and unproductive a business would be under such conditions. So the strict bureaucratic control coupled with corruption led to concentration of wealth in the hands of big business houses and this resulted in the stagnation in Indian economy. Big business houses were at an advantageous position in securing licenses to open or expand their business undertakings.

In April, 1964 the government appointed Monopoly Inquiry Commission to investigate the concentration of in private sector and to suggest necessary legislative measures. The MIC submitted its report in October 1965 and found that there was high concentration of economic power on over 85 percent of industrial items in India.[8] The committee also noted that dominant positions allowed firms to manipulate prices and output.

Then the planning commission of India, in July 1966, appointed Hazari committee to review the operation of the industrial licensing system under industries (development and regulation) Act 1951. The report also stated that the working of licensing system had resulted in disproportionate growth of some of the big business houses in India.[9]

After much debate the MRTP Act was enacted in December 1969 and came into force from June came into force. It deals with the monopolistic, restrictive and unfair trade practices of an enterprise. The MRTP Act was based on the economic philosophy which reflected towards achieving and securing socio-economic justice in furtherance of DPSP[10] of the constitution. It aimed towards securing:

1. The ownership and control of material resources of the community are so distributed as best to sub-serve the common good.
2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The broad premises on which the MRTP Act rests are:

- Unrestrained interaction of competition forces.
- Maximum material progress through rational allocation of economic resources.

- Availability of goods and services of quality at reasonable price.
- A just and fair deal to the customers.[11]

In spite of the changes made to the MRTP Act, the act was no proved to be useful for the changing economic scenario of the country. The act was inadequate on many aspects and because of this the MRTP commission was not able to work effectively.

Reasons for the poor performance of the Act:

(a) The act did not define many of circumstances which amounted to anti-competitive in nature. The act did not contain the definitions of the terms like predatory pricing, cartel, collusion, bid rigging, abuse of dominance, boycott and refusal to deal etc.

(b) If we check the behavior of the MRTP Act, the conduct of the undertakings or enterprises was examined only on the basis of:

Whether the practices of undertakings are detrimental to public interest?

Whether the said practices constitute any monopolistic, restrictive and unfair trade practices?

Many practices or acts of an enterprises which may amount to monopolistic, restrictive and unfair trade practices are not expressly provided in the act was causing confusion to the commission in deciding the disputes.

(c) On the point of taking action it can be very well said that the MRTP commission was a toothless tiger as if the commission on enquiry comes to a conclusion that an errant undertaking has indulged in any practices which are against the MRTP law then it can only direct that undertaking to discontinue or not to repeat the undesirable trade practices. The commission had no power to impose penalty either punitive or monetary.

The government felt that the whole system of MRTP has become obsolete and needs a new competition policy for country in line with international developments. It was also realized by the government that the judicial pronouncement and many provisions of the MRTP Act is not useful in the existing circumstances even after the major amendment of 1991. The establishment of world trade organization changed the whole economic scenario of the world. An expert group on interaction between trade and competition policy set up by government also recommended the need of a competition law to protect fair competition and to check anti-competitive practices, many of which could surface during the implementation of the WTO agreements.[12]

The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The government has decided to appoint a committee to examine this range of issues and proposed a modern competition law suitable for our country.

Considering the above factors and realizing the need for a new competition law the government appointed a high level committee (S V S Raghavan Committee) to suggest ways and means to promote competition and also suggest a legislative framework of new competition law for the country. The committee submitted its report in May 2000. On the basis of the report of the high level committee, competition law was enacted by parliament in December 2002 and it received presidential assent in January 2003. However the whole Act did not came into force at once and some part of the act came into operation time to time by the notification of the government.

A perfect competition market can best run the market than a monopolistic market. In a market having competition scarce resources can be allocated efficiently and also there can be best use of that resources ultimately resulting into welfare to the producer as well as consumer. In a competition market, market reaches to equilibrium wherein no more customers is willing to buy a product at a given price and no more producer

is willing to sell the product at a lower price to increase the sell. Competition promotes allocative efficiency, productive efficiency and dynamic efficiency. Further it provides a number of buyers and sellers without any restriction of entry into the market and it also keeps the prices of goods and services uniform.

On the other hand in a monopolistic market resources are used in a manner where prices are higher and quantity is lower resulting into social cost (also known as deadweight cost) in which there are buyers in the market who are willing to purchase the product at a price sufficiently high to cover the costs of production but are not given that opportunity. Society in this way lost and wastage of resources takes place and society suffers. Further in a monopolistic market the undertakings creates barrier to entry into the market. But acquiring monopoly by better commercial practices it not bad in law, what is bad that acquiring willful monopoly.[13]

There are two schools who have tried to analyze the competition on economic basis. Harvard school is the first which emerged on the issue and came with S-C-P paradigm[14] (structure-conduct-performance). According to S-C-P paradigm, the success of any business depends upon the conduct of buyer and seller and conduct is based on the market structure which again dependent upon the government policy and technology. The proponent of this model argued that the limitations of market power should be reduced whenever this could be done without corresponding cost in the performance of the industry.[15]

The second school was Chicagoans who declined to examine the welfare implications of structure of an industry and barriers to entry into that industry. They criticized and replaced the Harvard's S-C-P paradigm by arguing that monopolistic industries are also the result of efficient production, superior performance so by accepting Harvard's thought one should not attack on the existence of monopolistic firm. Thus the real question for competition policy is whether "artificial" barriers, not being the result of more efficient production or economies of scale, prevent the effective operation of the market.[16]

Competition policy is generally defined as those measures taken by the government that directly affects the behavior of enterprise and the structure of industry. The development of modern competition law around the world is under tremendous discussion on the point of its economic rationale. The contours of competition law are increasing day by day with the expansion of trade and service market and technological development. Academicians of the world are divided over the economic rationale of the competition law i.e. whether it should be for market efficiency or consumer welfare (policy debate). The other point of discussion is about the circumference of competition law i.e. whether the competition law should only concern with the economic aspect of the market or the competition law should also take into consideration the social and political effect of allocation of resources. The other point is about the standards which a business should conform.

The Main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the affective allocation of resources; productive efficiency, which ensures that costs or production are kept at a minimum; and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law. In view of the Preamble of the Competition Act, 2002, it requires not only protection of free trade but also protection of consumer interest. The delay in disposal of cases, as well as undue continuation of interim refrain orders, can adversely and prejudicially affect the free economy of the country. Efforts to liberalise the globalization would be jeopardized if time-bound schedule, and, in any case, expeditious disposal by the CCI is not adhered to. The scheme of various provisions of the Act including sections 26, 29, 30, 31, 53B(5) and 53T and Regulations 12, 15, 16, 22, 32, 48 and 31 of the Competition Commission of India (General) Regulations, 2009 clearly show the legislative intent to ensure time-bound disposal of such matters.[17]

Section 3 of the Competition Act, 2002 deals with anti-competition agreements. Sub-section (1) of section 3 relates to agreements which will be deemed to be anti-competition agreements. Sub-section (2) of section 3 provides that anti-competitive agreements shall be void. Sub-section (3) of section 3 describes the nature of the agreements which will come within the purview of anti-competitive agreements. Sub-section (4) of section 3 of the Act further clarifies certain kinds of agreements which will be called as anti-competitive agreements. Sub-section (5) of section 3 protects agreements relating to intellectual property from being assailed as anti-competitive agreements.

There is no specific definition of the expression "anti-competition agreement." A broad definition of competition has been given by the Raghavan Committee in High Level Committee on Competition Policy and Law. It means "a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share" (World Bank, 1999). The word "agreement" is defined in section 2(b) of the Competition Act, 2002 which includes amongst others any agreement or undertaking or action in concert whether formal or in writing or whether intended to be enforceable by legal proceedings. In the said contexts an agreement which is contrary to or inconsistent with competition agreement will be called as anti-competition agreement. Section 3 of the Act prohibits anti-competition agreement. No. enterprise or association of enterprise or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition within India. Any agreement by such person or association of persons including cartels engaged in identical or similar trade of goods or provision of services which directly or indirectly determines purchase or sale prices, limits or controls production, supply market, technical development, investment or provision of services, shares the market or source of production, or directly or indirectly results in bid rigging or collusive bidding, shall be presumed to be anti-competitive agreement. An agreement for "bid rigging" means an agreement between enterprises of persons engaged in identical or similar production or trading of goods or provision of services which was the effect of eliminating or reducing competition for bids.[18]

The following agreements shall also be regarded as anti-competition agreements[19]: (a) lien in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; resale price maintenance. Each of the said expressions is defined in the Explanation to sub-section (4) of section 3 of the Act. A "tie-in arrangement" includes any agreement requiring a purchaser of goods as a condition of such purchase, to purchase some other goods. "Exclusive supply agreement" includes any agreement restricting in any manner she purchaser in course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person. The expression "exclusive distribution agreement" includes an agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods. The expression "refusal to deal" includes any agreement which restricts or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are brought. The expression "resale price maintenance" includes any agreement to sell goods on condition that the prices to be changed on the resale of the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than these prices may be changed.

There is nothing in the Competition Act, 2002 to indicate that the competition Commission is not invested with the jurisdiction to determine jurisdictional facts. The question whether the Competition Commission has jurisdiction to initiate the proceedings in the fact situation of a case is a mixed question of law and fact which the Competition Commission is competent to decide.[20]

The efficacy and true effect of the competition act, 2002 will be see after its full implementation. But the moot question arises that are we ready for a law like this? The economy can be best described as a mixed economy. However, the new act is definitely a step towards harmonizing the competition policy with the international trade and policy.

References

(Endnotes)

1. Oxford Advance Learner Dictionary, 8thedn.
2. Hovenkamp, "The political economy of substantive due process", 40 Stan L Rev 417 (1988).
3. P.M. Bakshi, The constitution of India, I (Universal Law Publication, New Delhi 11thedn., 2011).
4. Art. 19(1) g, the Constitution of India, 1950.
5. Art. 39(b) (c), the Constitution of India, 1950.
6. Monopoly and Restrictive Trade Practices Act, 1969.
7. Competition Act, 2002.
8. Monopoly Inquiry Commission Report, Government of India, 1965.
9. Hazari Committee Report on Industrial Licensing Procuder, Ministry of Industry, Government of India, New Delhi, 1965.
10. Part IV of Constitution of India, (Directive Principal of State Policy).
11. Section 29 (i) goods and section 2(u) services of MRTP Act, 1969.
12. Report of the expert group on interaction between trade and competition policy, ministry of commerce government of India, 1999.
13. United States v. Grinnel Corp., 1996 384 US 563.
14. Developed by Edward S. Mason at Harvard University in late 1930s and early 1940s.
15. Kaysen C and Turner D.F., Antitrust policy: an economic and legal analysis (Cambridge, Mass., Harvard 959).
16. Bork, The Antitrust Paradox (New York, The Free Press, 1993).
17. Competition Commission of India v. SAIL, (2010) 10 SCC 744.
18. Explanation to sub-section (3) of section 3 of the Competition Act, 2002.
19. Sub-section (4) of section (3) of the Competition Act, 2002.
20. Amir Khan Productions Pvt. Ldt. Mumbai v. Union of India, AIR 2011 (NOC) 143 (Bom.).

❑❑❑

CHAPTER

30

The Role of Competition Law in New Economy

Dr. Brajesh Kumar Singh*

Competition law in now applied to many economic activities that once were regarded as natural monopolies or the preserve of the state: telecommunications, energy, transport, broadcasting, postal services, sports, media etc. Thus, competition law touches every sector of the economy.

Modern competition law is generally traced to the United States, where the **Sherman Act** was enacted in 1890. The Sherman Act, 1890, prohibited contracts, combinations or conspiracies in restraint of trade, and also prohibited monopolization or attempts or conspiracies to monopolize. Thus, the Sherman Act, 1890 was the first codified law which recognized common law principles of competition law with the progress of time, the competition law has attained new dimensions with the enactment of subsequent laws, i.e. the Clayton Act, 1914, the Federal Trade Commission Act, 1914.

After independence, the Indian Government assumed greater role for overall development of country Government policies were framed with the aim of achieving a socialist pattern of society that promoted equitable distribution of wealth & economy powers.[1] The Central Government laid before the Parliament a Bill relating to the monopolies and Restrictive Trade Practices. The said bill was passed by the Parliament under the title "Monopolies and Restrictive Trade Practice Act, 1969 (MRTP Act). So, in India, the first legislation relating to competition law was MRTP Act, 1969. The principal objects of MRTP Act were –

(i) Prohibition of concentration of economic power to the common detriment.

(ii) Prohibition of restriction trade practice.

(iii) Prohibition of unfair trade practice.

The MRTP Act took inspiration from Article 38 & of the Indian constitution.

With the passage of time, it was noticed that the objectives of the MRTP Act could not be achieved to the desired extent. Thus, in 1977 Government constituted a High Powered Committee under the chairmanship of Rajinder Sachar J., to review the Monopolies & Restrictive Trade Practices Act, 1969 and to suggest measures to make it appropriate &effective in the era of globalization of commercial transaction of the commodities.

On the recommendation of Sachar Committee, the MRTP Act, 1969 was amended in 1984 on the basis of the suggestions of the Sachar Committee & provisions relating to "unfair Trade Practice" were introduced, and the provisions relating to monopolistic enterprises seeking prior approval were deleted with the globalization of world economy, it became necessary to encourage competition to foster speedy economy development.

* Assistant Professor in Law, Amity Law School, Amity University, Haryana.

The year 1991 was a milestone year for India is economy. The Indian economy experienced a paradigm shift owing to the widespread. Economic reforms, moving away from the 'command & Control' economy to an economy dependent on free market principles. Liberalization became the catch phrase. The economy was opened up. This liberalized economic policy permitted greater participation of overseas companies in economic activities in India. As a corollary, large multinational companies taking advantage of the liberalized economic policy established their businesses in India. The provisions dealing with monopolistic enterprisesseeking prior approval were deleted from the statute book in 1991 by amending the MRTP Act, 1969. The amendment deleted various provisions of the Act like provisions which requires prior approval of the central Government for establishing a new undertaking, expending & existing undertaking, amalgamations, mergers & takeovers of undertakings.

However, despite several amendments, the MRTP Act was unable to adequately deal with anti-competitive practices tike cartels, boycotts, refusal to dial, predatory pricing, bid rigging, abuse of dominance arising out of the implementation of WTO agreements. Consequently, the decision to enact a law on competition policy was announced by Finance Minister of India in his budget speech delivered on 27th Feb., 1999 which stated that MRTP Act become obsolete in the light of international economic developments relating more particularly to competition laws & there is a need to shift the focus from curbing monopolies to promoting competition, thus Government has decided to appoint a committee to propose a modern competition law.[2]

A high level committee on competition law & policy under the chairmanship of S.V.S. Raghavan (popularly known as Raghavan committee) was constituted by central Government in 1999 to advice a new competition law for the country. The competition bill having been passed by both of the houses of parliament in December, 2002 received the assent of president on 13th January, 2003 & it came on the statute book as "The Competition Act, 2002. Consequently, the competition commission of India was setup at New Delhi on 14th October, 2003.

The objects of this Act is stated in the preamble as follows-

"To provide, keeping in view of the economic development of the country, for the establishment of a commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried by other participants in markets, in India, and for matters connected therewith and incidental there to."

In **Competition Commission of India V. SAIL,**[3] the Supreme Court held that the main objection of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three folds–

(i) Allocative efficiency, which ensures the affective allocation of resources;

(ii) Productive efficiency, which ensures that cost or production are kept at a minimum; and

(iii) Dynamic efficiency, which promotes innovative practices.

These factors, by and large have been accepted all over the world as the guiding principles of effective implementation of competition law. It requires not only protection of free trade but also protection of consumer interest.

For implementing the provisions of the competition law, the Act provides for the establishment of competition commission of India, which will hear competition cases and also play the role of competition advocacy. Competition Commission of India shall have a Chairperson (may/may not from judiciary) and 2 to 6 members appointed by central Government, having professional experience in relevant fields for at least 15 year and should be person of ability, integrity & standing.

The competition Act is designed to promote competition in all sectors of the economy through its system of effectively prescribing what companies should not do, i.e. engage in certain pricing behavior, curtails, collusions, etc.[4]

The Act also provides for a Director General which shall assist CCI, when directed by CCI in investigating into any contravention of the provisions of the Act or any rules or regulation made there under. An appeal against any direction, order of decision of the competition commission of India shall lie to the Competition Appellate Tribunal (CAT). The CAT will hear and dispose of appeals against recovery of compensation. CAT shall have a chairperson who is/has been the judge of Supreme Court or Chief Justice of High Court and two other member having professional experience in relevant fields for at least 25 years and should be person of ability. Competition Appellate Tribunal order are appealable to Supreme Court within 60 days. The Act provides for empowering the comptroller and Auditor General of India audit the accounts of the CCI.

Anti-competition agreement is an agreement having appreciable advance effect an competition Act is to proved prevent adverse effect on competition.

No enterprise or association of enterprises or person or association of persons or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provisions of services, which causes or is likely to cause an appreciable advance effect on competition within India.[5]

In **Haridas Exports V. All India Float Glass Manufactures Association,**[6] the Supreme Court observed that the words "adverse effect on competition" embraces Acts, Contracts, Agreements or combination which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing due course of trade.[7] The rule of reason in examining the legality of restraints on trade was explained by the U.S. Supreme Court in **Board of Trade of Lily of Chicago V. U.S.,**[8] where justice Brandeis observed – "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restraint, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

The Competition Act, 2002 highlights on the matters which are dealt with in the said Act for economic development of the country. It aims at establishing a Commission (i) to prevent practices having adverse effect on competition, (ii) to promote and sustain competition in markets, (iii) to protect the interests of consumers, and (iv) to ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith or incidental thereto.

In case of conflict between various provisions of rule or of statute, harmonious construction should be made by the court. Statute or rule made thereunder should be read as a whole. One rule cannot be used to defeat another rule in the same rules.[9] Proviso to section must be interpreted along with main provision by applying rule of harmonious construction.[10]

The Sherman Anti-Trust Act condemns all contracts, combination and conspiracies which restrain the free and natural flow of trade in inter-state commerce with foreign nations or restrict in that respect the liberty of trader to engage in business. It includes not only voluntary restraints where persons agree to suppress competition among themselves but also involuntary restraints where persons conspire to compel action by others. Sections 1 and 2 of the Act refer to and make illegal two different things. Section 1 makes illegal trade and commerce; and section 2 makes illegal combinations or conspiracies to monopolies or to attempt to monopolies inter-state trade and commerce. Section 2 is intended to supplement the first and make sure that by no possible guise could the public policy embodied in section 1 be frustrated or evaded. In other words, "having by the first section forbidden all means of monopolizing trade that is, unduly restraining it by means of every contract, combination, etc. The second section seeks, if possible, to make the prohibition of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even though the acts by which such results are attempted to be brought about or are brought about are not embraced within the general enumeration of the first section.[11]

The Competition Act, 1998 controls anti-competitive agreements by way of prohibition modeled upon article 81 of the EC Treaty. Section 3 and sub-sections 1-3 provide for some exclusion from Chapter 1 on Prohibition. Sections 4-11 of the said Act deal with exemptions. Chapter 1 must be read subject to section 50 of the Act which provides for exclusion by order, of vertical and land agreements. Section 2 of the (English) Competition Act, 1998 is analogous to section 3 of the (Indian) Competition Act, 2002. Section 2(1) of the 1998 Act deals with probation of agreements generally. Section 2(2) of the said Act sets out a list of agreements by way of illustrations as to which classes of agreements will come within the purview of section 2(1) of the said Act. In interpreting section 2(1) as to the effect on trade within the United Kingdom it has been held by the Competition Appeal Tribunal that there is no need for the "effect on trade" within the U.K. to be, appreciable.[12]

The Competition Appeal Tribunal in another decision[13] has considered the application of the concept of a concerted practice to the practice of collusive tendering and has concluded that there was an infringement of Chapter 1 or prohibition. The test to be applied to determine prohibition under Chapter 1 of the 1998 is to see whether the "object or effect" of the agreement is to prevent, restrict or distort competition.[14] It is necessary to establish that an agreement has an effect on Competition. In Race Course Association v. OFT,[15] the Competition Appeal Tribunal has held that OFT had failed to establish that the collective selling of the right to broadcast horse-racing events had an anti-competitive effect. Similarly, in P&S Amusements Ltd. v. Valley House Leisure Ltd.,[16] the High Court considered the agreement whether it had effect of restricting competition and held that a beer tie in a lease of a public house in Blackpool had no anti-competitive effect.

Section 2(4) of the 1998 Act corresponds to section 3(2) of the 2002 Act and the provisions contained in both the sub-sections deal with voidness of an agreement which is entered into in contravention of prohibition. In Gibbs Mew v. Gemmell, the court of Appeal held that an agreement that infringes article 81(1) of the E.C. Treaty is not only void and unenforceable, but also illegal.

Section 3(1) of the 1998 Act provides that the Chapter 1 on prohibition does not apply to cases which are set out in Schedule 1 (Mergers and Concentration), Schedule 2 (Competition scrutiny under other enactments), Schedule 3 (Planning Obligations and other general exclusions), Schedule 4 (Professional rules). These provisions in the schedules of the 1998 Act correspond to the provisions of promise to section 3(3) and section 3(5) of the 2002 Act.

Section 52 of Competition Act, provides about accounts and audits as (1) The Commission shall maintain proper accounts and other relevant records and prepare an annual statement of amounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

(1) The accounts of the Commission shall be audited by the Comptroller and Auditor-General of India sat such intervals as may be specified by him and any expenditure incurred in connection with such audit shall be payable by the Commission to the Comptroller and Auditor-General of India.

(2) The Comptroller and Auditor-General of India and any other person appointed by him in connection with the audit of the accounts of the Commission shall have the same rights, privileges and authority in connection with such audit as the Comptroller and Auditor-General of India generally has, in connection with the audit of the Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers and other documents and papers and to inspect any of the offices of the Commission.

(3) The accounts of the Commission as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before each House of Parliament.

Section 52 deals with accounts and audit. The CCI shall maintain proper accounts and other relevant records and prepare an annual statement of accounts in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.[17] The accounts of the CCI shall be audited by the Comptroller and Auditor-General of India at such time as may be specified by him and any expenditure in this connection shall be payable by the CCI to the Comptroller and Auditor-General of India. It is made clear that the orders of the CCI which are appealable to the Appellate Tribunal or the Supreme Court are not subject to audit under this section.[18] The Comptroller and Auditor-General of India and another person appointed by him for auditing the accounts of the CCI shall have the same rights, privileges and authority as those of the Comptroller and Auditor-General of India. The accounts of the CCI as certified by the Comptroller and Auditor-General of India or any person appointed by him together with the audit report thereon shall be forwarded annually to the Central Government for laying the same to the Parliament.[19]

The Central Government in exercise of powers under section 63(2) (k) read with section 52(1) of the Competition Act, 2002 has made rules under the title of the Competition Commission of India (Form of Annual Statement of Accounts) Rules, 2009. The said rules contain the Form of financial statement, annual statement of accounts and other procedural matters.

Section 53 of Competition Act, provides:

(1) The Commission shall furnish to the Central Government at such time and in such form and manner as may be prescribed or as the Central Government may direct, such returns and statements and such particulars in regard to any proposed or existing measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues, as the Central Government may, from time to time, require.

(2) The Commission shall prepare once every year, in such form and at such time as may be prescribed, an annual report giving a true and full account of its activities during the previous year and copies of the report shall be forwarded to the Central Government.

(3) A copy of the report received under sub-section (2) shall be laid, as soon as may be after it is received, before each House of Parliament.

Section 53 of the Competition Act, 2002 deals with furnishing of returns and statements to the Central Government. The CCI is under obligation to furnish to the Central Government at such time and in prescribed form (i) such returns and statements, and (ii) such particulars in regard to (a) any proposed, or (b) existing measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues as the Central Government may require from time-to-time.[20] The CCI shall prepare once every year in prescribed form an annual report giving a true and full account of its activities during the previous year and copies of such report shall be forwarded to the Central Government year and copies of such report shall be forwarded to the Central Government.[21] A copy of the said report shall be laid before the Parliament as early as possible.[22]

References

(Endnotes)

1. Burhan Majid, "Competition Law in India". Serials Publications, Istedn., p. 15.
2. Sinhal's competition & investment law in India, IIIrd Edn, P. 7.
3. (2010) 10 SLL 744.
4. Suzzane Rab, "Indian Competition Law and International Perspective." Wolter Kluwer (India) Pvt. Ltd., p. 12.
5. Section 3(1) of the competition Act, 2002.
6. (2002) 111 Comp. Cas. 617 (SC).
7. World Bank: Glossary of Industrial organization, economic & Competition Law.

8. 246 US 231 (1918).
9. Jagdish Singh v. Lt. Governor, Delhi, AIR 1997 SC 2239: 1997 AIR SCW 2016: (1997) 4 SCC 435.
10. J.K. Industries Ltd. v. Chief Inspector of Factories and Builders, (1996) 6 SCC 665: (1996) 4 SCJ 229: JT 1996 (9) SC 27.
11. Standard Oil Co. v. U.S. Mo, 31 SCT 502.
12. Aberdeem Journals Ltd. v. office of Fair Trading, (2003) CAT 11.
13. Apex Asphalt and Paving Co. Ltd. v. OFT, (2005) CAT 4.
14. Institute of Independent Insurance Brokers v. Director-General of Fair Trading, (2001) CAT 4.
15. (2005) CAT 29.
16. (2006) EWHC 1510 (Ch.).
17. Section 52(1), Competition Act, 2002.
18. Explanation to section 52(2).
19. Section 52(1), Competition Act, 2002.
20. Section 53(1), Competition Act, 2002.
21. Section 53(2), Competition Act, 2002.
22. Section 53(3), Competition Act, 2002.

❑❑❑

CHAPTER

31

E-Commerce & Competition Law: Principles and Analogies

Hon. Fola Ajayi (Ph.D)* **and Matthew Olong (Ph.D)****

Abstract

The article appraises e-commerce, in the era of competition law and argues that the changes brought about by the emergence of e-transactions ushered in by information technology has come to stay. In this wise, the facilitation of commercial transaction electronically using the Electronic Data interchange and the Electronic Funds Transfer, allow businesses to send commercial documents electronically. Millions of transactions are therefore concluded on daily-basis without, the physical presence, of the entities or the exchange of papers and documents as it used to be. So the need to enact legislation that would cover the trend as competition laws are redefined to meet the ever growing challenges of the modern era as e-commerce provides both new ways of making contracts and new methods of performing the contracts.

Introduction

It is generally accepted that the story of mankind is nothing but a history of changes. As epochs changes the affairs of man are of necessity being re-ordered. From the Stone Age until now, no change has been as far reaching and universal as the Information Technology. Indeed all sphere of human activity has been affected and altered. Information technology is central to agriculture, military operation, communication, industrial science and technology, healthcare and commerce and in all these areas, information technology and electronic transactions have taken the centre stage.[1] Millions of transactions are concluded on daily-basis without, the physical presence, of the entities or the exchange of papers and documents as it used to be.[2]

The paper intends to examine a narrow but critical issue of the legal effect of electronic commerce with regards to consumer transactions in Nigeria arguing for the need to enact a competition law to embrace e-commerce.[3]

In the study, it is assumed that the core meaning of the key term; *e-commerce* (electronic transaction) is fairly certain in spite of the different definitions that have been proffered.[4] The assumption is convenient and defensible. E-commerce originally meant the facilitation of commercial transaction electronically using the Electronic Data interchange (EDl) and the Electronic Funds Transfer (EFT). These devices, allow businesses to send commercial documents electronically.[5] Today, the term is generally used to describe activities such as

* Kogi State Judicial Judiciary, Egbe Judicial Division.

** Associate Professor, Department of Business Law, Faculty of Law, University of Benin, Edo State, Nigeria.

buying, selling, marketing, distributing and servicing of products carried on through the internet.[6] It is wide enough to include all electronically mediated transactions.[7]

The term consumer on the other hand is not entirely free of controversy.[8] But this paper intends to adopt the meaning accorded the term by the Consumer Protection Council Act.[9] Section 32 of the Act defines a consumer to mean an individual who purchases, uses, maintains or disposes of product or services. Categories of transactions covered by the definition are inexhaustible. It will quite naturally encompass any transaction which enables an individual to buy, use, maintain and dispose of products or services. In the modern setting, these consumer activities are increasingly and more conveniently being undertaken through or facilitated by means of electronic devices.

Consumer products and services are increasingly being marketed through compulsive electronic advertisements. Information is accessed more easily from the World Wide Web; contracts are negotiated and executed through e-mails and by click of buttons. Products and services may also be received through electronic network. Indeed, e-commerce has revolutionized consumer trading with immense benefits but not without a number of legal and socio-economic challenges. These challenges include issues such as applicable legal rules (choice of law, jurisdiction and taxation), intellectual property rights, cyber crime, consumer protection and dispute resolution mechanisms. Since legislation are generally belated and judicial activism oftentimes slow, there is impetus for spatial and theoretical examination of critical aspects of e-commerce in the light of extant regulations to assess the extent to which the evolving practices are supported by legal rules within the Nigerian legal system which competition legislation should comprehend.

Formation of Electronic-Contract

Traditional common law envisages that an enforceable contract may be concluded either orally in writing or by conduct. The flexibility of this framework was strained to accommodate new trends when telephone, telex, fax and facsimile were introduced and used in the process of negotiating contracts. But electronic contracting has dehumanized the process of contracting by making it more impersonal, automated, anonymous and global. Laws and legal rules of conventional commerce have to grapple with the new situation where papers and human elements are no longer insisted upon in the formation of contracts.[10]

It has been aptly observed that the law of contract may never be the same with the advent of the Internet.[11] Analogies and legal fictions have been used to construct the linkages needed to harmonize e-commerce with the fundamental principles of contract law. In the area of sale of goods, for example, electronic-commerce has not only affected the law but it has also affected the traditional categorization of -goods and products.[12] Rather than drawing analogies, legal, policy would be healthier if critical aspects of e-commerce are understood in their own peculiarity while formulating rules that are symmetric with established principles of conventional contract.

The challenge thrust by e-commerce to legal policy is to demarcate between an offer and an invitation to treat in the multimedia context of advertisements directed at the buyer in an electronic transaction. Reasons have been adduced to justify the view that an advertisement in the web must also be kept distinct from an offer. First, it has been pointed out that to hold the supplier bound to the number of acceptances received in response to an advertisement will result into chaos as the seller may become bound to sell more than he can supply.[13] This reasoning will also hold water in e-commerce context.[14]

The more significant issue arising from advertisement and invitation to treat in the context of e-commerce from the perspective of consumer protection law in Nigeria is the fact that there is no discernible regulatory framework for the regulation of advertisements on the net. Web advertisements are cross-border and the mandate of the national Agencies to control false and misleading advertisements may often be of no use with regard to worldwide web adverts.[15]

E-contracts often occur over a distance and it may become necessary to know where, when and how the contract was made.[16] E-contracts may come in two broad manners; by the exchange of e-mails or by web click to order.[17] The e-mail is not as instantaneous as fax and telephone calls.[18] The e-mail may be delayed by the server or delivered when addressee had close for business. It may be misaddressed or may not be collected or read immediately it was delivered. The sequence of e-mails may have to be examined to identify which party made the offer and when the offer was made. Again, assuming that the contract law rules regarding mails by post is to be applicable, acceptance will be complete upon posting. But postal rule has not been applied to messages sent by telex machines and there is no justification for its application to the more complex setting of e-mails.

It is always important to ascertain the time when the acceptance was made and when it became effective, since rights and obligations will accrue either from the moment the acceptance was made or when it was received or deemed to have been received. Similarly, the place of both the offer and acceptance may be relevant in determining where the offeror's place of business is located and in determining where acceptance took place. These facts are significant in resolving the issues of jurisdiction and choice of law. In Entores v. Miles Far Eastern Corporation[19] it was decided that an acceptance is not valid until when it is received by the offeror. The place of acceptance is therefore the place of business. The extension of this rule to e-mails will give rise to further inquiries. For instance, when may an offeror be said to have received an e-mail in acceptance of his offer? Is it when it was delivered to his server or when it was delivered to his computer or better still, is it when it was actually read by him?[20]

It is noteworthy that the above rigmarole arising from the straining of the contract law rules to cover e-mails has been obviated by the UNCITRAL[21] Model Law on Electronic Commerce. The provision of the Model Law is being adopted by the *Draft Nigerian Electronic Transaction Bill*. Under the draft bill an electronic document is dispatched when it enters an information system outside the control of the originator. Where the addressee has designated a particular system for receiving documents, receipt occurs when the document enters such system and if it is sent to a system other than the one designated, receipt occurs when the document is retrieved by the addressee. If the addressee has not designated an information system, then receipt occurs when the document enters an information system of the addressee. The draft bill also provides that a document is deemed to be dispatched from where the originator has his place of business and to be received where the addressee has his place of business.[22] Helpful as the draft bill appears; it seems that the provision, when it comes alive will require judicial and legislative amplification in many respects.[23]

With regard to consumer issues, the more significant problem raised by the extension of principles by analogy in the area of offer and acceptance is the difficulty in regulating the offer of unwholesome, fake and defective or prohibited goods and services to consumers as contemplated by some legislations.[24] Such legislations provides penalty for the mere offer for sale or display for purpose of sale of the proscribed products as distinguished from the actual sale.

Contracts required by statutes to be in writing and signed or endorsed by the parties are not uncommon.[25] Such transaction includes contracts-affecting interests in real property, hire purchase, guarantee and arbitration agreements. The definition of writing has not been given by relevant statutes. Consequently, it is moot among writers and jurists whether writing should be limited to ink on paper or it should extend to electronic generated data.[26]

For consumers, particular provisions have been inserted in some statutes to ensure that the consumer engaging in such transactions are personally committed and fully conscious of their involvement in the transaction. In such context a click of button "x" or the use of other e-signature may not effectively meet the intention of the legislature. Such context would include a hire-purchase contract and a contract of guarantee. Legal policy cannot fail to recognise the need to protect consumers in certain transactions and may hold the individual liable only when it is clear that he intends to enter the contract.

E-payment relies heavily on the intermediary role of service card providers.[27] Apart from Central Bank Guidelines on e-banking there is no direct legislation regulating e-commerce and the activities of card service providers in Nigeria. The Sales of Goods Law of the States is not suited for the nuances of e-transaction. Legal policy is not clear whether to regard the card service providers as agents of the e-payer or e-seller or to regard him as an independent service provider. The status of the service provider will necessarily determine among other issues, the issue of the duty of care expected of such service provider and the liability arising from breach of that duty. Even for debit-card transactions where the card holder uses the card primarily to access funds in the bank account under the normal bank-customer relationship newer problems are pose by the interposition of the activities of the Card service providers. ATM cases illustrate the problem in this area. Conventional banking law constructs a special creditor-debtor relationship between the bank and the account holder[28] Losses arising from ATM usage are generally borne by the card holder inspite of the fact that only 2% of such losses arose from compromised PIN numbers[29] Card holders around the country are reporting mysterious fraudulent withdrawals from accounts; the culprits are having a field day of stealing; the banks are non-chalant; and there is no law to protect the victims.

From the consumer perspective, online transactions involve distance and dealings with businesses whose identity are unverifiable. Consumer losses are often small and not worth the cost of legal services that may be needed to pursue the claim. E-commerce is not limited by space and time. The geographic location of parties to it is often dispersed. The question of where and how disputes arising are to be resolved is important because it influence the attitude of participants to this method of trading and thereby determines the future of e-commerce.

Dispute resolution seems to entail three options: court, arbitration or alternative dispute resolution (ADR). ADR generally involves negotiation, conciliation and mediation.

Dispute resolution mechanisms of arbitration, negotiation or mediation and conciliation considered as time and cost effective and speedy have been evolved as alternative to court-based redress. By reason of its very nature, e-commerce is conducted not upon individually negotiated terms but rather by the adhesion to fixed and standard terms supplied by the e-trader. Arbitration clauses have become usual terms in contracts of adhesion of which e-commerce is but one.

In Nigeria, there is no specific legislation on e-commerce relating to contracts and dispute resolution.[30] This means that the provisions of Arbitration and Conciliation Act,[31] and splinter provisions found in other enactments[32] will have to be relied upon, notwithstanding that they are not suitable for international trade and e-commerce. Section 47 of the Act superbly buttresses the point. The section allows the arbitral tribunal to decide disputes in accordance with the rules in force in the country the parties have chosen as applicable in the substance of the dispute. The effect of a rule which leaves the e-buyer in Nigeria to the discriminate choice of the e-supplier in the choice of law and forum is less than desirable and that may speculatively, not have been the intention of the law maker.

The fact may also be noted that the practice of arbitration in Nigeria is cumbersome, expensive and slow if precedents are anything to go by.

With regards to consumer in e-commerce, alternative dispute resolution options has come under attack by consumer advocates who have found fault in both the manner in which it was agreed upon and in the processes themselves.[33] Contracts by adhesion do not allow consumers to bargain. The inclusion of a mandatory arbitration clause in e-transactions is a double jeopardy for the consumer who involuntarily forfeits his right to a court (or jury) trial.

Worst still, arbitration decisions are not published and have no force as precedents and may not entirely preclude recourse to court action. Recourse to court is allowed for parties who are dissatisfied with the decision of arbitration. Thus, arbitration rather than saving time and cost, may result in the protraction of the redress process while also increasing cost. At the level of policy, the alternative dispute option serves to dispense private justice at the expense of the growth and certainty of public law, i.e. common law.

The interface of information technology and commerce has produced species of crime which is cyber-based. Cyber crime is used to describe refer to a criminal acts in which computer is used as a tool, a target or medium of criminal activity.[34] It is any crime which is computer assisted. Distance is no barrier to the crime. Cyber crime is easy, cheap and quite devastating. Examples include software piracy, hacking and cracking, identity theft, sale of illegal and stolen articles on the net, packet sniffing, banking fraud, phishing and the distribution of hostile software (i.e. viruses and worms).[35]

Ripeness of Competition Law in Nigeria on E-Transactions

Competition or antitrust law in Nigeria is generally absent. This is in spite of the seemingly benefits for such a law would primarily be designed to protect the consumer, promote free trade and commerce and prevent unwholesome and unethical practices especially in the age of e-commerce. Thus the object of any competition law been to discourage and prevent price or rate fixing, price discrimination, price gouging, restrictive exclusive contracts, abuse of dominate market, predatory pricing practices, conspiratorial pricing between competitors, hoarding, institutionalized boycotting of a competitor etcetera.[36] Sad to note that the Competition Bill,[37] has not been passed into law. But competition provisions can be found in the Nigerian Communications Act,[38] the Electric Power Sector Reform Act,[39] the Civil Aviation Act,[40] and the Investment and Securities Act.[41]

Conclusion

The evolution and proliferation of electronic commerce worldwide has proved to be a major revolution. More than ever, the world has become a 'global village' in which products and services can be sold with ease, speed and at a relatively efficient cost. In the process, fake, substandard and harmful goods and services may be marketed; unfair trading practices may be deployed and criminality may blossom. Traditional rules of contract and the existing commerce laws have been tasked to apply extant principles to the newly developed area of information technology. The legal issues arising from e-commerce requires more than analogy, legal fictions and extension of existing rules. The issues are substantial, palpable and a concern for legal policy. The Nigerian Law on Cyber crime and Electronic Transaction are overdue to be incorporated in competition bill which hopefully will become law in Nigeria for the protection of the consumer as regards e- commerce as even long over due.

References

(Endnotes)

1. The Nigeria National Policy for Information Technology, (2005), open with a preamble which recognized that Information technology is the bedrock of national survival and development in a rapidly changing global environment. It was in recognition of this fact that the policy was fashioned to cover all sectors of the national agenda including, human resource development, infrastructure, Governance, research and development, health, agriculture, urban and rural development and trade and commerce among others.
2. In "Nigeria's N24.4 tn e-payment card business under threat" in *The Punch* Newspaper, Tuesday, August 10, 2010 at 22, experts said the e-payment card business in Nigeria is worth N24.4 trillion. According to them, e-payment industry has the potential to become the engine room of the economy, if all stakeholders join hands to surmount the challenges facing its growth in Nigeria.
3. The choice of consumer transaction as the focus of this work is advisedly informed by a realization of the fact that e-commerce has several components, such as Business-to-Business; Business-to-Governance; Consumer-to-Consumer; Business-to-Consumer and mobile commerce.
4. See D. Rowland, & E. Macdonald, *Information Technology Law* (3rd edn. 2005), at 241. See also P. S Atiyah, P.S., J. N Adams & H. Macqueen, The Sale Of Goods, (11th edn. 2005) at 53, in which the authors referred to House of Commons Trade and Industry Committee Tenth Report 'Electronic Commerce' HC 648 1999 para. 11 to buttress the assertion that there is no agreed definition of the term *e-commerce*.

5. See A. Adline, "E-commerce", The Equatorial Business News Online, March, 14, 2010 at http://www.theequatorian.com/index.php (last accessed on 13/32016).
6. A more elaborate definition along with a concise history of the term can be found in "Electronic commerce" http://en.wikipedia.org/wiki/Electronic_commerce. (Last accessed on (3/8/2015).
7. Akomolede, T.I. "Contemporary Legal Issues in Electronic Commerce in Nigeria" at http://www.scielo.org.za.php (Accessed on 8/3/2010). Electronic mediated transactions includes the potentially robust mobile-commerce which refers to the buying and selling of goods and services through wireless technology, such as hand held cellular phones and Personal Digital Assistant (PDAs).
8. The term *consumer* has been defined in various ways by writers. Generally, the definitions may be categorized into two; the broad and the narrow. The former see consumer as citizens, while the latter regards consumer as the ultimate consumer of goods and services (apart from business). The latter meaning of the term is contemplated in this study.
9. Cap. C25. LFN, 2004.
10. See Alderman, R.M. "Consumer Arbitration: The Destruction of the Common Law" *at* 5.
11. Azinge, E. "Information Technology and Legal Practice" (2002) Nig. Bar Jour. 11.
12. Rowland, supra note 4 at 242.
13. Grainer & son v. Gough [1896] AC 325 at p. 334.
14. Rowland, *supra note12at 274.*
15. B. Owasanoye, "The consumer in the Globalised Information Society: Problem and Prospect for Developing Economies" *Political Reform and Economic Recovery in Nigeria* in Ayua and Guobadia ed. (NIALS; 2001) at 458 a asserts that there are no international rules but national laws to regulate broadcast in the Internet. The assertion is vividly brought out by the example of the Central Bank of Nigeria's power to regulate advertisements by commercial banks in Nigeria. See section 44 of Banks and Other Financial Institutions Act, cap. B3 LFN, 2004.
16. Rowland, *op.cit*., p. 275.
17. Bamodu, G., "Information Communication Technology and E-Commerce: challenges and Opportunities for the Nigerian Legal System and the Judiciary", (2004) 2 *The Journal of Information Law and Technology*. Electronic copy got from http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004-2/bamodu/>. (Accessed 3/8/2010).
18. Rowland, supra note 24 at 279.
19. [1955] 2 QB 327.
20. The issues have obviously been oversimplified. Complex technical and factual issues may arise which entails a deeper understanding of the 'communication topography'. Both the commercial and the consumer parties are less able to comprehend such pertinent issue. For instance, in the course of sending and receiving e-mails several servers in various jurisdictions may have been used out the jurisdiction of both the supplier and the buyer. Indeed, the server of a party required to have knowledge of the acceptance may be located outside the country where his business is domicile.
21. United Nations Commission on International Trade Law (UNCITRAL).
22. Rowland, supra note 29 at 12.
23. *Id*. For instance, where is the addressee's place of business in an e-commerce where the e-mail initiating the offer originated from a commercial cybercafé?
24. For instance, section 1(1) Trade Malpractices (Miscellaneous Offences) Act, cap. T12, LFN 2004, imposes punishment on any person who *offers* for sale any product that is false or misleading and likely to create a wrong impression as to quality, character, brand name, value, composition, merit or safety. See also sections 1 and 2 Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act cap. C34.LFN 2004, which punishes the display for sale of prohibited products.
25. The most common example includes the Statutes of Fraud, 1677.
26. See T. Osipitan, "Legal Impact of Technology on Rule of Evidence" in Banking, Commercial Litigation in Developments and Reforms-Nigeria's Commercial Laws. Fagbohun & Adewepo (eds) LASU Law Centre (1988) at 435 and F.C. Nwoke, "Contract Formation and Documentation in The Internet Age" (2003) 7 JIPPL at 161.

27. Service providers in Nigeria include Master Card, Inter Switch, Visa Card and e-transact.
28. *Joachimson v. Swiss Bank Corporation* (192l) 3 KB 110.
29. See Nigeria s first Class Action on ATM fraud begins!! *Business* Day October 22, 2009. The article reports that over 1000 persons who have suffered various losses arising from ATM usage have joined together to institute a class action at the federal High court. The decision in the case will certainly be clarify the question of who ought to assume liability for ATM malfunctions and third party frauds. An irresistible inference from this development is that the regulatory efforts of CBN to remedy complaints by establishment of ATM complaint desk have not sufficiently addressed the problem.
30. "Overview of e-commerce in Nigeria" *The Economist* http://www.ebusinessforumcorn/index.asp?layout=rich-storv&doc_id=8403&title=overview (Accessed on 3/8/2015).
31. Cap. A19 LFN, 2004.
32. For instance, section 2(a) Consumer Protection Council Act, cap. C25 LFN, 2004 makes it the function of the Council to provide speedy redress to consumer complaints through negotiations, mediation and conciliation. It is reasonable to assume that the procedure to be adopted for the negotiations, mediation and conciliation is the general procedure provided for in the principal Act (i.e. Arbitration and Conciliation Act).
33. Alderman, R.M. "Consumer Arbitration: The Destruction of the Common Law (2003) 2 *Journal of American Arbitration* 1. See electronic version at http://www.ssrn.com (Accessed on 12/l l/2013). See also Alderman, R.M. "Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform" (2001) 38 Houston *L. Rev*. l237; Brafford, A. "Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary" (1996) 21 *J. Corp. L* 331; and "Enforcing Small Prints to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration" (1997) *Wisc. L. Rev*. 33.
34. See "Legal Aspects of E-Commerce" supra note 42.
35. Akomolede, supra note 22.
36. See Oserogho & Associates, "Antitrust & Competition Laws & Regulations in Nigeria," 2 Nov. 2015.
37. 2005.
38. 2003.
39. 2005.
40. 2006.
41. 2007.

❑❑❑

CHAPTER

32

Mergers and Acquisitions: The Competitive Relevancy and Effects

Manik Sethi and Smeeksha Pandey*

Mergers and Acquisitions

Mergers and acquisitions (M&A) is a general term that refers to the consolidation of companies or assets. While there are several types of transactions classified under the notion of Mergers and Acquisition.[1]

A **merger** means a combination of two companies to form a new company, while An **acquisition** is the purchase of one company by another in which no new company is formed.

The term Mergers and Acquisition also refers to the department at financial institutions that deals with mergers and acquisitions.

Breaking Down Mergers and Acquisitions

Mergers and Acquisition can include a number of different transactions, such as mergers, acquisitions, consolidations, tender offers, purchase of assets and management acquisitions. In all cases, two companies are involved, where an acquiring company makes an offer to buy the other company in its entirety or purchase some of its assets.[2]

- **Merger:** In a merger, the boards of directors for two companies approve the combination and seek shareholders approval. After the merger, the acquired company ceases to exist and becomes part of the acquiring company. A merger in 2007 was a deal between Digital Computers and Compaq, where Compaq absorbed Digital Computers.[3]
- **Acquisition:** In an acquisition, the acquiring company obtains the majority stake in the acquired firms, which does not change its name or legal structure. An example of this transaction is Manulife Financial Corporation's 2004 acquisition of John Hancock Financial Services, where both companies preserved their names and forms of organization.
- **Consolidation:** A consolidation creates a new company. Stockholders of both companies must approve the consolidation, and subsequent to the approval, they receive common equity shares in the new firm. For example, in 1998 Citicorp and Travelers Insurance Group announced a consolidation, which resulted in Citigroup.
- **Tender Offer:** In a tender offer, one company offers to purchase the outstanding stock of the other firm at a specific price. The acquiring company communicates the offer directly to the other company's

* B.A., LL.B. (H) Fourth Year, Amity Law School, Noida, Amity University, U.P.

shareholders, bypassing the management and board of directors. While the acquiring company may continue to exist, if there are certain dissenting shareholders, most tender offers result in mergers. An example is when Johnson & Johnson made a tender offer in 2008 and acquired Omrix Bio pharmaceuticals for $438 million.

- **Acquisition of Assets:** In a purchase of assets, one company acquires the assets of another company. The company whose assets are being acquired must obtain approval from its shareholders. Typically, the selling company is liquidated upon the final transfer of assets to the acquiring firm. The purchase of assets is typical during bankruptcy proceedings, where other companies bid for various assets of the bankrupt company, which later ceases to exist.
- **Management Acquisition:** In a management acquisition, the management of a company purchases a controlling stake in a company, making it private. Such an M&A transaction is typically financed disproportionately with debt, and the majority of shareholders must approve it. In 2013, Dell Corporation announced that it was acquired by its chief executive manager, Michael Dell. This was a management acquisition.

The Competition Act, 2002

The Competition Act, 2002 was enacted by the Parliament of India and governs Indian competition law. It replaced the archaic. The Monopolies and Restrictive Trade Practices Act, 1969. Under this legislation, the Competition Commission of India was established to prevent activities that have an adverse effect on competition in India. This act extends to whole of India except the State of Jammu and Kashmir.

It is a tool to implement and enforce competition policy and to prevent and punish anti-competitive business practices by firms and unnecessary Government interference in the market. A competition law is equally applicable on written as well as oral agreement, arrangements between the enterprises or persons.[4]

The Competition Act, 2002 was amended by the Competition (Amendment) Act, 2007 and again by the Competition (Amendment) Act, 2009.

Salient Features

Types of agreement: Competition law identify two types of agreements. Horizontal agreements which are among the enterprises that are or may compete within same business. Second is the vertical agreement which is among independent enterprise. Horizontal agreement is presumed to be illegal agreement but rule of reasons would be applicable for vertical agreements.

Abuse of dominant position: There shall be an abuse of dominant position if an enterprise imposes directly or indirectly unfair or discriminatory conditions in purchase or sale of goods or services or restricts production or technical development or create hindrance in entry of new operators to the prejudice of consumers. The provisions relating to abuse of dominant position require determination of dominance in the relevant market.[5]

Combinations[6]: The Act is designed to regulate the operation and activities of combinations, a term, which contemplates acquisition, mergers or amalgamations. Combination that exceeds the threshold limits specified in the Act in terms of assets or turnover, which causes or is likely to cause adverse impact on competition within the relevant market in India, can be scrutinized by the Commission.

Review of orders of Commission: Any person aggrieved by an order of the Commission can apply to the Commission for review of its order within thirty days from the date of the order. Commission may entertain a review application after the expiry of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from preferring the application in time. No order shall be modified or set aside without giving an opportunity of being heard to the person in whose favor the order is given and the Director General where he was a party to the proceedings.

Appeal: Any person aggrieved by any decision or order of the Commission may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Commission. No appeal shall lie against any decision or order of the Commission made with the consent of the parties.

Penalty: If any person fails to comply with the orders or directions of the Commission shall be punishable with fine which may extend to 1 lakh for each day during which such non compliance occurs, subject to a maximum of 10 crore.

Review of Orders of Commission

Any person aggrieved by an order of the Commission can apply to the Commission for review of its order within thirty days from the date of the order. Commission may entertain a review application after the expiry of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from preferring the application in time. No order shall be modified or set aside without giving an opportunity of being heard to the person in whose favour the order is given and the Director General where he was a party to the proceedings.

Appeal

Any person aggrieved by any decision or order of the Commission may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Commission. No appeal shall lie against any decision or order of the Commission made with the consent of the parties.

Penalty

If any person fails to comply with the orders or directions of the Commission shall be punishable with fine which may extend to 1 lakh for each day during which such non compliance occurs, subject to a maximum of 10 crore.

If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under this section, he shall be punishable with imprisonment for a term which will extend to three years, or with fine which may extend to 25 crores or with both.

Section 44[7] provides that if any person, being a party to a combination makes a statement which is false in any material particular or knowing it to be false or omits to state any material particular knowing it to be material, such person shall be liable to a penalty which shall not be less than 50 lakhs but which may extend to 1 crore.

Competition Commission of India

Competition Commission of India is a body corporate and independent entity possessing a common seal with the power to enter into contracts and to sue in its name. It is to consist of a chairperson, who is to be assisted by a minimum of two, and a maximum of ten, other members.[8]

It is the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in the markets of India. The Commission is also required to give opinion on competition issues on a reference received from a statutory authority established under any law and to undertake competition advocacy, create public awareness and impart training on competition issues.

Commission has the power to inquire into unfair agreements or abuse of dominant position or combinations taking place outside India but having adverse effect on competition in India, if any of the circumstances exists:

- An agreement has been executed outside India.
- Any contracting party resides outside India.

- Any enterprise abusing dominant position is outside India.
- A combination has been established outside India.
- A party to a combination is located abroad.
- Any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

To deal with cross border issues, Commission is empowered to enter into any **Memorandum of Understanding** or arrangement with any foreign agency of any foreign country with the prior approval of Central Government.

Objectives

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.[9]

To achieve its objectives, the Competition Commission of India endeavors to do the following:

- Make the markets work for the benefit and welfare of consumers.
- Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.
- Implement competition policies with an aim to effectuate the most efficient utilization of economic resources.
- Develop and nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulatory laws in tandem with the competition law.
- Effectively carry out competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.

Cross Border Mergers and The Powers of The Commission

Expectations regarding the enforcement ambitions of the Competition Commission of India (**hereinafter CCI**) along with risks of hefty financial penalties for firms as well as imprisonment for individuals means that it is vital for all companies that deal with India to factor antitrust law into decisions affecting their Indian businesses. Antitrust impacts on firms' longer-term as well as day-to-day operational issues. Additionally, antitrust must be factored into the due diligence and contractual negotiation processes of mergers and acquisitions to ensure that any risks arising from antitrust compliance are addressed properly. The powers of merger review of CCI thus impacts the feasibility of certain deals. The Competition Act, 2002 (**hereinafter CA**) introduces three enforcement areas usually found in modern competition law regimes: prohibition of anticompetitive agreements, prohibition of abuse of dominance and merger regulation. Many concepts of the new law are similar to those found in other jurisdictions, such as European Union or US competition law.[10]

But since the market conditions are very different in India, these concepts may not be interpreted or applied in the same way. The first confession that needs to be made and accepted without any reservations is that in an interdependent world economy everything affects everything else.

Economic and industrial globalization has increased international competition and given rise to the need for an increasingly integrated and evolving legal system. A number of trends have contributed to the accelerated globalization of industry and the integration of international economies. For instance, the growing similarity in available infrastructure, distribution channels, and marketing approaches has enabled companies to introduce products and brands to a universal marketplace. However this is not to suggest that the Competition Act,

2002(hereinafter CA) should govern all the international economic conduct. There is a need to identify ways of distinguishing those international matters affecting Indian commerce sufficiently to warrant sufficient attention from our law.

It needs to be kept in mind that many ordinary difficulties of applying antitrust principles are compounded by the different mores and economic circumstances of international markets. These issues would have been at the background with a much lesser significance if the basis of jurisdiction was territorial and focused on the question as to where the relevant conduct occurred. However, with the judicially created "effects" test having come to the fore and the rise of its dominance these issues have acquired tremendous prominence.

Competitive Advantage of India

India today is considered to be one of the major forces in the global economic market. Though India is a developing economy, its economy has a major impact on global trading. The majority of the world's leading developed nations are keen to have or expand their ties with India. This is mainly because in the current scenario of globalization India is seen as a wonderland for investments. Thanks to its huge market base and fast-developing spending habits of middle-class Indians, India is a preferred destination for investors over other major countries, including China, because India has a favorable business environment, a good administrative setup, attractive foreign policies, and an available, abundant skilled workforce as well as provides attractive incentives to investors. India scores over other places in terms of being an ideal destination for investments mainly due to its vibrant democratic setup, which is aptly underpinned by a broad legal framework and independent judicial system. Apart from these factors, the presence of a vast network of bank branches, financial institutions, and a well-organized capital market contribute to making India a preferred destination over other places by foreign investors.[11]

India boasts a vast network of technical and management institutions that are of the highest international standards. These institutions develop excellent human resources. India also has a strong base of an English-speaking population for business purposes. The strategic location of the country in the context of the third world market in the rapidly growing southeastern Asian markets along with a supportive infrastructure provides India with a competitive advantage over other countries for attracting foreign investments. The government of India has taken several initiatives to attract foreign investments in India's diverse sectors. It has announced a number of attractive schemes and policies from time to time to lure investments. The individual ministries of different industries have made special attempts to ease the rules and regulations related to foreign investment in the industry. Apart from formulating attractive policies for investors the ministry also provides guidance to the investors with regards to the infrastructure availability, the market structure, and so on. The Indian government also allows foreigners to make direct investments in the country's firms by way of acquiring share and debentures. This favorable government initiative gives India an edge over other countries for investments.

Today, there is hardly any big company in the world who does not have their presence in India in one or the other way. Several companies outsource their accounts and BPO operations to India. This is mainly because regardless of the domestic issues, these companies get excellent service and value for the money they invested.

The Effect of Competition on Pricing Strategy

When two products have similar core features, but are produced by different companies, competition results. Competition-based pricing strategy involves setting your prices based on your competitors' prices rather than on your own cost and profit objectives. Before pricing your product, research your competition to figure out where you fit in or what to change.[12]

- **Price Environment:** Your price environment determines the level of control you have over competitive pricing. Price environments are market-controlled, company-controlled or government controlled. A market-controlled environment shows a higher level of competition, similar products and little price

control by individual companies. A company-controlled environment shows moderate competition, unique goods and services, and a lot of price control by individual firms. In a government-controlled environment, the governments takes input from related companies and then determines prices; public bus fare or state university tuition are examples.

- **Competitive Product:**[13] Competitive pricing relies on three product styles: lasting distinctiveness, low cross elasticity and perishable distinctiveness. Products with lasting distinctiveness are ones that will always stand out from the crowd, such as medicines protected by patent laws. Low cross elasticity means the demand for the product will rise, such as with software upgrade. Products with perishable distinctiveness are unique in the beginning, but fall to medium distinctiveness after a period of time and would include popular technology products.
- **Price Range:** Every product has a price range; look at your competitors pricing to find the range for your product. To decide where you fit on the current price range, or if you should choose something outside it, compare your product to those of your competitors. Customers use the existing prices as a guide to what is normal or considered a good deal, so be prepared to handle the consequences of pricing outside the standard range.[14]
- **Product Comparison:** The products with the most features can charge the highest price, so research what your competitors are selling first. Core features of all the products should be similar, if not the same, so you need something special to raise the price of your product. If, instead, you would rather be the cheapest, let that be your special feature and leave everything else out.[15]
- **Target Market:** Figure out what market your competitors are targeting, and pick a different one. Even though the products are similar, you can charge more if you design for a specific group. Certain markets will always pay higher prices, or are willing to pay for the perceived exclusivity, so take advantage of that in your marketing strategy.[16]

Conclusion

Practical experience has shown that the majority of mergers notified are cleared quite quickly. The Competition Act, 2002 itself lays down stringent time lines – the Commission must take a view within 90 working days from the day it has obtained complete information failing which the merger is deemed to have been approved. Further, the Commission may initiate suo-motu enquiry into merger only within a period of one year from the day the merger has taken effect. These provisions adequately dispel any apprehension of inordinate delay or unbridled scrutiny into mergers Further global experience suggests that hardly four per cent of the all notified mergers are taken up for a detailed scrutiny by the competition authorities, of which 50 per cent are approved, and a further 25 per cent are approved with modifications.[17]

Even the proposed merger of the two largest steel producers in the world did not attract many competition concerns. Whereas the US authorities have already cleared the proposed merger, recent news reports indicate that the controversial Mittal Steel/ Arcelor takeover bid which has been notified to the European Commission will be cleared 'due to the largely complementary nature of the combined group'. In other cases, where the authority comes to the conclusion that a proposed merger would lead to an appreciable adverse effect on competition, it may yet allow the merger but subject to one of several directions including divestment, requiring access to essential inputs/ facilities, dismantling exclusive distribution agreements, removing no -competition clauses, imposing price caps or other restraints on prices, refrain from conduct inhibiting entry, and so on.

The Commission needs to swing into action undertaking substantial capacity building to implement the extra territorial jurisdiction that is embodied in the Competition Act, 2002. As India integrates at a fast pace with the global economy there is a need to ensure international co-operation to tackle cross border challenges.

Combinations are economic enhancing trade practices hence they necessarily need to be encouraged by all so as to ensure ultimate benefit to the end consumers. However, there is a flip side of it too. Today's combination may be tomorrow's dominance and though dominance is not frowned upon under the CA but its abuse surely is. Abuse of Dominance (AoD) is mandatorily prohibited under the law. Therefore, every acquirer (not the target) has to be Competition Law Compliant even post combination and has to remain so forever if it desires to remain in healthy business practices. Except sovereign functions and functions relating to Atomic Energy, Space Research, Defense and Currency – all commercial activities of the departments of Union and States and their statutory bodies come within the ambit of the CA, which warrants the policy makers to seriously consider taking suitable steps before it is too late. Likewise, any department of a government is also a procurer of goods and services even from a non-government agency – hence it too may fall prey to an anti-competitive practice of a private supplier and the law does not preclude it to refer such matters, if any, to the CCI against such private supplier.

Therefore, private – public participation is the need of the hour if one is serious about seeing the Competition Law in its full steam. The CCI too needs to have appropriate professional manpower to understand and then implement the provisions of the law effectively. Professional and academic institutes too need to upgrade their academic curricula so as to provide the future manpower to all stakeholders and help implement the intents and purposes of this legislation for overall economic and social well being of the country.

References

(Endnotes)

1. https://en.wikipedia.org/wiki/Mergers_and_acquisitions visited on 17th of April, 2016 at 11:30 am.
2. Mergers and Acquisition – RajinderS.Aurora, Kavita Shetty, Sharad. R. Kale.
3. Case Reference– http://content.time.com/time/business/article/0,8599,166732,00.html - The Anatomy of the GE Honeywell Disaster – visited on 15th of April, 2016 at 11:30 am.
4. https://en.wikipedia.org/wiki/The_Competition_Act,_2002 visited on 17th of April, 2016 at 12:30 pm.
5. http://www.bms.co.in/explain-the-salient-features-of-competition-act-2002/ visited on 07th of April, 2016 at 6:30 pm.
6. http://www.pwc.com/us/en/issues/business-combinations/publications.html- visited on 18th of April, 2016 at 9:30 am.
7. Bare Act of Competition Commission of India – 2002 - visited on 19th of April, 2016 at 11:00 am.
8. https://en.wikipedia.org/wiki/Competition_Commission - visited on 18th of April, 2016 at 2:30 pm.
9. http://www.livemint.com/Opinion/nKY6PoaDeUi9NP2aOhECYL/The-significance-of-the-Competition-Commission-of-India.html- visited on 08th of April, 2016 at 7:00 pm.
10. https://www.educba.com/cross-border-merger-and-acquisitions/ - visited on 19th of April, 2016 at 8:00 am.
11. http://www.investinindia.com/competitive-advantage-india - visited on 19th of March, 2016 at 9:00 am.
12. http://smallbusiness.chron.com/effect-competition-pricing-strategy-1109.html - visited on 09th of April, 2016 at 11:00 am.
13. http://npdbook.com/problem-definition/competitive-products/ - visited on 21st of April, 2016 at 9:00 am.
14. http://www.investopedia.com/terms/c/competitive-pricing.asp visited on 21st of April, 2016 at 10:00 am.
15. http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=1343629&fileOId=2432962 -visited on 17th of April, 2016 11:00 am.
16. https://en.wikipedia.org/wiki/Target_market- 18th of April, 2016 at 6:00 pm.
17. Crux of the entire research - visited on 22nd of April, 2016 at 10:00 am.

❑❑❑

CHAPTER

33

Public Interest-vs-Private Interest: The Quandary of the Face-off between Intellectual Property Right and Competition Laws

Anindhya Tiwari* **and Priyanka Dhar****

Prologue

Intellectual Property Rights has extended its arms in relation to every sphere of the law and one such connection and relationship of Intellectual Property Rights is with the Competition Law. The premise of the Intellectual Property Rights Law is to reward and recognize the work of the creators as well as the inventors for all the contributions they have made in the development of the society. It also infuses effectiveness as well as efficiency and stimulates the competition in new products, new technologies or new markets per se.

On the other hand, competition law regulates the market economies and focuses on fair and perfect competition in the market as a result of which both Intellectual Property Rights Law as well as the Competition Law gets into the tussles with each other time to time. Competition Law makes the space for new entrants in the markets by restricting monopolistic anti competitive behavior of dominant enterprises and also by checking collusive tendencies. It also functions on the touchstone of consumer welfare and economic efficiency.

Both these laws intersect at the point of fostering efficiency, innovation, consumer welfare and economic growth yet an inevitable chasm exists in the sphere of "monopoly rights" which is the essence of Intellectual Property Rights Law. Three theoretical bases have been suggested for this reconciliation between IPRs and competition law regimes:

(a) The view that competition law should only interfere with innovation/IPRs when social welfare is at risk;

(b) The view that concentration and monopoly markets have the edge over competitive markets in terms of innovation owing to greater capital and resources and

(c) The view that competition law only concerns itself with consumer welfare when the effects of a proposed action on production and innovation efficiency are neutral or indeterminate.

* Assistant Professor at Galgotias University, Greater Noida, U.P.
** Assistant Professor at Amity University, Noida, U.P.

India has recently started facing a lot of IPR and competition law issues and its litigation is at the infant stage but the *Aamir Khan Productions v. The Director General*[1] case has given a boost in the Indian regime. The petitioners in the above mentioned case have challenged the show cause notices mainly on the ground that the Competition Commission established under the act[2] does not have any jurisdiction to initiate any such proceedings in respect of films for which the provisions of the Copyright Act, 1957 contains exhaustive provisions. It is therefore, very important to draw a clear demarcation between both these laws so that they do not come in conflict with one another.

The issue is to create an, optimal for society, balance between the necessary reward or incentives of the inventor and the need to disseminate innovation. Innovation serves as the common objective of competition law and intellectual property, but both of them accord different importance to the aims of reward and dissemination. If competition law emphasizes dissemination, intellectual property aims to ensure that creators have appropriate incentives to engage in creative activities, which may imply, but not necessarily, the existence of a reward scheme for the investment made.[3]

One solution to the impasse over the use of the term "common property" is to distinguish the resource and the regime. This distinction, between the resource itself and the property-rights regime under which it is held, is critically important. In fact, the same resource can be used under more than one regime.

Bromley[4] suggests 4 possible regimes in the case of natural resources. These regimes are defined by the structure of the rights and duties that characterise individual domains of choice. This definition includes: State property; Common property; Open Access and Private property.

In the case of private property, the individuals have the right to undertake the socially acceptable uses (and only those, which means they have the duty to conserve the resources) and to prevent the use from non-owners.

The state property is a regime where individuals have rules of access and duties to observe about the resource use face to a management agency, which has the right to determine these access / use rules.

The "balancing test" of the European Commission has the objective to ensure that these "qualitative efficiencies", such as new and improved products, will create "sufficient value for consumers to compensate for the anti-competitive effects of the agreement, including a price increase". This is because "(t)he availability of new and improved products constitutes an important source of consumer welfare".The assessment of pro and anti-competitive effects is an arduous task as it is difficult to assign precise values to dynamic efficiencies in order to conduct a cost benefit analysis.[5] Similarly, competition law takes into account the effect of commercial practices on innovation markets.[6]

One could therefore conclude that intellectual property law shares with competition law a common dynamic conception of "consumer welfare". Indeed, one can distinguish between two types of innovation: stand-alone innovation, which refers to the situation where the IP right will not be used as an input to another innovation and cumulative innovation, which refers to the situation where successive innovations build upon earlier innovations. It is widely accepted that cumulative innovation substantially increases social value. As Newton once wrote, "(i)f I have seen further it is by standing on ye shoulders of Giants". Public authorities recognize this reality by establishing innovation clusters, such as the Silicon Valley in the United States, which provide the possibility for information exchange and the development of research synergies.[7]

It will therefore be important to find the right incentive mechanism in order to ensure that earlier innovators are compensated adequately for establishing the foundations for later innovators, while also making sure that cumulative innovators still have an incentive to innovate. The original design of intellectual property rights should take into account the need to compensate both the initial and the subsequent innovators.

The Cross Roads of Law

By granting an exclusive right, intellectual property offers the opportunity to the right holder to earn extra profits. The consumers of the particular good embodying the IP right will consequently loose because the level of output of the particular good will be lower than in the absence of an exclusive right. A tension between intellectual property policy and competition policy will result as the objective of the later is to maximise consumer welfare. However, if the right holder didn't have the opportunity to overprice the good, there would be suboptimal incentives to commit resources to investment at the first place. The assumption is that if no intellectual property right was granted, the consumers would benefit from less innovation.

The term "innovation" covers, according to Joseph Schumpeter the following five cases:

"(1) the introduction of a new good – that is one with which consumers are not yet familiar – or of a new quality of a good. (2) The introduction of a new method of production, that is one not yet tested by experience in the branch of manufacture concerned, which need by no means be founded upon a discovery scientifically new, and can also exist in a new way of handling a commodity commercially. (3) The opening of a new market that is a market into which the particular branch of manufacture of the country in question has not previously entered, whether or not this market has existed before. (4) The conquest of a new source of supply of raw materials or half-manufactured goods, again irrespective of whether this source already exists or whether it has first to be created. (5) The carrying out of the new organization of any industry, like the creation of a monopoly position (for example through trustification) or the breaking up of a monopoly position."[8]

Usually the IP right owner will not have the interest to refuse to license. There is an important literature explaining that, in high technology sectors, competitors usually share information by publishing their research and do not systematically have recourse to intellectual property protection in order to appropriate part of the social value created by cumulative innovation.[9] In publishing the results of their research, the initial innovators weaken their bargaining position in the licensing negotiation process. By the same token they increase the potential reward of the cumulative innovators by maintaining their incentives to innovate *ex ante*.

Nevertheless, the private interest of the IP right holder will not always coincide with the goal of promoting cumulative innovation. The IP right owners might likely decide to exclude competition, but the simple fact that the refusal to license will have the effect to exclude rivals from the market is not enough to infer a competition law infringement but it should also be possible to plausibly explain it by an anti competitive harm story.

A distinct theory of anti competitive effects is that dominant firms may use IP rights to create barriers to entry and raise the costs of their rivals.[10] They will therefore have the opportunity to increase profitably their prices, up to the level of their rivals' increased costs and exercise market power or profitably undercut rivals' prices and drive them out of the market. IP rights may facilitate raising rival costs strategies if the technology covered by the IP right is a valuable input.

Competition law also plays a vital role in a liberalized economy. Its importance can be inferred from the fact that as of 2010, more than 100 countries have enacted competition laws.[11] Some of these laws date back more than a century: the US, for example, enacted the Sherman Act as far back as 1890. The competition rules of the European Union were implemented through the adoption of the Treaty of Rome of 1957. Newly emerging economies seem to have either amended their existing laws or enacted modern competition laws in the wake of economic liberalization that began with the conclusion of the WTO agreements in 1995. For example, India enacted a new competition law in 2002 to cope with its new economic policies.

Due to the increasingly important role played by intellectual property in the world economy, measures against the misuse of IPR have become particularly relevant in the economic policy of many countries. In fact as Martin Khor puts it, a trade-off may exist between achieving static efficiency through competition and

achieving long-term efficiency through growth and innovation.[12] The market dominance of the monopoly holder may seem to be anti-competitive, but it is a part of intellectual property protection.

There is no harm in dominance of market power as long as it is not abusive. It may be considered as an abusive action when a dominant company refuses or refrains from licensing its IP to competitors at a reasonable price.[13] Korah argues that a trade-off exists between innovation and the liberty of another to use a protected product. The author propounds that this trade-off is often theoretical in nature rather than practical as neither side of the balance can be quantified.

In the recent past, competition authorities and courts have prohibited certain activities of intellectual property owners which are lawful under the intellectual property legislations, but contravened some of the provisions of competition law. Intellectual property rights create monopolies, while competition law battles monopolies. This is the general perception and how these two streams balance each other is the moot question.

The aim of the competition policy in a country is to ensure fair competition in the market by way of regulatory mechanisms. It is not intended to create restrictions or constraints that may be detrimental to the growth of the society. Companies can monopolize their technologies for a limited period of time, but they cannot maintain a monopoly over the market. Intellectual property protection *per se* is not abusive and ironically is only serving its legitimate purpose, namely, to create incentive for further innovation, when it dominates the market. However, when companies refrain from licensing their intellectual property to competitors, they undermine the basic tenets of competition law as well as the spirit of intellectual property protection.

Integration of Competition Law Concerns in Intellectual Property Law

Intellectual property has developed its own mechanisms in order to set limits on abusive patent exploitation of intellectual property rights. I will examine the issue of patents as these are the stronger IP rights in the sense that they give the possibility to the IP owner to exclude others from the use of the IP right. Copyright law only protects from copying (duplication, adaptation, distribution and public performance) and is subject to important exceptions and defences, such as the fair use doctrine.

"Inadvertent" re-creation of the copyright work is also not actionable. "Inadvertent" infringements of patents are, on the contrary, actionable. More generally, patents involve a stronger exclusionary right, while copyright may be conceptualized as a governance regime.[14]

Different instruments restrict the patentee's rights once they have been granted. According to the exhaustion doctrine, the rights of the patent holder are "exhausted" after first sale by the right-owner or his consent therefore limiting the rights of the patentee. However, this doctrine relates to the free circulation of the goods embodying the patent right and does not solve the main issue covered by this paper, the possibility of the patent-holder to block cumulative innovation.

On the important reasons why IP and Competition law and policy are seemingly at loggerheads is due to the fundamentally different perspectives on the relationship between property, IP and Innovation vis-à-vis Competition and innovation. The underlying utilitarian principle behind granted IP rights is because of market failure in differentiation. Similarly, the cause of dynamic efficiency is the underlying economic policy basis for Competition policy.

Differentiation through Exclusivity

Differentiation is the underlying economic justification for offering IP protection to products or processes. Such differentiation is owing to several aspects of the product, including unique technical process, new industrial design, branding etc… Differentiation had positive benefits for consumers since it provides new products and processes. Hence differentiation allows creative destruction. IP is an incentive to engage in such differentiation.[15]

Dynamic Efficiency-Underlying Philosophy of Competition Policy

The aim of competition policy is to efficiencies in the market to benefit the consumers. Here, static efficiency is achieved through competitive price based competition. However, with price based competition, only static efficiency can be created. In the long run, static efficiency does not lead to growth of markets.

Innovation is needed to produce and sustain dynamic efficiency. Although Competition law and policy may defer to dynamic efficiency, it does not lead to a necessary conclusion that IP is the only way to achieve this. There may be other alternative tools to create dynamic efficiencies in the market.[16] Intellectual property rights provide the opportunity for profits over and above marginal costs both to finance ongoing research and development and as an incentive for further research and development. Thus a basic policy question is how to reconcile providing short-term benefits to consumers (static efficiency) with the need to ensure that long-term benefits are obtained as a result of innovation (dynamic efficiency).

Efficiency V. Public Good

While efficiency is one of the goals of competition law, IP is distinguishable from other property rights that create efficiency in the markets. This is owing to the unique nature of knowledge, which is both non-rival and non excludable. Hence a balance has to be maintained. The concept of public goods in relation to IP is important for understanding the kind of regulatory interface regime that must be developed. The public good concept of knowledge/ information, to which IP law extends protection can be explained by an example. If I have an apple, I can only give so much to you from whatever is left after eating because apples (all chattels and land also) are rival in their consumption. No two people can consume the same apple at the same time in full measure due to such rivalry. However, if I decide to give a lecture, it can be consumed by several people together without depleting the possibility of each one (include me) to consume the lecture.

This non-rivalry is inherent in knowledge/information due to its public good character. Similarly, if I have give out the apple to you, I can always take it back and exclude you in the sense that land and chattels are excludable in character. However, a piece of information or knowledge once disclosed with any inhibiting factor (like IP) cannot be disposed from those who now possess it.

Indian Competition Act, 2002

Even after few years since the Government notified provisions that may implicate IP practices, the CCI has not come up with any guidelines in this regard. The Competition Act, 2002 is not primarily intended to interfere in IP protection unduly, however, if the CCI finds AAEC in India, there is definitely an action possible under the Act. Section 3(5) when read with Section 60 and 62 of the Competition Act gives and impression that resolution of the IP Competition interface is fraught with difficulties. Section 60 states that the provisions of the Act shall have effect notwithstanding anything contained in other law (non-obstante clause). Section 62 at the same time states that the provisions of the Act shall be in addition to and not in derogation of any provision in any other law. This creates problems in assessing the real nature of the interventions that are possible under the Competition Act. For example: Under section 3(5) allows IP holders to impose "reasonable conditions" on their licences to secure IP protection.

However, the test for reasonableness cannot completely undermine the rights of the IP holder. Similarly, would it be unreasonable to conclude that Section 3(5) can be invoked where conditions declared as unreasonable under Section 140 or 84 or 91 of the Patents Act, are to be prima-facie considered also unreasonable under the competition Act. In Multiplex Association of India v. United Producers the CCI came to a conclusion that copyright is a statutory right and not absolute. It is restricted to the term granted under the statute. The extent of 3(5) which is in the nature of an non-obstante clause was held as clearly providing guidance. Hence collective bargaining agreement entered into by trade associations is anticompetitive in nature. Hence a violation of Section 3(3)(a) and (b) was made out and the defence under 3(5) was not upheld.

Under Section 4, refusal to licence IP can also amount to abuse of dominance. Section 4(2) (b) and(c) considers the question of abuse of dominance which involves limiting production of goods or provisions of services or market or restriction the technical or scientific development relating to goods or services to the prejudice of consumers or denial of market access.

However, there are no cases of grant of compulsory licences in India. But a remedy in the form of a compulsory licence is definitely possible for violation of competition law. The HT media case discussed above will be the first one if the CCI determines that compulsory licence is an appropriate remedy. In another case, Bull Machines Pvt. Ltd. v. JCB India Ltd., the Hon'ble high court came to a conclusion that once a interlocutory relief was granted by any court, CCI could not have jurisdiction, although the high court has allowed CCI to conduct the investigations.

Abuse of Dominant Position

Dominant position is a position of economic strength that enables a firm to prevent effective competition in the relevant market. If a dominant firm in the market uses such practices, it is considered anti-competitive. Section 4 of the Indian Competition Act, 2002 specifically states that no enterprise shall abuse its dominant position. 'Dominant position' has been defined as a position of strength enjoyed by an enterprise in a relevant market, which enables it to operate independent of the established competitive forces and adversely affect its competitors or the consumers in the relevant market. It means that the dominant position of enterprises is *per se* not prohibited, but their abuse which adversely affects the competitive forces and consumers in the relevant market, is prohibited under the Act.

India is also emerging as a fertile ground for discussions on this important topic of IPR versus competition. Multiple agencies dealing with intellectual property and competition are also a concern in India. There is no clause in Section 4 on the ground of public interest or IPR abuse as a ground for interference. Action can be taken only when there is 'appreciable adverse effect on competition.'

Refusal to License

The law on licensing in the US as well as in the EU is based on a concept of complementary goals of the intellectual property system and competition law. The intellectual property holder has the exclusive right granted under the law for a limited period of time. The right holder is able to prevent others from exploiting it but he cannot prohibit the development and use of a superior technology. Thus intellectual property protection promotes dynamic competition in the market. However, the refusal of a patented technology prohibits the entrance of a new product into the market and is considered anti-competitive.The Supreme Court of India in the case of *Entertainment Network (India) Limited* v *Super Cassette Industries Ltd*, elaborately discussed the relationship between intellectual property protection and effects on competition in the market.[17] The Court observed that when the owner of a copyright exercises monopoly over it, any transaction with unreasonable terms would amount to refusal. It is true that the copyright owner has complete freedom to enjoy the fruits of his labour by charging royalty through the issue of licences. However, this right is not absolute.

There have been cases where a dominant firm ceases to supply its competitors, refuses to allow access to production facilities (essential facilities), does not allow access to IP rights or refuses to cooperate in normal industry practices.[18] Three conditions to be satisfied for declaring such a refusal as an abuse of dominant position are:

1. That the refusal to license 'is preventing the emergence of a new product for which there is a potential consumer demand.'
2. That it 'is unjustified' and
3. That such refusal 'excludes competition in the secondary market.'

It means that the freedom of the right holder is limited to balancing the competition in the market. Thus the objective of IP rights should be to enhance innovation in the market and promote dynamic competition in the market.

Judicial Opinion on the Issue

Aamir Khan Productions Pvt. Ltd. v. *Union of India*[19] is a landmark judgment delivered by the Bombay High Court wherein the Court while dealing with a matter pertaining to the issue of IPR held that CCI has the jurisdiction to deal with all cases concerning competition law and IPR. In *Kingfisher* v. *Competition Commission of India*[20] also, the Court reiterated that the CCI is competent to deal with all the issues that come before the Copyright Board. Such cases enumerate the fact that the Indian Courts are ready for dealing with emerging cases of competition law involving IPR.

Competition law has provided Section. 3(5) as a provision that highlights interface between competition and IPR issues. It is a blanket provision incorporated in the competition law. However, there is no provision under Section. 4 on the ground of IPR abuse or public policy for interference in such cases. It specifically enumerates that action can be taken only in cases where there is abuse of dominant position leading to appreciable adverse effect on the competition.

Cartel is yet another issue that is dealt elaborately under the competition law. Formation of cartels is a prevalent practice among industries and firms. Recently the proprietors owning IPRs have indulged in formation of cartels and thereby causing distortion of competition in the market. An evident example of the same can be traced from the film industry as it involves both IPR issues i.e. copyright along with competition law provision affecting the industry. In the case of *FICCI Multiplex Association of India* v. *United Producers/ Distributors Forum (UPDF)*,[21] the petitioner (FICCI) filed a complaint against the UPDF alleging the formation of market cartels in the film industry. This was deliberately done by UPDF to boost their revenue, and thus, it had refused to strike deal with the multiplex owners. This has direct and drastic effect on the multiplexes as their business is wholly dependent on the film industry.

Consequently, this resulted in anti-competitive practice of refusal to deal leading to distortion of competition adversely for gaining profits. Further, defendants held 100 per cent share in the industry and thus indulging in limitation of supply of films in the market qualifies as an anti-competitive practice. It qualified as a violation of Section 3(3) the Competition Act too. The parties on delivery of the show cause notice filed a petition in Bombay High Court on the pretext of lack of jurisdiction of CCI to decide a matter pertaining to IPR. The Court citing Section 3(5) of the Competition Act, 2002 read with Section 3(1) held that the latter section cannot curtail the right to sue for infringement under IPR, and further CCI has jurisdiction to entertain all matters that can be presented before the Copyright Board.

Recently, CCI also held that copyright is not an absolute right but is merely a statutory right under the Copyright Act, 1957.[22] Further, in

Microfibres Inc v. *Girdhar & Co.*, the Court observed that:

"The legislative intent was to grant a higher protection to pure original artistic works and lesser protection to the activities that are commercial in nature. Thus, the intent of the legislature is explicitly clear that the protection provided to a work that is commercial in nature is at lower pedestal than and not to be equated with the protection granted to a work of a pure Article."[23]

In *Hawkins Cookers Limited* v. *Murugan Enterprises,*[24] The Delhi High Court held that a well-known mark on the pretext of being prominent and well-known cannot be left unchecked to create a monopoly in the market by indulging in practices of controlling the incidental market. The same would fall under the category of abuse of dominant position in the market and is prohibited.

The status of law in U.S. is no different. In *Twentieth Century Music Corp* v. *Aiken,*[25] the Court reiterated that the immediate aim of the copyright law is to make sure that the author gets a fair return, however, the ultimate aim is to stimulate artistic work for public good. Thus, the aim and objective of both IPR and Competition law is to promote innovation and interest of the public along with furtherance of competition in the market for common good.

In *Entertainment Network (India) Limited* v. *Super Cassette Industries Ltd*,[26] Hon'ble Supreme Court in length stated the interface between competition law and effect of IPR on competition in the market. Refusal to deal is one such limb of anti-competitive practices that is covered under the competition law. The Court observing the same held that, though the proprietor of a copyright exercises absolute monopoly over it, but the same is limited in the sense that any transaction with unreasonably tainting or limiting competition would amount to refusal. Undoubtedly, IPR owners can enjoy the fruits of their labour via royalty by issuing licenses but the same is not absolute.

The jurisdiction of other countries also highlights the fact that exercise of rights under IP laws is subject to the competition law/anti-trust law. Dealing a case pertaining to refusal of license, a U.S. Court in *Kodak II*[27] and in *In re Independent Service Organizations*,[28] held that IPR does not grant an unfettered right to violate the anti-trust law. Further, in *United States* v. *Microsoft,*[29] the Court held that the IP laws are not immune from anti-trust laws and all the general laws are equally applicable on IP laws and exclusive right holders.

Excessive pricing and predatory pricing is yet another problem that competition law is grappling with. It is also closely associated to refusal of license. In *Union of India* v. *Cyanamide India Ltd. and another*,[30] the Hon'ble Court held that overpricing of life saving drugs is also prohibited, and the same does not fall beyond the ambit of price control. Competition law is currently facing a lot of trouble in keeping the branded agencies and patented products under the ambit of price control.

Conclusion

It can undoubtedly be inferred now that both IP and competition law have complementary goals. Both are working towards achieving the ultimate objective of promoting innovation and protection of consumer & economic welfare. IP furthers innovation which consequently results in promotion of competition in the market. Over the time, direct goals of these two domains of law have been sufficiently reconciled for attaining the optimum middle path.

IP confers rights to the property holder to enjoy the returns of the disclosure, while competition law is required to deal with IPR in a manner of not absolutely curtailing it rather reconciling it with the goals of competition law. Competition law should impose regulation on IPR only to the extent of interference by holder of IPR in the domain of competition law. There is a need to strike an optimum balance between the policies of IPR and competition law. This will facilitate the long term relationship between the two along with fulfilling the goal of innovation and economic welfare.

However, there are certain inferences that need to be taken into consideration while reconciling the IP law and competition law. IPR confers exclusive rights on the proprietor and hence, it must be regulated with regard to the following points.

Firstly, since the jurisprudence pertaining to effect of IPR on competition law is restricted only to the jurisprudence from U.S., ECJ and sparsely from other jurisdictions; hence, its activities relating to acquisition of ownership under IPR for strengthening monopolies should be seriously discouraged.

Secondly, IPR law must be regulated only in the sphere where it causes adverse effect on the competition to prevent unnecessary interference in the IP laws.

Thirdly, IPR companies must be regulated efficiently to prevent concentration of market power in the hand of few to prevent the potential threat of cartels and abuse of dominant position.

CCI must be given ample power and jurisdiction to scrutinize distortion of competition and refusal to deal by the industries and firms in the market.

Fifthly, excessive pricing and refusal to deal unnecessary on frivolous grounds should be made subject to CCI scrutiny to facilitate smooth functioning of the market.

The detailed analysis of both the streams-IPRs and competition law direct us to the conclusion that both have overlapping issues which can't be dealt in isolation. Despite both are in essence poles apart, however, their goals and objectives are converging than conflicting as understood in general parlance. Despite the fact that there are intricacies and sensitive issues, both the streams have managed to reconcile and strike a middle path in order to ensure the fulfillment of the ultimate objective of common good and protection of consumer welfare.

Thus, at this initial stage of competition law in India, the emerging jurisprudence in India and abroad allay down sufficient framework for development of competition law and regulatory scheme for IPR. The emerging jurisprudence had effectuated the inclusion of gradual changes in both the laws thereby getting prepared to tackle new challenges and plethora of new cases & disputes. Also, it is equally important from the perspective of a developing nation like India to understand the sensitive and crucial aspects of the contentious issue of tussle between IPR and its effect on competition law. The framework is set inappropriately to handle any interference with economic growth. However, a true understanding and application of laws and reasons behind the precedents would help in ensuring the smooth function of both the domains and specific needs of the Indian market.

Reference

(Endnotes)

1. Manu/Mh.1025/2010.
2. The Competition Act, 2002.
3. I. Rahnasto, Intellectual Property Rights, External Effects and Anti-Trust Law (Oup, 2003), 64 ('The Dissemination Of Innovations and Creative Works is Not Necessarily Seen as the Primary Goal Of Intellectual Property Systems. Rather, The Encouragement of Innovations and Creative Works is The Goal of The System'); Mark Lemley, A New Balance Between Ip And Antitrust (2007).
4. Daniel Bromley, Environmental And Economy: Property Rights and Public Policy(1991).
5. European Commission, Guidelines on The Application of Article 81(3) of The Treaty [2004] Oj C101/97 Paras 24 &25.
6. M. Glader, Innovation Markets and Competition Analysis (Edward Elgar, 2006).
7. For an Analysis of The Silicon Valley Model in Product System Development, See M Aoki, Toward A Comparative Institutional Analysis (The Mit Press, 2001).
8. J Schumpeter, The Theory of Economic Development (London, Transaction Pub., 2005).
9. O. Bar-Gil & G. Parchomovsky, The Value of Giving Away Secrets (2003).
10. T.G. Krattenmaker & S.C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price (1986).
11. Taimoon Stewart, Competition Law in Action (2012).
12. Khor Martin, Intellectual Property, Competition and Development(2012).
13. Kobak James B. Jr, Antitrust Treatment of Refusals To License Intellectual Property: Unilateral Refusal to License Intellectual Property and The Antitrust Laws (2011).
14. H.E. Smith, Intellectual Property as Property: Delineating Entitlements in Information (2007).
15. Nuno Pires De Carvalho, Toward A Unified Theory of Intellectual Property: The Differentiating Capacity (and Function) as the Thread that Unites all its Components (2012).

16. Carlos M. Correa, Managing the Provision of Knowledge: The Design of Intellectual Property Laws (2002).
17. Entertainment Network (India)Limited V Super Cassette Industries Ltd, Manu/Sc/2179/2008.
18. Hanlen Edmond O', Refusal To Supply: Jurisprudence In European Competition Law Since Oscar Bronner (2006).
19. Aamir Khan Productions V. Union Of India, 2010 (112) Bom L R 3778.
20. Kingfisher V. Competition Commission Of India, Writ Petitions No. 1785 Of 2009.
21. FICCI Multiplex Association of India v. United Producers Distribution Forum (UPDF), Case No. 1 of 2009, CCI order dated 25 May 2011.
22. Gramophone Company of India Ltd. v. Super Cassette Industries Ltd., 2010 (44) PTC 541 (Del).
23. Microfibres Inc v. Girdhar & Co., RFA (OS) no. 25/2006 (DB), decided on 28 May 2009.
24. Hawkins Cookers Limited v. Murugan Enterprises, 2008 (36) PTC 290(Del).
25. Twentieth Century Music Corp v. Aiken, 422 US 151(1975).
26. Entertainment Network (India) Limited v. Super Cassette Industries Ltd., MANU/SC/2179/2008.
27. Image Technical Serve v. Eastman Kodak Co., 125 F. 3d 1195 (1218) (9th Cir 1997).
28. CSU LLC v. Xerox Corp., 203 F. 3d 1322 (1326) (Fed Cir. 2000).
29. United States v. Microsoft, 38 1998 WL 614485 (DDC, 14 September 1998).
30. Union of India v. Cyanamide India Ltd. and another, AIR 1987 SC 1802.

❑❑❑

CHAPTER

34

Analysis of Indian Competition Act, 2002

Vagavi Prakash*

Introduction

The Indian competition law regime is a nascent regime. Prior to the operationalization of the Competition Act in May 2009, MRTP Act was the operational law that regulated certain aspects of competition. This paper discusses the legislative history of the Competition Act and analyzes salient jurisprudential trends in competition law enforcement. Part I of this paper deals with the MRTP to Competition Law, Part II discusses anticompetitive agreements and abuse of dominance, respectively. Part III of this paper discusses the jurisprudential trends in the enforcement of the Competition Act. Finally it is summed up with a conclusion.

MRTP Act to Competition Act, 2002

As noted earlier, a substantial part of the MRTP Act[1] was focused around monopolistic behaviour and economic concentration. In light of the changing economic situation and initiation of economic reforms in the country post 1991, the need was felt for a change in approach towards fostering competition. Against this background, the Finance Minister of India in its budget speech in February, 1999 made the following statement in the context of to the then existing MRTP Act.

"The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a committee to examine this range of issues and propose a modern competition law suitable for our conditions."[2]

The Raghavan Committee,[3] was constituted to recommend a suitable legislative framework relating to competition law for the country. It was felt that although the MRTP Act seemingly had provisions regulating anti-competitive practices, in comparison with competition laws of many countries it was inadequate for promoting competition in the market trade and for reducing, if not eliminating, anticompetitive practices in the country's domestic and international trade.

One of the biggest failings of the MRTP Act was the inadequacy of MRTP Act to provide adequate remedy to complainants. Except for orders directing a respondent to 'cease and desist' from the alleged monopolistic, restrictive or unfair trade practices the MRTP Commission could not impose penalties for breach of law and; no other penalty or fine could be imposed.[4]

* Assistant Professor, Department of Management and Commerce, Jagan Nath University, Bahadurgarh, Haryana.

Secondly, it is a generally accepted principle that competition law has extraterritorial application in all the cases where the overseas conduct of defendant distorts competition in the domestic market. However the Supreme Court repeatedly refused to acknowledge this principle and had held that the wording of MRTP Act did not provide for extra territorial jurisdiction.[5]

Thirdly, MRTP Act did not define certain key terms[6] such as abuse of dominance, cartels, collusion, price-fixing, bid rigging, boycotts, refusal to deal and predatory pricing. It is often argued that lack of definition was immaterial. Because the general nature of MRTP Act could have covered all anticompetitive practices e.g. RTP was defined in fairly general terms to include all trade practice that prevents, distorts or restricts competition and therefore there was no need for a new law.[7] It is true that the generic nature of MRTP Act was very wide but this generic nature caused ambiguities in the interpretation and application of the MRTP Act and ambiguities resulted into atmosphere of general business uncertainty on key issues.[8]

In pursuance of its mandate, the Raghavan Committee deliberated between amending the existing MRTP Act and enacting a new competition law. It was felt that drafting a new law would be most beneficial. This led to the enactment of the Competition Act. The CCI was established in October 2003. However the operative provisions of the Competition Act would be brought into force in two phases in May, 2009[9] and June, 2011[10] respectively.

Anti-Competitive Agreements

Section 3 of the Competition Act states that any agreement which causes or is likely to cause an appreciable adverse effect (AAE) on competition in India is deemed anti-competitive. Section 3 (1) of the Competition Act prohibits any agreement with respect to "production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India."

Although the Competition Act does not define AAEC and nor is there any thumb rule to determine when an agreement causes or is likely to cause AAEC, Section 19 (3) of the Act specifies certain factors for determining AAEC. The intent of the legislature reflected vide the mandatory language of Section 19 (1) of the Act is that the CCI is required to carry a balanced assessment of anti-competitive effect as well pro-competitive justification of the agreement. As stated above AAE is not defined but Section 19 (3) provides the following factors that the CCI must have due regard to which determining whether an agreement has an AAEC under Section 3:

(i) creation of barriers to new entrants in the market;
(ii) driving existing competitors out of the market;
(iii) foreclosure of competition by hindering entry into the market;
(iv) accrual of benefits to consumers;
(v) improvements in production or distribution of goods or provision of services;
(vi) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

The language in section 19(3) states that the CCI shall have 'due regard to all or any' of the aforementioned factors. In the adjudications that have been analysed by us below, we note that the CCI has examined the allegations and material on record as against the elements of Section 19(3) as set out above. However, in Automobiles Dealers Association v. Global Automobiles Limited & Anr.,[11] CCI held that it would be prudent to examine an action in the backdrop of all the factors mentioned in Section 19(3).

The Competition Act does not categorize agreements into horizontal or vertical however the language of Sections 3 (3) and 3 (4) makes it abundantly clear that the former is aimed at horizontal agreement[12] and later at vertical agreements.[13] Horizontal agreements relating to activities referred to under Section 3 (3) of

the Competition Act are presumed to have an AAE within India. The Supreme Court in Sodhi Transport Co. v. State Of U.P.[14] as interpreted 'shall be presumed' as a presumption and not evidence itself, but merely indicative on whom burden of proof lies. Vertical agreements relating to activities referred to under Section 3(4) of the Competition Act on the other hand have to be analyzed in accordance with the rule of reason analysis under the Competition Act. In essence these arrangements are ant-competitive only if they cause or are likely to cause an AAEC in India. Section 3(3) of the Competition Act provides that agreements or a 'practice carried' on by enterprises or persons (including cartels) engaged in trade of identical or similar products are presumed to have AAEC in India if they:

- Directly or indirectly fix purchase or sale prices;
- Limit or control production, supply, markets, technical development, investments or provision of services;
- Result in sharing markets or sources of production or provision of services;
- Indulge in bid-rigging or collusive bidding.

The first three types of conducts may include all firms in a market, or a majority of them, coordinating their business, whether vis-à-vis price, geographic market, or output, to effectively act like a monopoly and share the monopoly profits accrued from their collusion. The fourth type of cartelised behaviour may involve competitors collaborating in some way to restrict competition in response to a tender invitation and might be a combination of all the other practices.

The only exception to this per-se rule is in the nature of joint venture arrangements which increase efficiency in terms of production, supply, distribution, storage, acquisition or control of goods or services. Thus there has to be a direct nexus between cost/ quality efficiencies the agreement and benefits to the consumers must at least compensate consumers for any actual or likely negative impact caused by the agreement.

Section 3(4) of the Competition Act provides that any agreement among enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including (a) tie-in arrangement; (b) exclusive supply agreement; (c) exclusive distribution agreement; (d) refusal to deal; (e) resale price maintenance, shall be an agreement in contravention of Section 3(1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. As can be reason, these agreements are not deemed anti-competitive. Only if they cause or are likely to cause an AAEC in India will these agreements be in violation of section 3(1) of the Competition Act. The rule of reason must be applied in this determination.

The Competition Act does recognize that protectionist measures with respect to rights granted under intellectual property laws need to be taken by the holder thereof in the course of activities and entering into agreements and arrangements. Consequently, the Competition Act specifically states that the contours of anti-competitive restraints will not apply with respect to those horizontal and vertical agreements which impose reasonable conditions to protect or restrain infringement of, the rights granted under intellectual property laws. For instance, in the case of Shri Ashok Kumar Sharma v. Agni Devices Pvt. Ltd,[15] it was held that a mere restriction on the use of trademark would not be in violation of Sections 3 or 4 of the Competition Act, 2002.

In the pronouncements /orders passed by the CCI in the context of allegations under section 3 and section 4 of the Competition Act examined by us in this paper, the CCI has not set out broad principles of ingredients of an offence or of the nature of permitted activities. Generally, CCI has, on an examination of the material before it and on an analysis of the relevant provisions of the Competition Act, arrived at a conclusion as to whether an agreement or arrangement is violative of section 3 or section 4 of the Competition Act without setting principles of interpretation or a broad proposition of law. As the court of first instances, the CCI has shown that it is generally more concerned with establishment of facts.

The decisions by the CCI under Section 3 that have gained most significance and have had the greatest impact are those pertaining to cartelization. Since the establishment of an anti-competitive or a cartel like conduct is fact based, the CCI in all cases has relied extensively on reports of the DG In certain cases, the CCI has directed the DG to file a supplementary report as well.

Abuse of Dominance

Section 4 of the Competition Act is the operative provision of the Act dealing with the abuse of dominant position. This provision is broadly fashioned on the European Union prohibition on abuse of dominance contained in Article 102 of the Treaty on the Functioning of the European Union (TEFU).

Section 4 prohibits any enterprise from abusing its dominant position. The term 'dominant position' has been defined in the Act as "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour." The definition of the dominant position provided in the Competition Act is similar to the one provided by the European Commission in United Brand v. Commission of the European Communities case.[16] In the United Brands case the Court observed that –

"a position of strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitor, customers and ultimately of its consumers."[17]

The Competition Act defines the relevant market as 'with the reference to the relevant product market or the relevant geographic market or with reference to both the markets.'[18] The relevant geographic market is defined as "a market comprising 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."[19] The Competition Act further provides that the CCI shall determine the relevant geographic market having due regard to all or any of the following factors:[20]

(i) regulatory trade barriers;
(ii) local specification requirements;
(iii) national procurement policies;
(iv) adequate distribution facilities;
(v) transport costs
(vi) Language
(vii) consumer preferences
(viii) need for secure or regular supplies or rapid after-sales services

The relevant product market is defined in as 'a market comprising 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.' The Competition Act provides that the CCI shall determine the relevant geographic market having due regard to all or any of the following factors:

(i) physical characteristics or end-use of goods
(ii) price of goods or service
(iii) consumer preferences
(iv) exclusion of in-house production
(v) existence of specialized producers
(vi) classification of industrial products

The abuse of dominance analysis under the Competition Act starts with the determination of market, once the relevant market has been determined; the CCI's next task is to establish whether the enterprise enjoys a dominant position. It is important to note here that the Competition Act does not prohibit the mere possession of dominance that could have been achieved through superior economic performance, innovation or pure accident but only its abuse.[21]

The Competition Act sets out following factors which the CCI will take into account to establish the dominant position of an enterprise:[22]

(i) market share of the enterprise.

(ii) size and resources of the enterprise.

(iii) size and importance of the competitors.

(iv) economic power of the enterprise including commercial advantages over competitors,

(v) vertical integration of the enterprises or sale or service network of such enterprises.

(vi) dependence of consumers on the enterprise.

(vii) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise.

(viii) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers.

(ix) countervailing buying power.

(x) market structure and size of market.

(xi) social obligations and social costs.

(xii) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition.

(xiii) any other factor which the Commission may consider relevant for the inquiry.

Once the dominance of an enterprise in the relevant market is determined the CCI has to establish the abuse of its dominance by an enterprise. The Competition Act sets out a list of activities that shall be deemed abuse of dominant position:

(i) anti-competitive practices of imposing unfair or discriminatory trading conditions or prices or predatory prices.

(ii) limiting the supply of goods or services, or a market or technical or scientific development, denying market access.

(iii) imposing supplementary obligations having no connection with the subject of the contract, or

(iv) using dominance in one market to enter into or protect another relevant market.

The list of abuses provided in the Competition Act is meant to be exhaustive, and not merely illustrative. This broadly follows the categories of abuse identified under 102 of TEFU.[14] The Competition Act also exempts certain unfair or discriminatory conditions in purchase or sale or predatory pricing of goods or service from being considered an abuse when trading.

Jurisprudential Trends

As stated above, the decisions by the CCI under Section 3 that have gained most significance and have had the greatest impact are those pertaining to cartelization.

1. **Varca Druggist and Chemist and Others v/s Chemist and Druggists Association, Goa[23] ("Varca Drug")**

   This case was initiated on a complaint filed by Varca Druggist & Chemist through its proprietor Mr. Hemant Pai Angle and two other proprietors of pharmaceutical drugs and medicines firms before the Director General (Investigation & Registrations), Monopolies & Restrictive Trade Practices Commission (DGIR, MRTPC) alleging that the Opposite Party, namely, Chemist & Druggist Association, Goa (CDAG) was indulging in restrictive trade practices. The case was transferred to the CCI on the repeal of MRTP Act. The CCI comes to the conclusion that the conduct and practices of CDAG were limiting and controlling the supply of drugs in the district of Baroda in the state of Gujarat in violation of provisions of Section 3(3)(b) read with Section 3(1) of the Competition Act. The CCI imposed a penalty ₹ 2,00,000 on CDAG.

2. **Builders Association of India v/s Cement Manufacturer's Association and 11 cement companies[24]("Cement Manufacturer Association")**

   The informant, a society registered under the Societies Registration Act, 1860 was an association of builders and other entities involved in the business of construction. The Opposite Party-1 (OP 1) is an association of the cement manufacturers of India in which both public and private sector cement units were members. The informant had submitted that cement manufacturers, namely, Associated Cement Co. Ltd., Gujarat Ambuja Cement Ltd., Grasim Cement, Ultratech Cement Ltd, Jaypee Cement, India Cements Ltd., J.K. Cements of Group, Century Cement, Madras Cement Ltd, Binani Cement Ltd. and Lafarge India Ltd. were members of OP-1 and were the leading manufacturers, distributors and sellers of cement in India. As per the informant, the respondent cement manufacturers under the umbrella of OP-1 indulged directly and indirectly into monopolistic and restrictive trade practices, in an effort to control the price of cement by limiting and restricting the production and supply of cement as against the available capacity of production. The CCI found the Opposite Parties in contravention of section 3(3)(a) and 3(3)(b) read with section 3(1) of the Act. The CCI imposed a penalty of 0.5 times of net profit for 2009-10 and 2010-11 in case of each cement manufacturer named as Opposite Parties in this case.

3. **In Re: Suo Moto case against LPG Cylinder Manufacturers[25] ("LPG Cylinder")**

   The cognizance in the present case was taken by the CCI suo-moto under section 19(1) of the Competition Act consequent upon the submission of investigation report of the DG in Case No. 10 of 2010, M/s Pankaj Gas Cylinders Ltd. v. Indian Oil Corporation Ltd. In that case it was reported by the DG that in tender No. LPG-0/M/PT-03/09-10 floated by Indian Oil Corporation Ltd. (IOCL) for the supply of 105 lakh, 14.2 kg capacity LPG cylinders with SC valves, the manufacturers of LPG cylinders had manipulated the bids and quoted identical rates in groups through an understanding and collusive action. The CCI also observed that all the bidding companies who had infringed the provision of section 3(3) of the Competition Act were responsible in equal measure and no mitigating circumstances were available to any of them. Considering the totality of facts and circumstances of the present case and the seriousness of contravention the commission decides to impose a penalty on each of the contravening company at the rate of 7% of the average turnover of the company.

4. **Film & Television Producers Guild of India v/s Multiplex Association of India & Ors.[26] ('Film & Television Producers Guild')**

   The Film and Television Producers Guild of India, Informant, filed a complaint against Multiplex Association of India (MAI) and various constituents of MAI alleging that MAI was forcing producers/distributors to negotiate revenue sharing only with MAI and not individual constituents. Further, MAI was imposing terms of exhibition which was prejudicial to the producer given the nature of film industry. The Informant alleged that these practices were anti-competitive (Section 3

of the Act) and that MAI was abusing its dominant position (Section (2) (a) and 4 (2) (c) of the Act). The CCI framed two issues – whether the Opposite Parties ('OPs') acted in violation of Section 3 and Section 4 of the Act. After an examination of the detailed findings of the DG, the CCI rejected the same as there was insufficient evidence to establish that OPs had formed a cartel or acted in concert either for the purpose of revenue sharing or controlling the distribution and exhibition of films. Both issues were therefore decided in favour of the OPs.

Conclusion

Competition law analysis entails complex legal and economic considerations. The CCI orders as discussed above suggests that the CCI has been called upon very early in its existence to determine complex antitrust issues arising from the conduct or enterprises engaged in very complex market. The Competition Act is a big step in India's competition law framework from MRTP regime focused on 'curbing of monopolies' to promote competition in market by proscribing practices that have 'appreciable adverse effect on competition'. The CCI has to be cautious and consistent with respect to its approach in terms of its operations and advocacy exercise. A consistency in CCI's approach in will go long way in enabling the industry in planning pro-competitive business strategy within the framework of the Competition Act. No legislation is perfect. It evolves through time. History is witness to the fact that competitive pressure has always done wonders for the economy of any country and we hope that the CCI will also be able to do the same in India by fostering the culture of competition in business practices.

References

(Endnotes)

1. Subsequent to the 1991 amendment to the MRTP Act, there was a shift in emphasis towards prohibition of monopolistic, unfair or restriction trade practice rather than on concentration of wealth and control of monopolies. See Jaivir Singh, Monopolistic Trade Practices and Concentration of Wealth : Some conceptual problems in MRTP Act, Economic and Political Weekly, Vol. 35, No. 50 (Dec. 9-15, 2000), pp. 4437-4444.
2. See, Chakravarthy S. MRTP Act metamorphoses into Competition Act. www. Cuts-international.org/doc01.doc.
3. http://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_ committee.pdf
4. Supra, note.
5. See American Natural Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and others (1998) 3 Comp LJ 152 MRTPC. ANSAC, a joint venture of six USA soda ash producers attempted to ship a consignment of soda ash to India. AMAI complained, to the MRTPC to take action against ANSAC for forming a cartel to exports to India. SC did not go into the allegations of cartelization, it held that the MRTP Act did not give the MRTPC any extraterritorial jurisdiction therefore MRTPC therefore could not take action against foreign cartels.
6. See Study of Cartel Cases in select Jurisdiction at http:// www.cuts-ccier.org/CARTEL/pdf/FinalReport.pdf
7. Ibid.
8. Both Supreme Court and MRTP Commission had in various cases such as: Haridas Exports v. All India Float Glass Manufacturer Association (AIFGMA), (2002)6 SCC 600, AIFGMA v. PT Mulia Industries, 2000 CTJ 252 (MRTPC), Union of India v. Hindustan Development Corporation 16 SCC 499 (1993), DG (I & R) v. Modern Food Industries, 3 Comp LJ 154 (1996), had not been able to give any guidance to the business community as to what will constitute predatory price under MRTP Act. In Modern Food , Supreme Court did mention Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)but missed the significance of this judgment with respect to the market structure and the theory recoupment.
9. Central Government notification S.O. 1241 (E) and S.O. 1242 (E) dated May 15, 2009.
10. Central Government notification S.O. 479(E) dated 4th March, 2011.
11. Case No. 33 of 2011, decided on July 3, 2012.

12. Between actual or potential competitors operating at the same level of the supply chain.
13. Between firms operating at different levels, i.e. agreement between a manufacturer and its distributor.
14. AIR 1986 SC 1099.
15. Case No. 12 of 2015 decided on 07.05.2015.
16. United Brands v Commission of the European Communities; [1978] ECR 207.
17. *Ibid*.
18. Section 2 (r) of the Act.
19. Section 2 (s) of the Act.
20. Section 19 (6) of the Act.
21. Section 19 (7) of the Act.
22. Section 19 (4) of the Act.
23. MRTP C-127/2009/DGIR4/28; decided on June 11, 2012.
24. CCI Case No 29/2010; decided on June 20, 2012.
25. Suo-Moto Case No. 03/2011; decided on February 24, 2012.
26. CCI Case No. 37 of 2011; decided on January 3, 2013.

❑❑❑

CHAPTER

35

Merger Control Regime under Competition Law: A Comparison

Prashant Motsara and Sara Fathima*

Prefatory

Every new merger in the market is a whistle-blower to the competition policy makers of the century as there are lots of market related risk that is associated with mergers. A merger is when two business powers resolve to unite together to form a bigger economic entity. Such mergers can have implications regarding the concentration of power and market dominance in a way to detriment the welfare and fair competition of the other players entering the market. Since such mergers are in a way budding to bring the market in the balance, regulation and inspection are quite necessary in the very beginning stage itself. The apprehended risks are reduction in the number of business entities opening in the market and increased number in the market share controlled by the merged entity.[1] Thus in the wake of all these concerns the competition law makers mostly take the following general measures to regulate the negative mergers likely to affect the harmonious flow of market strategies.

Primarily to take a peep into the nature of merger being established to assess the likelihood of such a merger to promote anti-competitive trade practises and if so abate it at the earliest or if the merger in itself is too complicated to draw a line of balance then to prevent such mergers from happening. But at the same time, no law is a good law if it fails to achieve a balance. Understanding right kind of mergers is equally important as mergers are effective to the economy in numerous ways. Thus there has to be a subtle balance between stipulation and stimulation. Thus an effective competition law to ensure the adequate functioning of mergers are necessary. However, the already existed Restrictive and Monopolies Trade Practises Act, 1969 was more of prohibitive than of permissive in its nature. Due liberalisation was a need of the hour and it was high time to loosen up the policies to ensure more flow of economic marketing. Thus in the light of the same, Competition Act was enacted to achieve a balance between unfair trade practises and easy functioning of business. Whether the conundrum relating to mergers still remains a cloud in the horizon or not has to be looked over from the standpoint of policy makers.

Mergers under Indian Law

Mergers are ordinarily understood as the absorption of one company that ceases to exist, into another that retains its own name and identity acquires the assets and liabilities of the former.[2]

---

* VI Semester, NUALS, Kochi.

In India mergers are mostly called combination and acquisition of share and asset or control of one's entity are considered to be mergers for the purpose of merger notifications.[3]

The definition of Combination includes any merger or amalgamation, in the case of which the turnover or assets jointly of the merging entities meets the prescribed threshold limits.[4] Though joint ventures doesn't hold a precise definition under the Act, its presumed that if a joint ventures satisfy all the conditions set out in section 5 of the Competition Act, then it comes under the purview of scrutiny by the Competition Commission of India.[5] The threshold must be clear, understandable[6] and shall be based on objectively quantifiable criteria and on information that is readily assessable to the merging parties. The significance of insisting on threshold for notifications lessens the administrative burden for competition authorities, compared with mandatory notification for all mergers, also enabling competition authorities to focus on mergers most likely to cause concern. While assets are a criterion on which net sales have been set out in India, turnover is the criterion in the ECMR.

Threshold Limits

In India threshold limits prescribed in the context of any merger, amalgamation, acquisition or control by any party is the parties jointly having in India assets of or more than the value of ₹ 1000 crore or turnover of or more than the value of ₹ 3000 crore in India or outside India, in aggregate, assets of more than USD 500 million or a turnover of or more than USD 500 million or a turnover of or more than USD 1500 million, with a local nexus provision requiring at least ₹ 500 crore of assets or 1500 crore of turnover in India. In the case of group, corresponding thresholds are in India, assets of or more than ₹ 4000 crore or a turnover of ₹ 12,000 crore in India or outside India, an aggregate value of assets of or more than USD 2 billion or turnover of ₹ 6 billion of which assets of ₹ 500 crore or turnover of ₹ 1500 crore must be in India.[7]

Pre-merger Notification System

Now for those falling under the prescribed threshold, the Indian Law insists on mandatory pre-merger notification, as such a notification is half the battle for the competition policy makers in assessing the crux of the market risk it may induce. Reliance on premerger notification system is to provide advance notice of proposed transactions based on a tried and tested basis that competition authorities lest might end high and dry due to lack of resources and time to monitor all the business transactions in an attempt to identify those that pose a threat to competition. Nor can they detect those midnight mergers that are consummated without prior notice. Thus pre-merger notifications are always a one step ahead formula for merger regulation and India, needless to say, has taken the bull by its horns when compared to UK who follows voluntary pre-merger notifications.[8]

Substantive Assessment of Mergers

Once the pre-merger notifications are released, what comes next is the crux component of the merger control complex which is the substantive assessment of the merger where the competition commission gets down to brass tacks to decide whether the particular merger is detrimental or not. The impact of every merger depends on the behaviour of the market where its formed, thus defining the relevant market is one of the fundamental steps taken on this behalf.

Competition Act in India has a crystal clear definition of relevant market and its further two components geographic market and product market.[9] In the context of product market the CCI must delve into numerous aspects and another sets of aspects[10] regarding geographic market.[11] In a substantive test what is essentially examined is whether and to what extend the proposed merger negatively impacts competition. Though Competition Act in India prohibits mergers which are like to cause an 'appreciable adverse effect' on competition in the relevant market in india, it fails to explain the said term and the hole of interpretation is largely left to the SC and CCI to examine whether those factors enumerated falls within ambit of the section.[12]

To bespeak the level of competition concentration in the market, market share before and after the mergers are studied. Competition Act has set rules and factors to determine the same and generally there is a line of *de minimis* market share and combinations falling below the specified share are not usually considered threats to combination. The determination of effects of the proposed mergers on competition involves the perlustration of not only the actual level of competition, but also to prognosticate the percussion of a potential transaction as well. Indian Competition law requires the consideration of 'actual or potential' competition but this is qualified by the words 'through imports'.[13] At the same time equally significant aspect would be 'extent of effective competition likely to sustain in the market and if it happens to reduce or eliminate the competition, then such combination becomes prohibitive. Last but not the least the way any merger is welcomed in the market is also considered though as such consumer interest does not find a mention in the law.

Merger Control Regime in UK

Merger and Acquisitions are becoming very popular for the foreign companies who are willing to invest in UK. There are numerous ways to achieve business growth. The most conventional option would be Organic expansion through marketing business development but it certainly isn't the swiftest. It rather becomes a challenge if one does not fully understand the local customs, rules and regulations. The quicker option would be to invest in or buy a business operating in the market of interest.

UK merger control legislation is primarily contained in the Enterprise Act 2002 (the EA 2002) and is enforced (since 1 April 2014) by the Competition and Markets Authority (the CMA). The UK is also subject to the EU Merger Regulation (EUMR) which applies where the turnovers of the companies involved in a transaction exceed certain thresholds, usually to the exclusion of the UK's domestic merger control regime (and those of all other EU Member States). If the EUMR thresholds are met then notification to the European Commission (the Commission) is mandatory, and the UK merger control rules will not usually apply. Conversely, if the EUMR thresholds are not met, the EU rules will not usually apply.

There are two stages in UK merger control. The first one considers whether there are any prima facie competition concerns at all and that is referred to as Phase 1 investigation and the second stage is an in-depth review for more contention mergers and it is called Phase 2 investigation. CMA handles both the stages of the review. Mostly CMA is responsible for stage one investigation while and Inquiry Group comprising between three to five Panel member of CMA is responsible for Phase 2 decisions. The CMA Panel comprises people from backgrounds such as professional or academic lawyers, economists, accountants, directors or other business role.

The EA 2002 allows political involvements to a certain level which has the potential to raise wider public interests. In such cases, the Secretary of State has the power to intervene and impose additional conditions on a merger in order to protect and any public interest involved. If there are no competition concerns and the merger is felt to be in public interest overall, The Secretary of State can even "trump" the competition assessment and clear a merger which has been identified as potentially anti-competitive.

Critical Evaluation of Mergers

A prior clearance of qualifying merger from the CMA is not obligatory under the EA 2002 either before or after the merger takes place, and there are no sanctions for the same. The commercial decision whether (a) to notify and (b) to make the transaction conditional on receipt of merger clearance, usually depends on a combination of –

- an analysis of the risk of a reference for a Phase 2 investigation and the likely ultimate outcome
- the likely impact of notification on the transaction timetable
- the relative bargaining positions of the parties

- the likelihood that the CMA will hear about the merger from another source and investigate on its own initiative.
- the CMA's powers to impose a "hold separate" order.[14]

an informal advice may be given by MCA because of certain reasons which could include good faith, confidential transactions which are not yet in public domain in cases where CMA is likely to refer the merger for Phase 2 investigation. In other words, it is an advice based on good faith and cannot be replaced by a notification as a rubber-stamping process to gain confirmation from the CMA that the proposed merger presents no competition issues. Informal advice can be sought just once and cannot be used as a dialogue process or negations with CMA.

Pre Notification of Merger

If the decision is taken to notify a merger voluntarily to the CMA, the parties will be expected to first provide the CMA with a draft of the notification and to engage in "pre-notification discussions." Such discussions with the CMA were once simply "best practice" but are now considered by the CMA to be mandatory. The risk of not engaging in pre-notification discussions is that the CMA may reject a notification as incomplete.

The pre-notification procedure is only about the completeness of the draft an the same is done by having a dialogue with the CMA (and not on the question of whether the merger will be cleared or referred). The process involves sending the submission to the CMA in "final draft" form, which it will then review.

As explained, there is no obligation on the parties to a qualifying merger to notify it to the CMA for clearance. But once then notification is made the parties will have to abide by the required statutory procedure and will have to provide all the information requested in the proforma Merger Notice (unless formal waivers have been granted by the CMA for specific information).

On the grounds of misleading information, a merger notice may get rejected by the CMA. But that is not the only ground on which a merger notice might get cancelled. If it suspects that the parties do not propose to carry the arrangements into effect, if the party notifying fails to supply the required information or any subsequently requested information, or if the notified arrangements appear to be a concentration with an EU dimension within the EUMR, in all such cases the CMA has the power to cancel the merger notice.

A window of 40 working days is provided to clear the transaction or refer it to Phase 2 investigation once the CMA has confirmed that the submitted notification is complete. The period cannot be extended.

Merger fees are payable by the person who submits the merger notice or if an own-initiative investigation is launched by the CMA, by the person(s) acquiring control. The fee needs to be paid by the end of Phase–1, when the CMA announces its decision whether to refer or clear the merger. Merger fees are payable in respect of any merger (subject to some limited exceptions) that qualifies as a relevant merger situation and in which the CMA (or Secretary of State in public interest cases) reaches a decision on whether or not to refer the merger for a Phase 2 investigation (regardless of whether a reference is made or not).

Cessation

Thus it can be drawn out that the laws on regulation of mergers in India and UK have a similar scheme and have several common features in terms of various stages of merger review and steps taken by the competition authorities in this behalf. However discrepancies have been discerned in certain aspects. In India it is unclear whether a joint venture would be included within the definitions of combinations but in UK joint ventures are clearly defined under combinations. The system of pre notification of merger is different in different jurisdiction. Where pre-merger notification is made mandatory in India, it is voluntary in UK. Also with regard to substantive test for analysis of mergers it's found that Indian law requires the assessment of whether the merger is likely to cause 'appreciable adverse effect' on competition. The UK law provides for the test of 'substantial lessening of competition' within a national market for good or services.

References

(Endnotes)

1. Alan H Goldberg, 'Merger Control' in Vinod Dhall (ed) Competition Law Today: Concepts, Issues and the Law in Practise (1st ed, Oxford University Press 2007) 93.
2. Black's Law Dictionary, 7th Edition, 1002 (1999).
3. International Competition Network (ICN)document points out; an acquisition of control presumptively arises whenever the purchaser acquires a majority of the target company's shares such that the purchaser obtains voting rights that permit it to control the target company's board and/or management decisions. ICN,Defining 'Merger Transactions' for Purposes of Merger Review, at 2, available at:

   http://www.internationalcompetitionnetwork.org/media/library/conference_6th Moscow 2007/23ReportonDefining MergerTransactionforPurposesof MergerReview.pdf.
4. In India, s 5 of the Competition Act, which defines 'combinations', includes acquisitions by persons and groups as well as acquiring of control bya person over an enterprise in certain circumstances. 'Acquisition' has been defined by the Competition Act as including 'acquiring or agreeing to acquire', directly or indirectly,

   (i) shares, voting rights, or assets of an enterprise; or

   (ii) control over management orcontrol over the assets of an enterprise.
5. Vinod Dhall, 'The Indian Competition Act, 2002' in Vinod Dhall (ed), Competition Law Today: Concepts, Issues and the Law in Practice (1st ed, Oxford University Press 2007) 527.
6. ICN Recommended Practices on Merger Notification Procedures, (2002) at 3-4, available at: <http://www.internationalcompetitionnetwork.org>
7. Merger Under the Regime of Competition Law: A Comparative Study of the Indian Legal Framework with EC UKavailable athttp://heinonline.org/HOL/Page?handle=hein.journals/bondlr23&div=9&start_page=[i]&collection=journals&set_as_cursor=1&men_tab=srchresults
8. In India, the Competition Act 20012 as initially enacted provided for involuntary notification mechanism as per the reports of Raghavan Committee but it appears to have some practical difficulty which may arise on approval of 'delays and unjustified bureaucratic interventions'. In 2007, amendment made the pre-merger notification mandatory.
9. Section 2(r) of the Competition Act defines the relevant market as 'the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the market. Relevant product market is defined by s2(t) as 'a market comprising 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'. Section 2(s) defines relevant geographic market as 'a market comprising the area in which 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 neighbourhood areas'.
10. Section 19(7) says CCI to assess the physical characteristics of the goods, price, customer, preference exclusion of in house production, existence of specialised products and classification of industrial products
11. Section 19(6) where factors include regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, customer preferences and need for secure or regular supplies or rapid after sales service.
12. Section 6(1) of Competition Act.
13. Section 20(4)(a) of Competition Act says, "For the purposes of determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market, the Commission shall have due regard to all or any of the following factors, namely: (a) actual and potential level of competition through imports in the market; https://indiankanoon.org/doc/1482397/
14. https://www.ashurst.com/doc.aspx?id_Resource=4633.

❑❑❑

CHAPTER

36

Approach of Competition Commission of India on Quantum of Penalty: A Critical Analysis

Preeti Mechan*

Abstract

We live in an era where economies are based on market competitions. Competition is the fundamental element in ensuring efficient working of markets in any economy. It is also not uncommon in any economy that the market players resort to anticompetitive practices in order to prevent or reduce competition in a market. The Competition Commission of India has evolved as the savior and has taken the lead role in protecting competition in the markets in India. In recent years, the CCI has analyzed and ruled on various provisions of the Competition Act, 2002 in several orders in order to check anticompetitive practices. However, the orders of CCI imposing heavy penalty has been criticized. It has been argued that the CCI has been imposing heavy penalties on the defaulters in the range of 5% to 10% of the turnover of the enterprises violating the Act. However, the definition of the 'Turnover' under Section 2(y) is ambiguous and does not clarify if the turnover includes any applicable taxes on such goods or services while calculating it under the relevant provisions of the Act. Further, it has been criticized that once the contravention is proved, CCI imposes penalties without offering any opportunity of hearing to the parties on the "quantum of penalty" imposed. In 2012, the Competition (Amendment) Bill was introduced in the Lok Sabha on December 10, 2012 by the Minister of Corporate Affairs, Sachin Pilot which proposed to amend the Act and bring clarity on these issues. However, the Bill lapsed due to the dissolution of the 15th Lok Sabha. Presently, the issue regarding quantum of penalty remain contentious and abstruse. This article discusses the rules that CCI is required to follow while assessing penalty and how the CCI has failed to provide a rational framework for quantifying the penalty as adopted by more advanced jurisdictions, such as European Union.

Introduction

In India, the Competition law has developed significantly and Competition Commission of India has emerged as a robust regulator. The Competition Act, 2002 which came into effect in the year 2009 is evolving and developing its jurisprudence with time. The Competition law is vital for the economic development of any nation as it ensures that each player in the market get the opportunity to compete without any obstacles or *malafide* conduct by the other players in the market. Despite the success of the Competition Law in India, the approach of the CCI towards imposition of heavy penalty and fines has been criticized in recent years. The

* LL.M., Gujarat National Law University, Attalika Avenue, Knowledge Corridor, Koba, Gandhinagar, Gujarat Email id: preeti.mechan@gmail.com

Competition Act, 2002 under Section 27(b) sets the maximum penalty for a cartel violation at three times of the amount of profits made out of such agreement by the cartel or 10% of the average of the 'turnover' of the cartel for the last preceding three financial years, whichever is higher. The penalty for other anti-competitive agreements including the abuse of a dominant position should not exceed 10% of the average turnover of the last three preceding financial years. The approach of CCI towards imposition of heavy fines have been criticized as the CCI has failed to make give reasons and justifications on what basis it has calculated the fines. In India, the antitrust/competition law has been greatly benefitted by the laws and precedents of other countries mainly European Union (EU) and United States. Also, the provisions under the Competition Act, 2002 are broadly analogous to the provisions on anticompetitive agreements and abuse of dominance under the European Union Competition Law and the United States Antitrust Law. Therefore, the practice and methods adopted by this jurisprudence must be looked into to fill in the gaps in the Indian Competition Law.

Approach of Competition Commission of India Towards Imposition of Penalty and Calculation of the Penalty

The competition law in India has developed significantly in recent years. The competition law violations are dealt strictly and are subject to significant civil penalties. Under the Competition Act, 2002, where after inquiry the CCI finds that any agreement referred to in Section 3 or an action of an enterprise in a dominant position is in contravention of Section 3 and Section 4 respectively, CCI has been entrusted with the power to impose such penalty as it deems fit, upon each of such person or enterprises which are parties to such agreements or abuse. Section 27(b) of the Act requires that the penalty imposed shall not be more than 10% of the average of the 'turnover' for the last three preceding financial years. It further provides that in case of cartel, CCI may impose a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or 10% of the average turnover of the cartel for the last preceding three financial years, whichever is higher. However, in recent years, CCI has been imposing significantly heavy penalties on the enterprises contravening the provisions of the Competition Act, 2002. For e.g., in *Builders Association of India v. Cement Manufacturers' Association & Ors.*[1] ('Cement Cartel case'), 10 cement companies and an industry association were cumulatively fined approximately US$1 billion; in *In re Shamsher Kataria v. Honda Siel Cars and Ors.*[2] ('Auto Parts case') Tata Motors was penalised approximately US$220 million. The ability of the CCI to impose significant fines and penalties is not in questionin particular. However, it is alleged that there is lack of transparency in the methods and ways in which CCI imposes such fines. Also, CCI in its orders has failed to provide any logic and satisfactory clarifications with regard to the methods and ways it adopts to calculate such fines and penalties. CCI's orders have been criticized for being silent on the reasons and factors considered by the commission for fixing the penalty amount. This approach of CCI is against the principles of natural justice which requires the Court to give reasoned order.

Ambiguity Regarding the Definition of 'Turnover'

The definition of "turnover" is given in the Section 2 (y) of the Act which defines it as to "includes value of sale of goods or services." The term turnover is used in Section 5 and 6 of the Act to determine the thresholds of the combinations that are caught by the Competition Act, 2002. Under Section 27 of the Act which empowers the CCI to impose fine also uses the term 'turnover' as mentioned above. In EU Competition law, the turnover for concentrations is looked after, turnover taxes are deducted. However, in the Indian Competition Act, 2002 the definition of turnover is ambiguous and it does not clarify whether the turnover excludes taxes imposed on goods and services. The Competition law is mainly enforced by way of imposition of penalties on the undertakings violating the provisions of the Act.[3] Therefore, there is a need for bringing more clarity to the definition of the term 'turnover'.

Further, in case of the enterprises which have more than one business and deal in supply of multiple products and services, the situation is worse and more uncertain. In such cases, CCI has calculated penalties based

on the entire turnover of the enterprise including other businesses not forming part of the violation by the enterprise. This approach of CCI has been questioned in catena of cases appealed to COMPAT and SC. Also, the said approach of CCI is in violation of the COMPAT's decision in the matter of *M/s. Excel Crop Care Limited v. Competition Commission of India*[4] wherein the Tribunal held that penalties imposed on enterprises with multiple products and services should be calculated on the basis of 'relevant turnover' accrued on account of products to which the contravention is related. The Tribunal further held that the authorities may rely on the general principles expressed in guidelines issued by European Union (EU) and Office of Fair Trade (OFT) regarding method of calculation etc. while arriving at conclusion about relevant turn over. The Tribunal further held that it should be endeavor of authorities to apply those principles not mechanically or blindly but after carefully considering factual aspects which include financial health of company, necessity of product, likelihood of company being closed down on account of unreasonable harsh penalty. COMPAT has also noted that imposing penalty on entire business would be against the *principle of proportionality* which is the fundamental principles of judicial system. However, it has been observed that CCI has not been following COMPAT order the Excel Crop Case and has been erroneously levying hefty fines without considering the 'relevant turnover'. For e.g. In *In Re LPG cylinders Suo Moto case*,[5] it was argued that the relevant annual turnover in respect of manufacturing of 14.2 Kg LPG cylinders is less than the entire annual turnover of the companies. The European Commission in its 2006 Guidelines on the method of setting fines[6] specifies the methods regarding fining and the turnover in the 'affected markets' is considered for calculation of the quantum of penalty.

Moreover, the parties imposed with the fines are not given opportunity of hearing as the Commission vide a Notification No. L-3(2)/Regulation.-Gen(Amdt)/2009-10/CCI dated 31 March 2011 had amended the regulation 48 of the CCI(General) Regulations, 2009 thereby foreclosing the opportunity of being heard to the parties before finalising the quantum of penalties. As such, the parties are not given any opportunity to submit mitigating factors before the Commission. The orders of CCI levying heavy penalties in a number of cases are appealed to the COMPAT and to the Supreme Court of India (SC) which increases the burden on the judiciary. Owing to the gravity of the situation, CCI should set independent guidelines on the ways and methods of calculation of penalties to be imposed on the parties violating the provisions of the Competition Act, 2002. The Competition Act (Amendment) Bill 2012[7] attempted to address the said issue. However, the Bill lapsed due to dissolution of the 15th Lok Sabha. The Bill attempted to amend the Act to bring clarity to the definition of the term 'turnover' and to ensure that no penalty can be imposed without the concerned party having an opportunity to be heard.

EU Approach

The EU Competition Law empowers the Commission to penalize by the imposition of fines and periodic penalty payments on the enterprises. Unlike Indian Competition Law, the Commission does not have the power to fine individuals such as directors or employees of the companies which have infringed the law. The Regulation on Procedure provides for two kinds of fines: (i) fines imposed in connection with procedural infringements; and (ii) fines imposed either as a sanction for the violation of Article 101(1) and 102, or for non-compliance with an interim measure or a commitment decision.[8] A review of the Commission's practice makes it clear that during the initial days of anti-trust enforcement, fines for substantive breaches of the competition law were very low. In 1980, the Commission in *Pioneer*[9] brought a policy change. In Pioneer, the fines imposed ranged from 2% to 4% of the companies' turnover and on appeal, the Court of Justice confirmed the Commission's right to suddenly depart from its previous practice to increase the amount of fines substantially, and to use fines as a deterrent.[10] In 1991, the Commission in view of Regulation 17 (replaced by the Regulation on Procedure in 2004) declared its intention to impose fines upto 10% of the annual turnover of the companies involved in order to reinforce the deterrent effect of penalties under the Community Competition Law.[11] Since then, the Commission has actually imposed fines upto maximum of

10% of the turnover of the company. The Commission in recent years started to impose dramatically heavy penalties, for instance, a fine of EUR 497.2 million was imposed on Microsoft in 2004 for abuse of dominant position,[12] a fine of EUR 1.06 billion imposed in May 2009 on Intel for allegedly abusing its dominant through exclusionary practices.[13] It has been held in catena of European Courts decisions that the Commission enjoys wide powers and discretion in exercising its powers in imposing fines on undertakings and associations of undertakings for breaches of Article 101 and 102.[14] However, the discretionary power of the Commission has been limited. Firstly, the general principles of law impose restrictions on the Commission to follow the general principles of law like principles of natural justice. In addition, the Regualtion on Procedure fixes the legal maximum amount of fines that the Commission is allowed to impose for substantive breaches of the competition law. It further sets out the basic criteria like the gravity and duration of the infringement-to be taken into account for calculation of the fines imposed in a particular case. On these basic principles, the Commission has set out detailed fining guidelines aimed at clarifying the methodology for calculating the fines. In European Commission has set the 2006 Guidelines on the method of setting fines[15] which prescribes the basis for setting the fine. It provides that is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates and consider only the relevant turnover for calculation of the quantum of penalty.

In point 8 of the guidelines set out the principles which would guide the Commission where it order fines in terms of Article 23(a) of Regulation No. 1/2003 and the method of setting of fines is prescribed. It provides that in determining the basic amount of the fine, the Commission will take the value of the undertakings sale of goods to which the infringement directly or indirectly relates. It is pointed out that the value of sales to be determined should be before the VAT and in other taxes i.e. VAT and taxes are excluded while determining the turnover of the undertaking. In Chapter 2, the steps for determining the level of a penalty is set out in which paragraph 2.7 defines the relevant turn over as "as the turnover of the undertaking in the relevant product market and the relevant geographic market affected by the infringement in the undertaking last business year". Para 2.8 provides that the starting point for determination should not exceed 10% of the relevant turnover. In step 2, reference is made to the duration of the infringement as a relevant factor to adjust the amount determined in Step 1. In Step 3 the relevant factors for adjusting the amount of starting point are mentioned. It is provided that "consideration at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement." Therefore, the Commission relies on the four elements for imposing penalty- general principles, legal maxims, legal criteria and guidelines.

Learning from South African Jurisdiction

The Competition Appeal Court of South Africa in the case of *Southern Pipeline Contractors & anr. vs. The Competition Commission*[16] wherein the Tribunal dealt with the question as to what should be the relevant turnover to determine the appropriate amount of penalty to be imposed. It must be noted that Section 59 of the Competition Act of 1998 of South Africa provided for maximum penalty of 10% of the annual turnover in that and the concept of 'turnover' is not defined in the Act and is only referred to in Section 59(2), being annual turnover. Thus, like India, there is thus some uncertainty as to the precise meaning of 'turnover'. However, section 59(3) refers on more than one occasion to 'the contravention', in particular, in dealing with the nature, duration, gravity and extent 'of the contravention', the loss or damage suffered as a result of the 'contravention' the market circumstances in which 'the contravention' took place and the level of profit derived from 'the contravention'. The Tribunal relied on the guidelines issued by the European Union (EU) and The Office of Fair Trade (OFT) and the principle of proportionality and held that the appropriate amount of penalty had to be determined keeping into consideration the damage caused and the profits which accrue from the cartel activity. However, the Section 27(b) of the Indian Competition Act, 2002 is completely silent regarding any specific factors to be taken into consideration or the methodology to be adopted for

imposition of penalty. Therefore, the guidelines issued by the EU in relation to old Article 81 and the new Article 101 should have been kept in mind by the CCI and the CCI have not given any reason should be mindful of the guidelines.

Suggestion and Conclusions

The enforcement mechanism of the Competition Law is on through imposition of fines and penalties. The imposition of fines and penalties is to cause a deterrence amongst the market players from violating the competition laws. Thus, it is understood that the imposition of fines is in the interest of the other market players and overall economy of the nation. However, it is also essential that the fundamental principles of the judicial system viz principles of proportionality and principles of natural justice are followed while fixing the quantum of penalty and fines. It is widely accepted amongst the international competition networks that formulating penalty guidelines are inculcates a culture of compliance and brings transparency in the system. CCI has not formulated an all-encompassing and rational penalty framework that set out clear principles on calculating the quantum of fines, as well as factors that heighten and mitigate fines. It cannot not doubted that formulation of guidelines will ensure more investments into India. The Commission should take into consideration the practice followed in other jurisdictions as discussed and lessons learned by the developing nations.

References

(Endnotes)

1. Case No. 29 of 2010 (Apr. 20,2012) ; See also (Apr. 10,2016) http://www.cci.gov.in/sites/default/files/292011_0.pdf.
2. Case No. 03/2011 (July 27, 2015) ; See also(Apr. 10,2016) http://www.cci.gov.in/sites/default/files/03201127.pdf.
3. KK Sharma, Competition Commission Cases: A Compendium of CCI Cases from 2009 to 2014, (LexisNexis, 1st edn. 2014).
4. Appeal No. 79 of 2012 (Oct. 29, 2013).
5. Suo Moto Case No. 03 of 2011; See also(Apr. 10,2016) http://www.cci.gov.in/sites/default/files/SMC032011.pdf.
6. [2006] OJ C210/2, (Apr. 10,2016) http://eur-lex.europa.eu/legal-ontent/EN/ALL/?uri=CELEX:52006XC0901(01).
7. (Apr. 10,2016) http://www.prsindia.org/billtrack/the-competition-amendment-bill-2012-2571.
8. Ivo Van Bael, Due Process In EU Competition Proceedings (1sted, Wolters Kluwer, 2011).
9. Pioneer Hi-Fi Equipment, OJ 1980 L60/21.
10. Musique Diffusion Francaise and Others v. Commission, ECR 1825 (1983) at paras 106-109.
11. Twenty-first Report on Competition Policy, point 139.
12. Microsoft Corp v. Commission, (Apr. 10,2016) http://ec.europa.eu/competition/sectors/ICT/microsoft/. Further penalty payments of EUR 280.5 million and EUR 899 million were later imposed on Microsoft-respectively on 12th July 2006 and 27th February 2008 for failure to comply with the 2004 decision of the Commission; *Microsoft v. Commission (periodic penalty payments),* Case T-167/08).
13. Intel v. Commission, OJ 2009 C227/13 (summary decision).
14. Dansk Ror industry and Others v. Commission, ECR I-5425 (2005) at para. 172.
15. Supra 8.
16. Case No. 23/CR/Feb09, See also (Apr. 10, 2016) http://www.comptrib.co.za/assets/Uploads/23CRFeb09-SPC.pdf.

❑❑❑