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India's Tryst with Competition Law: A Brief Glance at The Competition (Amendment) Act 2023

Aakanksha Dasmesh^a Shailja Khosla^b

^aAmity University, Noida, India ^bProfessor, Amity University, Noida, India

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The recently enacted Competition (Amendment) Act, 2023 is one of the most dynamic legislations to come to light in India's economic history. It allows India to participate and have a seat in the Global Competition arena by encouraging and sustaining competition not only within the home territory but also in collaboration with other international laws. This article analyses India's paradigm shifts with the evolving times by briefly glancing into the history of the country's antitrust law over the years; starting from the Monopolies and Restrictive Trade Practices Act or MRTP Act 1969 and eventually arriving at the Competition (Amendment) Act, 2023 as we know it today. It further goes on to simplify the understanding of the key amendments made to the previous Competition Act of 2002 which prove to be an important chapter in today's time; aligning with the core objectives of the Act and the digital era dawning over the world.

Keywords: *competition law, amendment, monopolies and restrictive trade.*

INTRODUCTION

The Competition Law in India experienced a notable transformation with the enactment of the Competition (Amendment) Act in 2023. With the pace of evolution, there was a need to develop and enhance the competition law in the country. This legislative change was a required response

to the ever-evolving nature of the economic environment necessitating updates to ensure fair competition and market efficiency. However, to reach the current status, India has gone through a long journey. The first step was the implementation of the Monopolies and Restrictive Trade Practices Act, or MRTP Act 1969 which brought with it, India's initial attempt to be a part of this key domain in the world.

During this period, India boasted abundant untapped resources, yet its economy remained largely unregulated, prompting the need for legislation to streamline market processes and protect the interests of all stakeholders. Subsequently, the transition to the Competition Law in 2002 represented a significant milestone in India's regulatory landscape. This legislation aimed not only to regulate monopolistic practices but also to foster competition and innovation within the market. Its enactment was particularly timely, coinciding with the emergence of the New World Economy in the 1990s, characterised by the principles of Liberalisation, Privatization, and Globalization ('LPG'). Now, we have the Competition (Amendment) Act, 2023 which reflects the country's commitment to creating a competitive and vibrant economic environment that promotes growth, innovation, and consumer welfare.

This article analyses India's paradigm shifts with the evolving times by briefly glancing into the history of the country's antitrust law over the years; starting from the Monopolies and Restrictive Trade Practices Act, or MRTP Act 1969 and eventually arriving at the Competition (Amendment) Act 2023 as we know it today. It further goes on to simplify the understanding of the key amendments made to the previous Competition Act of 2002 which prove to be an important chapter in today's time; aligning with the core objectives of the Act and the digital era that is dawning over the world.

FROM THE MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969 TO THE COMPETITION ACT, 2002

The Monopolies and Restrictive Trade Practices Act, or MRTP Act was India's most basic version of competition law in effect from 1969. It was primarily concerned with regulating monopolies and restrictive trade practices that were thought to be detrimental to competition in

India when it was passed on June 1st, 1970. Nonetheless, it is always crucial for such a dynamic element to change along with the times.

Due to criticism that the MRTP Act was out of date and unable to adequately handle the problems facing the nation following the 1991 economic reforms—which had a significant impact on India in the form of Globalisation, Privatisation, and Liberalisation¹—a new competition law was necessary. Because of the strong need to update and enhance the current legislation, India passed the Competition Act in 2002, replacing the MRTP Act of 1969.

The first competition law passed in India was the MRTP Act, which also created the Monopolies and Restrictive Trade Practices Commission (MRTPC) to supervise its application and enforcement. The Competition Law, 2002 superseded it, and the Competition Commission of India (CCI) took its place as a significant statutory body overseeing various procedures and mishandled implementations of competition law in the Indian economy.

In fact, as part of the Indian submissions for the World Trade Organization's meeting on the 'Working Group on the Interactions between Trade and Competition Policy' a statement dated June 26, 1998, was submitted by the Permanent Mission of India and distributed to all members. This communication stated that "*Antitrust legislation is now an integral part of economic life all the world over. It is present not only in the developed countries but also in the developing countries.*"²

It went on to say that the Directive Principles of State Policy (DPSP) of the Indian Constitution served as the basis for the MRTP Act's drafting. These values aimed to guarantee Indian citizens' social fairness as well as their economic prosperity.³ In terms of consumer protection and competition law, the Act's main objective was to end monopolistic, unfair, and restrictive trade practices that impede commerce and industry and, in turn, negatively impact consumers'

¹ Soumi Bandyopadhyay, 'From MRTP to Competition Act: An Evolution of Competition Laws in India' (2023) 2(3) JLRJS <<https://jlrs.com/wp-content/uploads/2023/05/130.-Soumi-Bandyopadhyay.pdf>> accessed 20 February 2024

² 'Communication from India - Working Group on the Interaction between Trade and Competition Policy' (Department of Commerce and Industry, 24 July 1998) <<https://commerce.gov.in/international-trade/india-and-world-trade-organization-wto/indian-submissions-in-wto/competition-policy/communication-from-india-3/#:~:text=The%20objective%20of%20the%20MRTP,practices%20in%20both%20the%20statutes.>>> accessed 20 February 2024

³ *Ibid*

interests. The Consumer Protection Act, 1986 (commonly known as the 'CPA') was another piece of law that was passed to combat unfair trade practices and complement the recently passed MRTP Act.

Here, it's critical to remember that a robust competition policy maximises the advantages for consumers and society in addition to being an essential part of the framework for economic policy. Customers benefit from the way it creates an environment in a company where efficient resource allocation eventually reduces or eliminates the misuse of market power.

The said communication also justified India to enact a Competition Law by stating that "a perfectly competitive market was just a pipe dream" and that suppliers have a predominantly upper hand in comparison to buyers who have imperfect product knowledge. *"The consumer, therefore, needs and deserves legal protection against certain trade practices, business methods and unscrupulous forces."*

While the MRTP Act remained effective in its implementation for quite some time, undergoing several amendments; the period of the 1990s massively affected and influenced the economic reforms in India; it introduced three key principles: Liberalisation, Privatisation and Globalisation. As a result of these adaptations, the Indian government formed a high-level committee whose main objective was to review the nation's competition laws.⁴

The Raghavan Committee led the conversation, trying to explain why India needs a new Competition Law. The MRTP Act of 1969 and the Consumer Protection Act of 1986, according to the committee's report, were adequate for dealing with anti-competitive practices; however, the former was 'limited in its sweep' and thus failed to fully realise 'the need of a competition law in an age of growing Liberalisation and Globalisation.' The report went on to say that the international cartels would cease their anti-competitive actions in India if a national competition law was passed.⁵

⁴ Bandyopadhyay (n 1)

⁵ Report of High Level Committee on Competition Policy-SVS Raghavan Committee, *THE NEED FOR A COMPETITION POLICY* (2013) pg 3 paras 1.2.3-1.2.4

Another argument made was that in order to promote the core goals of economic reforms by fostering a competitive market economy, national policies must evolve into competition law and domestic competition law must precede the existence of an international competition law.⁶

The Competition Act of 2002 essentially replaced the MRTP Act of 1969 due to these and other reasons. It significantly altered and modified how India's Competition Law and related policies were put into practice. The Act's Sections 3⁷, 4⁸, 5⁹, and 6¹⁰ – which forbade Anti-Competitive Agreements, Abuse of Dominant Position, and Regulation of Combination (Mergers and Acquisitions) – described the enforcement functions.¹¹

This Act was enacted in order to promote and control competition in India with the understanding that the Indian market must be equipped and competent to meet both domestic and foreign competition. Hence, it became important to address new challenges and bring the Competition Act into compliance with the best international practices for which numerous revisions were made.

In September 2007, the Parliament of India passed the Competition (Amendment) Bill, 2007 which aimed at amending the previously enacted Act of 2002. However, the Act could not be fully put into effect since a Writ Petition was filed in the Supreme Court, challenging the validity of the Act.¹² According to this petition, the Indian Constitution's concept of Separation of Powers required that the Chairperson of the CCI be appointed by the Chief Justice of India since the CCI would have the authority to execute judicial functions. Nevertheless, these lacunae were promptly addressed and the Competition (Amendment) Act, 2007 was thereby enacted.¹³ With

⁶ Report of High Level Committee on Competition Policy-SVS Raghavan Committee, *THE NEED FOR A COMPETITION POLICY* (2013) pg 3 para 1.2.6

⁷ Competition Act 2002, s 3

⁸ Competition Act 2002, s 4

⁹ Competition Act 2002, s 5

¹⁰ Competition Act 2002, s 6

¹¹ Competition Act 2002

¹² Subhadip Ghosh and Thomas W Ross, 'The Competition (Amendment) Bill 2007: A Review and Critique' (2008) 43(51) *Economic & Political Weekly* <<https://www.epw.in/journal/2008/51/perspectives/competition-amendment-bill-2007-review-and-critique.html>> accessed 20 February 2024

¹³ Competition Act 2002, s 4

this amendment, it was also said that the CCI would now function as an expert and advisory body instead of a judicial one.¹⁴

This Act also established the Competition Appellate Tribunal (COMPAT) which was empowered to address and dispose of appeals that may arise from any order or decision of the CCI. Earlier, the Supreme Court was deciding upon such issues. Other than this, the Amendment also imposed an obligation upon parties to provide a mandatory notification to the CCI of any Combinations (Mergers and Acquisitions) in India or abroad to which the CCI must respond within a stipulated time period of 210 days.¹⁵ On the whole, the amendment strengthened and improved the first formal competition law of 2002.

Eventually, 2 years later, the Act was again amended to incorporate clauses pertaining to the abuse of dominance, competition advocacy, and anti-competitive agreements. Other than this, while the CCI was established under the Competition Act 2002 for the purpose of implementation, administration and enforcement of the Act, it was finally constituted in March 2009 with the objectives of preventing practices from having adverse effects on competition, promoting and sustaining competition in markets, protecting the interests of consumers and ensuring the freedom of trade to all participants¹⁶.

The impact of this Act was that all the pending cases for adjudication before the Monopolies and Restrictive Trade Practices (MRTP) Commission that was to continue to exercise jurisdiction for two years following the repeal of the MRTP Act would be administered by the Competition Appellate Tribunal (COMPAT). The COMPAT would do this by applying the provisions of the repealed MRTP Act as if it had not been repealed.¹⁷

¹⁴ Shardul Thacker, 'Introduction of the Competition (Amendment) Bill, 2007' (*Mondaq*, 25 September 2007) <<https://www.mondaq.com/india/trade-regulation--practices/52606/introduction-of-the-competition-amendment-bill-2007>> accessed 20 February 2024

¹⁵ *Ibid*

¹⁶ Ministry of Corporate Affairs (MCA), Affiliated Offices-Competition Commission of India <https://www.mca.gov.in/mca/html/mcav2_en/home/aboutmca/affiliatedoffices/competitioncommissionofindia/cci.html> accessed 20 February 2024

¹⁷ 'Competition (Amendment) Bill, 2009 got the Approval of Parliament' (*Taxguru*, 17 December 2009) <<https://taxguru.in/income-tax/competition-amendment-bill-2009-got-the-approval-of-parliament.html>> accessed 20 February 2024

Thus, between 1969 and 2023, India's competition law has evolved into a vibrant and intricate field that has seen numerous revisions and adjustments. The main goal of competition policy, however, has always been to create a legal framework that would allow other initiatives to promote competitive growth and success in the country.

COMPETITION (AMENDMENT) ACT, 2023

The Competition (Amendment) Act, 2023 was introduced as the Competition (Amendment) Bill, 2022 in the Parliament in August 2022 and it eventually received Presidential assent on 11 April 2023. As per a publication,¹⁸ the substantial expansion of the Indian markets and the shift in corporate practices were the driving forces behind the need for this revision. Hence, the Ministry of Corporate Affairs (MCA) advised the Government of India (GoI) to form the Competition Law Review Committee (CLRC) to review and recommend modifications to the Act of 2002.¹⁹

As a result, the MCA also proposed a number of modifications to the Act in 2022, and they were sent to the Joint Parliamentary Standing Committee (Standing Committee) for a careful review and suggestions from interested parties.²⁰ After reviewing the report, the Lok Sabha eventually passed the Competition (Amendment) Bill, 2023, and on April 3, 2023, the Rajya Sabha passed the same bill without any debate. This marked a change to the legislation.

The Act was significantly amended, with the scope of anti-competitive agreements being expanded, the review period for mergers and acquisitions (M&As) being shortened from 210 to 150 days, the Settlement and Commitment framework for quick market correction being introduced, regulations being framed following public consultations, and more. Let us examine all these amendments briefly below.

¹⁸ 'Competition (Amendment) Act, 2023 Salient Features' (CCI) <https://www.cci.gov.in/images/publications_booklet/en/competition-amendment-act-2023-salient-features1684831868.pdf> accessed 20 February 2024

¹⁹ *Ibid*

²⁰ Aayushi Singh and Pavitra Dubey, 'The Competition (amendment) Act, 2023: A Game Changer for Mergers and Acquisitions' (SCC Online, 05 June 2023) <<https://www.sconline.com/blog/post/2023/06/05/the-competition-amendment-act-2023-a-game-changer-for-mergers-and-acquisitions/>> accessed 20 February 2024

HIGHLIGHTS: AMENDMENTS TO THE COMPETITION (AMENDMENT) ACT 2023

The three-pillar objective of the Competition (Amendment) Act, of 2023 is to provide a trust-based business environment, provide regulatory certainty and ensure faster market correction in the event of any lapses. In this light, it is important to analyse the important amendments implemented and they are as follows:

Introduction of 'Deal Value Threshold' for M&A transactions: The Amendment to Sections 5²¹ and 6²² of the Act demands that any company holding significant business operations in India is required by regulations to report to the CCI, the value of any acquisition, merger, or amalgamation that exceeds Rs. 20000 Crores. Earlier, combination deals had to be reported to the CCI depending on the asset's value or turnover. Further, the examination period for M&A has also been reduced to 150 days from 210 days, under this Amendment.²³

Introduction of Settlements and Commitments Mechanism: This component is, by far, one of the most important amendments to be made in the aforementioned Act of 2023. Any party facing an investigation for violating the Competition Act, 2002 after the report of the Director-General, can seek the provision of Settlement with CCI before the passing of the final order. They can also propose modifications before the Director-General's report is issued or submitted. The aim of this mechanism is to expedite enforcement proceedings by providing options for Settlements and compromises under Section 48-A.²⁴

Issuance of Statement of Objections and Modifications: By this Amendment, the CCI is empowered to publish a statement of objections if it believes that a combination has or may have an adverse effect on the competition in the market. The concerned party is then given 45 days to provide a justification as to why the particular combination must be approved. In response,

²¹ Competition Act 2002, s 5

²² Competition Act 2002, s 6

²³ Singh (n 20)

²⁴ Competition (Amendment) Act 2023

the party in question may submit an application to the Commission with the required changes to rectify the adverse effect of the combination on the market.²⁵

Broadening the scope of anti-competitive Agreements: The Amendment Act has extensively widened the scope of anti-competition agreements by substituting the term ‘exclusive dealing agreement’ for ‘exclusive supply agreement’ so as to include the selling aspect of the agreements as well as their purchase aspect. These provisions are also applicable to an enterprise or group of enterprises as well as people engaged in the same or related trade. Further, if they engage in the advancement of such an agreement or plan to support it, it will be presumed to be a part of the anti-competitive agreement. In addition to this, the aspect of hubs and spoke has been included in the definition of ‘Cartels’, which refers to those who indirectly participate at the horizontal levels but do not directly engage in the supply or production.

Leniency Plus: This aspect allows an existing leniency applicant to receive further leniency from the CCI in return for ‘true and vital admissions’ about a ‘separate undisclosed cartel’²⁶. This was a part of the amendment in order to encourage and promote cartel disclosures which could further result in the discovery of more cartels as the investigations proceed.

Provision to Avoid the Multiplicity of Proceedings: The Amendment Act allows the Commission to refrain from investigating the conduct of an enterprise under Section 4²⁷ or the agreement mentioned in Section 3²⁸ if the Commission has already arrived at a decision on the same or nearly related facts and issues raised in the information received under Section 19²⁹, or from the reference from the Central Government, a State Government, or a statutory authority.

Appointment of the Director-General (DG) by the Commission, with the prior approval of the Central Government: The CCI now has the power to appoint the Director General, but it must be done with the approval of the Central Government. Previously, this power was only

²⁵ Shruti Manchanda, ‘Analysis of the Competition (Amendment) Act, 2023’ (*Mondaq*, 01 June 2023) <<https://www.mondaq.com/india/cartels-monopolies/1323672/analysis-of-the-competition-amendment-act-2023>> accessed 20 February 2024

²⁶ Competition (Amendment) Act, 2023 Salient Features (n 18)

²⁷ Competition Act 2002, s 4

²⁸ Competition Act 2002, s 3

²⁹ Competition Act 2002, s 19

vested in the hands of the latter, however, while the CCI has now been empowered to be a part of this process; the DG may only be appointed after the prior approval of the Centre.³⁰

Penalties for contraventions to be indexed to Global Turnover: This amendment brings the definition of 'global turnover' into the picture of applicable turnover, widening the scope of penalty provisions, and thereby maintaining the aspects of accountability and transparency. It allows the CCI to impose penalties upon the entire global turnover from all the products and services of a business which could eventually lead to the imposition of higher penalties after an enquiry.

CONCLUSION AND ANALYSIS

The Competition Law, with its recent amendment in 2023, is aiming to constantly evolve and calibrate its approach to antitrust law, not only domestically but also internationally. These amendments have sought to bring about positive changes to the Act of 2002 in order to bring it into line with the dynamic market changes, including its nature which is increasingly inching towards the realm of technology and digitalisation. In addition to this, the current Act has also widened the scope of various provisions in order to enhance and further maintain the original objectives of the Competition Act of 2002 being accountability and transparency.

The current amendment is a notable step by India, towards a better market setting by promoting competition and safeguarding the interest of all players. One of the significant impacts of this Act is aimed at enhancing the enforcement mechanism in order to address anti-competitive behaviours more effectively. In addition to this, tougher penalties and fines would prove to be a strong deterrent against such practices as well. The Act also envisages a healthy and competitive market, in line with modern business practices, which promotes innovation while also protecting the consumers which invariably also helps to achieve the objectives of this Act.

However, there have also been certain reservations with respect to these recent amendments as well. For example, the definition of 'Combinations' encompasses acquisitions, mergers, or amalgamations of enterprises that satisfy the asset or turnover thresholds that the Competition Commission of India (CCI) must approve. Additionally, the amendment adds a new barrier

³⁰ Singh (n 20)

based on the deal value of transactions, requiring notification and investigation for any transaction valued at more than Rs. 2000 crore. However, the value of transactions in digital markets is frequently determined by data or company innovation. Targets with little income and assets may also be involved, which could have an effect on market competition. The existing legal framework does not have provisions to assess such transactions in the event that they do not meet the specified asset or turnover criteria.³¹

Another impact that was considered before its implementation was that the Bill suggested a substantial modification to the process which is used to impose penalties on enterprises that violate competition law. On a comparative note, instead of the previous system based on 'relevant turnover', penalties can now amount to 10% of the enterprise's total global turnover. However, this shift is unprecedented and may raise constitutional challenges, potentially conflicting with the Supreme Court's rulings, especially with reference to the Doctrine of Proportionality. In this sense, one can also refer to the case of *Excel Crop Care Ltd. v CCI*³², where, the Supreme Court propounded that, "*the penalty cannot be disproportionate, and it should not lead to shocking results*". It is therefore not justified to include other products if one product is included in violation.³³

Thus, while the current Act raises several other concerns, the way to move forward is to further analyse and take into consideration the dynamism of the market and regulate it in order to uphold the pillars of competition law.

Therefore, India has had a long and dynamic tryst with Competition and Antitrust Laws; however, the objectives of the original Competition Act of 2002: were to prevent practices from having an adverse effect on competition, to promote and sustain competition in markets, to promote the interests of consumers and to ensure freedom of trade to all participants in the market remain constant and the goal post for all future legislations related to this field.

³¹ Shivani Sehrawat, 'The Competition (Amendment) Bill, 2023' (*Canonsphere*, 04 August 2023) <<https://canonsphere.com/archive/blogs/the-competition-amendment-bill2023/>> accessed 20 February 2024

³² *Excel Crop Care Ltd. v CCI* (2017) 8 SCC 47

³³ Sehrawat (n 31)