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Competition Law in India and The Perils it Faces

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The following paper tries to discuss the current situation of Indian Competition Law. The paper explores the difficulties, problems, and dangers which hampers the functioning of this Law. The paper also discusses some landmark cases and judgments of the Competition Law and a few ongoing cases such as Amazon and the Future group including Reliance Retail which is the current buzz in the legal and corporate world. The landmark judgement of Mohit Mangalani vs Flipkart has also been discussed in this paper. Elements of Competition law such as abuse of dominance, predatory pricing, and anti-competitive agreements have been explained in this paper. The issues which are faced by the Competition Appellant Tribunal (COMPAT) have also been discussed. The history and evolution of the Competition Act, 2002 has been mentioned in the paper. This paper gives an overview of the competition law in India and discusses' its key issues. Per se rule and the rule of reason have also been discussed in brief in this paper. The author has also explained the situation of Competition Law in other countries such as Russia, the USA, China, and the European Union.

Keywords: *competition, antitrust law, CCI.*

INTRODUCTION

"Competition is the law of the jungle, but cooperation is the law of civilization"

– Peter Kropotkin

The Competition Act, 2002[1] came into force on 31st March 2003 after being assented on 13th January 2003, this act was introduced by Arun Jaitley (Former Minister of State for Finance of India). The main issue for the competition law in India is the proper functioning of the regulator appointed to the law, in this case, the concerned authority is The Competition Commission of India (CCI). One of the incumbent regime's shortcomings has been the Director General's (DG) and CCI's failure to uphold due process and natural justice principles throughout investigations and decision-making.[2] In India, The Competition Act, 2002 was ratified in India to ensure the protracted viability of market competition while also taking into account the interests of consumers and allowing Indian market players to trade freely. This law encourages enterprise competition while protecting the market from the manipulation of dominant trading entities. The main goal of the act is to (a) prevent monopolistic behaviour as well as those who promote antitrust, (b) build and sustain market competition, (c) safeguard consumer interests, and (d) ensure free trade.

This act like many other acts too had a predecessor and it was the infamous The Monopolies and Restrictive Trade Practices Act of 1969[3] [MRTP Act of 1969] outlaws monopolies and restrictive trade practices. In 1967, the Monopolies and Restrictive Trade Practices Bill was enacted by Parliament and referred to the Joint Select Committee. The MRTP Act of 1969 came into operation on June 1st, 1970. Since India was actively heading towards globalization, many of the people found this act to be orthodox and old in regards to the developments in the corporate world and international influence. Yashwant Sinha, the Finance Minister in his budget speech in February 1999 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.*" The Monopolies and Restrictive Trade Practices Act of 1969 [MRTP Act] was

[1] Competition Act, 2000
[2] Vedika Mittal, Shehnaz Ahmed, Param Pandya, Debanshu Mukherjee, Joyjayanti Chatterjee, & Ritwika Sharma, 'Systematizing Fairplay – Key Issues in the Indian Competition Law Regime' (*Vidhi Centre for Legal Policy*, 25 November 2017)<https://vidhilegalpolicy.in/research/report-on-systematizing-fairplay-key-issues-in-the-indian-competition-law-regime/> accessed 10 November 2021
[3] Monopolies and Restrictive Trade Practices Act of 1969

abolished and replaced by the Competition Act of 2002 on September 1, 2009. The Central Government nominates a chairperson and six members to the CCI. CCI acts as a market regulator in the country, impeding and curtailing anti-competitive practises. A Competition Appellate Tribunal (COMPAT) was also established, which is a quasi-judicial body established to hear and investigate appeals against any CCI direction or decision.

THE VARIOUS ASPECTS AND THEMES OF COMPETITION LAW IN INDIA

To understand the problems, the law faces, we will first have to understand a few elements of the competition law which are considered to be its building pillars: -

ANTI-COMPETITIVE AGREEMENTS: No one shall engage in any affiliation in respect of the production, supply, distribution, storage, acquisition, or control of products or provision of services that creates or is capable of creating an appreciable deleterious effect on competition inside India (AAEC). Anti-competitive agreements can also be segmented into Vertical and Horizontal agreements. Horizontal agreements are those in which two competing firms at the same stage of production either rig prices or reduce the scope of output or stock markets. Cartelization is a well-known example of a horizontal agreement. Vertical agreements are those in which two entities enter into a production agreement at separate phases of production, either between a producer and a seller or between a seller and a distributor. According to the Competition Act, all of these agreements tend to advocate antitrust and jeopardise competition in any of the markets.

ABUSE OF DOMINANCE: The word "dominance" has been denoted as a company's position of strength in the relevant market in India, allowing it to function unilaterally of the competitive dynamics prevailing in the relevant market; or to prominence its competitors, consumers, or the relevant market in its advantage. Section 2(r) determines the relevant market as "the market that the Commission may compose in relation to the relevant product market, the relevant geography market, or both markets." The following elements are accountable for domination and are constituted abuses within Section 4 (2)[4] of the Act: (a) adoption of

[4] Monopolies and Restrictive Trade Practices Act, 1969, s 4(2)

inhuman and degrading constraints in the purchase or sale of goods or services; (b) implementation of unfair or discriminatory tariffs in the purchase or sale of goods or services (including predatory prices); (c) curtailing or restricting the production of products, the provision of services, or the market; (d) constraining or stifling technical or scientific advancement referring to goods or services to the jeopardy of consumers; and (e) denying market access in any event. (f) concluding contracts pertaining to the endorsement of the performance by other parties of ancillary duties that, by their nature or industrial purpose, have no nexus with the subject matter of such contracts; and (g) the use of its dominating position in one important market to acquire admission or enfranchise other relevant markets.

PREDATORY PRICING: The concept of 'predatory pricing' has been defined as the sale of goods or provision of services at a price that is less than the cost of production of goods or provision of services, as determined by regulations, in order to curb competition or nullify competitors [further interpretation is provided in section 4 (b)]. The first prerequisite for predatory behaviour is that the entity is in a dominating position. The following elements must be uncovered in order to determine predatory behaviour: (a) foundation of a dominant position of the entity in the relevant market; (b) Pricing below *cost* for the relevant product in the relevant market by the dominant enterprise. (c) *Mens Rea* to minimize competition in the market or to eradicate other competitors, in the competitive law parlance this is known as the 'predatory intent test'.

PER SE RULE: MAIN POINTS TO BE KEPT IN MIND

- Legally the law is not clear on the case.
- The burden of proof is on the defendant.
- It is already presumed that the agreement is anti-competitive**.**

THE RULE OF REASON: MAIN POINTS TO BE KEPT IN MIND

- The law has a much broader concept.
- It involves a lot of analysis and investigation.
- The burden of proof is on the plaintiff to prove that the agreement is anti-competitive.

- This rule has been derived from the historic Sherman act section.

THE PERILS FACED BY COMPETITION LAW IN INDIA

The following points will discuss the issues and perils the current competition law faces:

LEGAL COMPLIANCE PROCEDURE: The principles of natural justice have witnessed non-compliance by the Director General (DG) and CCI. Search and seizure powers issued, have been abused and exhausted in some cases by the DG. However, foreign jurisdictions have special rules and procedures to avoid these situations. If a proper channel and eye are not kept on these fallouts, corporates will lose trust and confidence in both the CCI and the Competition Law of the country.

COMPAT AND THEIR ISSUES: The Competition Act, 2002 has given an indicative timeline of six months for the eradication of appeals. The annual reports of CCI which are published have found that more than 46% of Cases have been languishing before the tribunal for further than a year. The COMPAT and CCI have no stage-by-stage timelines for the appellate process, and it is not referenced in the CCI (Public) Legislation, 2009, the Competition Appellate Tribunal (Form and Fee for Lodging a Complaint and Fee for Filing Compensation Applications), Laws 2009, or the Competition Appellate Tribunal (Procedure) Restrictions, 2011. Another issue is that the members of the appellate tribunals do not even have a technical member who has prior experience in the domain of competition law and economics.

THE AGE OF AI, BIG DATA, AND IT: It has been noticed that new age algorithms do not need a human touch or interference to grow and control the markets if they are already programmed to do so. There is a need to conduct surveys and studies to see how these AI's influence the markets as if it isn't done then it could hurt the competition in the market. The members of the CCI and COMPAT should be educated on these new aspects and they should also be selected based on knowing and having expertise in these areas.

CLASHES WITH OTHER REGULATORS: There have been many instances where other regulators such as SEBI and state regulators had a tug of war and turf conflict with the CCI.

There should be a mandate of cooperation and compatibility between these regulators regarding the aspects, jurisdictions, legal theory of the Competition act. CCI should learn from counties like the UK which have various acts for handling these situations such as the *'UK Enterprise Reform Act'* which gives a fresh view on which sectoral regulator has what powers under the concerned competition law.

COMPETITION LAW IN OTHER COUNTRIES

THE UNITED STATES OF AMERICA: When it comes to competition law, we can say that The USA is somewhat of a 'Dad' as compared to other countries as competition law was introduced in the states in 1890. Competition Law in the USA is governed by different acts and not a single one. Primarily, 3 acts govern the competition law which is as follows; (a) The Sherman Act, 1890[5] (b) The Clayton Act, 1914[6], and (c) The Federal Trade Commission Act, 1914[7].

CHINA/PEOPLE'S REPUBLIC OF CHINA(PRC): The Anti-monopoly law marked its beginning in PRC on 1st August 2008. Other laws such as;

- Price law
- Bidding law
- Foreign trade law
- Anti-unfair competition law

To constitute under the competition law. China has a dual regulatory system for competition law viz-a-viz the Anti-Monopoly Committee (AMC) and the Anti-Monopoly Enforcement Agency (AMEA). The AMC acts as a legislative body whereas the AMEA acts as the executive as it enforces the laws made by the AMC.

EUROPEAN UNION (EU): The European Union's antitrust regulations are known as European Union competition law. It is the legislation that governs the nearly 25 nations that

[5] Sherman Act, 1890
[6] Clayton Act, 1914
[7] Federal Trade Commission Act, 1914

comprise the European Union. The preponderance of EU competition regulations is grounded on Articles 101–109 of the Treaty on the Functioning of the European Union[8]. Through the European Competition Network, the European Commission and national competition authorities from all EU Member States collaborate.

RUSSIA: Russia has competition laws but the nation has been labelled abusive in the competition law by critiques as Russia often uses the law to have a price curb and has an unethical way of implementing the law. It had sanctioned google and has also set up an inquiry and investigation against apple regarding their antitrust and anti-competitive nature.

CASE ANALYSIS

AMAZON, FUTURE GROUP, AND RELIANCE

The Future group led by Kishore Biyani is in a lot of debt. Eventually, the State Bank of India (The Lender) pressurized the company to pay off their debts due to covid and lockdown. It had entered into a deal with Amazon in 2019 and agreed to sell 49% of Future Coupons (promoter entity of Future Retail) stake to Amazon. Future Coupons holds a 7.3% stake in Future Retail. If computed further This signifies that Amazon indirectly possesses 3.58 percent of Future Retail. It was also allotted a call option, which could be conferred between the third and tenth years. The call option mandates Amazon to buy Future Coupons' portion of Future Retail in accordance with the legislation.

Reliance Retail a subsidiary of Reliance Industries comes into the picture in August 2020, where Future Group entered into a contract with Reliance Retail to sell its retail, wholesale, logistics, and warehousing business for almost Rs 26,000 crore. In this deal Reliance Retail would acquire Future Group's supermarket chain Big Bazaar and sister chain of retail outlets like Brand Factory, Home Town, Central, eZone, and others. Since no one in their right mind would buy a car without an engine, Amazon retaliated. Amazon held that Future Group by entering into this contract with Reliance Retail was creating a violation of a non-compete

[8] Treaty on the Functioning of the European Union, 1958, art 101-109

clause and a right-of-first-refusal pact it had signed with them. Going by this contention, the deal between Reliance and Future is null and void.

Amazon approached Singapore International Arbitration Centre (SIAC). Amazon fought based on the same above-stated argument and got the ruling in their favour. However, both Reliance and Future non complied with the ruling. Amazon then approached SEBI and asked the market regulator not to approve the Reliance-Future merger and browbeaten Reliance and Future to follow the order. The Arbitration and Conciliation Act of 1996 contained a clause for the enforcement of an interim order issued in a foreign-seated arbitration. Similarly, the Delhi High Court refused a stay on Future Group's SIAC Interim Order.

Recently, however, the tables turned, and on 17th December, the CCI jumped in out of nowhere and imposed a penalty to the tune of ₹202 crores on Amazon.com NV Investment Holdings LLC (Amazon) for its failure to notify CCI about certain crucial details of its acquisition of 49% stake in Future Coupons Private Limited (FCPL), as required under Section 6(2) of the Competition Act, 2002[9] and for 'suppressing the actual scope' and purpose of the deal. The arguments which earlier supported Amazon have now backfired at them. The right to the first refusal and indirect benefits received by Amazon is considered to be anti-competitive by the CCI. This indirect acquirement of Future retail was a wild card for Amazon which was exposed by the CCI. The internal emails of Amazon throw light on how this investment was supposed to be a foot-in-the-door opportunity for Amazon once the foreign investment laws were relaxed in the nation. This proceeding did not affect the frozen Reliance-Future deal but proved to be a dent in Amazon's viewpoint. This shows us that Competition Law can affect any corporate matters and so the law has to be flexible and it has to be complied with.

MOHIT MANGALANI VS FLIPKART AND OTHRS

The main issue, in this case, was of whether AAEC has been observed in the e-commerce business portals and does the opposite parties enter into an 'exclusive agreement' with the

[9] Competition Act, 2000, s 6(2)

consumers leaving them no choice but to Concede the contract's hostile terms and conditions or stagnate the acceptance.

It was held that the e-commerce websites were imposing rigorous terms and conditions, getting an advantage through abuse of dominance, and were indulged in anti-competitive agreements with sellers and producers of the market. The informant alleged that '*The portal operator establishes the circumstances of resale, vendor value, payment terms, delivery timeframe, quality and reliability standards, and so on. All of these clauses are non-negotiable for a customer who wants to acquire those products. Further, in order to garner buzz for the goods, the supply is restricted by the e-portal with whom the premium arrangement has been negotiated, giving the illusion of scarcity.*'

The argument of the Op's (Flipkart and others) was that they are third parties as they only provide a marketplace model for the owner/business to sell their products. They alleged that the concept of the relevant market brought up by the informant is gravely misunderstood as every product available on their portal cannot be held as a relevant market. Coupled with rising demand for e-commerce and online retailing, it is anticipated that it accounts for less than 1% of overall retail in India. According to the Ops, internet retail is a subset of the retail market, and as organised retail is for a minor fraction, around 8% of the entire retail industry in India, the contribution of online retail is absolutely minuscule.[10] While dealing with this case it was important to consider the *Doctrine of Contra proferentem* as consumers are in a weaker position while entering into the contract with such online e-commerce portals. However, this crucial point was avoided by the regulator. In the end, it was found that AAEC was not there and these agreements proved to be beneficial for the consumer instead of as they can compare prices and quality of the products from different sellers and buy according to their needs and requirements. Since there was no *prima facie* evidence found the case was dismissed and no inquiry was set in motion against any of the opposite parties.

[10] *Mohit Mangalani v Flipkart and Ors* [2015]

CONCLUSION

The Competition Act, 2002 adopted by the country is intact with other corporate laws such as the Companies Act, Insolvency and Bankruptcy Code (IBC), Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999 (MPID Act) et al as monitored by the Ministry of Corporate Affairs (MCA). The regulator should be more flexible and should adapt to the new enhancements, innovations and, developments of the corporate world. The powers issued and authorized to the DG and CCI should be revisited once in a while. There should be a proper framework and channel to avoid clashes with other sectoral regulators. Aspects such as the rule of reason and per se should also be thoroughly checked before giving rulings. Vacancies should be filled immediately in the CCI as well as COMPAT. Workshops on state-of-the-art technologies, AIs should also be provided to the concerned members.

"Violent fires soon burn out themselves, small showers last long, but sudden storms are short; he tires betimes that spurs too fast".

- William Shakespeare