



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2024 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Unfair Trade Practices and Antitrust Laws: Protecting Consumers in Competitive Markets

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Received 01 April 2024; *Accepted* 03 May 2024; *Published* 07 May 2024

Consumers as we know form an important part of a business ecosystem. They help in the manufacturing of goods in businesses due to their demand for such goods and services thereby inducing an increase in the supply chain to match their everlasting demand. Demand and Supply chains go hand-in-hand and consumers being on the receiving end play a vital role in maintaining the business ecosystems. However, with the steady increase of Businesses/Industries in India, there arose a worrisome trend of consumers being duped and taken advantage of by big entities. To assert their presence, such entities tend to dominate the market thereby stagnating market growth by preventing the rise of newer startups. Through this article, the author delves into the trade practices of businesses and compares them with the existing scope of the Competition Act, 2002 to see if there exist adequate safeguards to protect the consumer's interests while at the same time correlating it to the Consumer Protection Act, 2019.

Keywords: *consumers, businesses, competition, unfair trade practice.*

INTRODUCTION

In a developing country like India, the trade industry has gone through significant changes and reforms over the past few decades ever since it gained independence in 1947. Compared to many Countries, India's economy is mixed in nature whereby both public and private sectors coexist

with each other. Throughout the years, attaining growth in industries and businesses was very much crucial for the overall development of India. It was only after decades of stability and growth that India's business landscape is well-off, especially considering that it is currently the world's 5th largest GDP in 2024¹. When it comes to the nature of India's economy, is a mixture of capitalistic and socialist economy with reasonable restrictions on international trade. However, in spite of this system there was a rise in the prevalence of a few business entities that had asserted dominance in the market system which created a barrier for newer firms to enter the market. Though it is lawful for a business entity to protect its market share, it is unlawful to have unfair trade practices and agreements that would prevent the growth of the industry as a whole.

LEGISLATIVE BACKGROUND

Up until 1970, the Competition Commission of India had enacted the Monopolies and Restrictive Trade Practises Act with the objective of free-flowing trade thereby reducing the concentration of market share from Monopolistic entities. Moreover, due to the non-dynamic nature and vagueness of the provisions of the MRTP Act, of 1970 along with the prospect of globalization, it was replaced by the Competition Act, of 2002². The main objective of the act was to promote and sustain the competition in India besides preventing unlawful trade agreements between different entities. When it comes to business, there exists a plethora of products or services that are manufactured/ created for the consumers to purchase for their use readily. For this to happen, entities tend to create such products or services that would provide utility for the consumers to maximise their purchases.

Anti-Competitive Agreements: In a highly competitive market, this could lead to collaborations between entities in the form of anti-competitive agreements whereby certain enterprises, associations or persons come together and form agreements that may have an adverse effect on the competition of India according to Section 3 of the act³. This could potentially restrict the free

¹ 'Top 10 largest economies in the world in 2024' (*Forbes India*)

<<https://www.forbesindia.com/article/explainers/top-10-largest-economies-in-the-world/86159/1>> accessed 12 March 2024

² The Competition Act 2002

³ Competition Act 2002, s 3

flow of trade and business in the competition since the market share and the practices followed are concentrated between the associations or individuals who collaborate to further their business transactions and purchases. Such agreements are done for their own interest and benefit which is abnormal in the business sector due to its unhealthy competition thereby having a domino effect on the business economy. Section 3 of the act prohibits such types of agreements stating that they are void in nature if entered upon by association of entities.

Abuse of Dominant Position: Section 4 of the act describes a company or entity as having a dominant position in the market if it enjoys a position of strength that allows it to operate independently of competitive forces⁴. It is even sufficient if such an entity can affect the business of its competitors or consumers. Though there are no clear-cut criteria to distinguish companies on this basis, it is based on different factors such as market share, size and resources, and economic power to name a few.

COLLUSIVE PRACTICES

As according to the act, the different types of unfair/collusive practices are provided under Section 3 which occur in the form of anti-competitive agreements. There exist 2 levels of such agreements namely- Horizontal and Vertical agreements. Horizontal agreements refer to those types of agreements that take place between players of the same level be it production or distribution chain ex-supplier to supplier, retailer to retailer etc. Vertical agreements on the other hand are those agreements that operate at different levels of the production or distribution chain such as manufacturer and retailer, wholesalers and retailers etc. Here are various types of such collusive practices which are prohibited according to the statute:

Horizontal Agreements

Price Fixation - Price fixation agreements involve competitors or entities who agree to set specific prices for their products or services. This would be detrimental to the competition due to its direct impact on the purchase and sale prices of products and services.

⁴ Competition Act 2002, s 4

Production Limitation Agreement - This refers to agreements wherein the competitors agree to limit or control the production of goods or services. These types of agreements imbalance the normal dynamics of the market by having an inherent effect on the forces of demand and supply due to their restrictive nature.

Market Sharing Agreements - These refer to agreements whereby the players or competitors divide the market segments amongst themselves and accordingly segregate customers. It essentially follows the divide and conquer rule but with the intent to distribute profits evenly without incurring losses which opposes the main principles of businesses. These agreements control markets by limiting competition based on geographical conditions or customer segments.

Bid Rigging Agreements - This refers to a situation when competitors agree with each other not to compete against one another so as to manipulate the bidding process with the intent to distribute the resulting gains amongst themselves⁵. This involves coordinated action between the competitors to manipulate the bidding process so as to ensure that the final outcomes are predetermined.

Vertical Agreements

Tie-In Agreements - These agreements involve selling a product or service with the condition that the buyer also purchases another product or service that is unrelated to the first purchase. These agreements could be misused by dominant firms to assert their position in sales and prevent newer firms from entering the market.

Exclusive Agreements - Exclusive agreements occur when a seller agrees to sell its products or services exclusively to a particular buyer, limiting the ability of the seller to deal with other buyers. This causes a negative effect on the market by limiting sales of other competitors due to

⁵ Neelambera Sandeepan and Amruta Pradhan, 'Bid-Rigging in Public Procurement: An Indian Perspective - Government Contracts, Procurement & PPP - India' (*Mondaq*, 26 August 2022) <<https://www.mondaq.com/india/government-contracts-procurement-ppp/1213654/bid-rigging-in-public-procurement-an-indian-perspective>> accessed 12 March 2024

the mandate of purchasing from one competitor thereby restricting the free flow of goods and services in the market.

Exclusive Distribution - Exclusive distribution agreements involve restricting the distribution of goods or services to certain distributors, and limiting access to other potential distributors. In such agreements, the supplier agrees to sell its products to only one distributor for resale purposes in a particular territory which inherently disrupts the supply and distribution chain in the market.

Refusal to Deal - Refusal to deal occurs when a dominant entity refuses to deal in transactions or provide inputs to competitors. This prevents growth in a business sector due to the concentration on one dominant entity thereby restricting customer choices.

Resale Price Maintenance - Resale price maintenance involves a supplier dictating or influencing the price at which its products are resold by retailers or distributors.

These terms collectively represent a range of unfair trade practices that the Act aims to prevent, ensuring fair competition amongst businesses and also protecting the interests of customers and competitors in the Indian market.

E-COMMERCE & COMPETITION LAW: NAVIGATING CHALLENGES

Competition law has a significant impact on e-commerce by promoting fair and competitive markets, protecting consumers, and preventing anti-competitive practices. Here's how competition law affects e-commerce:

Ensuring Fair Competition: The act overlooks the business sector ensuring that entities practise fair conduct of their businesses thereby promoting fair competition. The CCI is empowered to oversee the activities of the entities and has the power to order inquiries on the various business practices. Hence, in this way, the CCI prevents anti-competitive agreements, bid-rigging and other such practices that unfairly tilt the market in favour of powerful e-commerce entities.

Preventing Abuse of Dominant Position: The statute regulates the positions of different entities to ensure that everyone has a level playing ground. By preventing big e-commerce entities from

taking advantage of their market control, the CCI promotes smaller upcoming businesses by providing them with protection to grow the business. After all, due to past instances such as predatory pricing and exclusive dealings, it is in CCI's interest to protect new upcoming businesses.

Consumer Protection: Competition law overlaps with consumer protection laws to provide adequate safeguards to consumers in ensuring their interest in the purchase of such goods and services. The statute ensures that consumers have choices, accurate information and fair treatment when dealing with such transactions on a daily basis. Business entities have to provide honest services for consumers to attain maximum satisfaction. In case the intent of the entities is mala fide then, they could be penalised under Sections 42 to 48 of the act.

Addressing Collusions: The statute strictly prohibits collusive practices due to their unethical methods of collaborating to destroy market competition. Such collaborations put a barrier to the entry of newer firms thereby stifling the competition and limiting choices to the consumers. The CCI plays a vital role in ensuring that investigations are carried out to penalise e-commerce players who intend to collaborate to fix prices, allocate markets, coordinate actions etc.

Promoting Innovation: Encouraging and promoting the entry of newer firms unlocks a plethora of opportunities for the establishment of new players in the field. Such entries increase healthy competition between the players leading to new inventions for products or services which indirectly has a positive impact on a country's GDP. Moreover, it leads to the sharing of business secrets, technologies, strategies, and ideas which inculcate the need to outperform rivals via innovation.

Regulating Mergers and Acquisitions: The CCI plays a crucial role in maintaining a competitive marketplace and protecting consumer interests by evaluating competitive transactions on a daily basis. As according to Section 6(1), there is a bar on combinations due to the negative effects on market structures and consumer choices. The CCI has regulatory powers to deal with mergers and acquisitions with the objective of ensuring smooth competition in India without any adverse effects on the sector.

CONSUMER REDRESSAL MECHANISM

As defined under the Consumer Protection Act, 2019, the term 'consumer' refers to any person who purchases or uses any goods or services excluding those who obtain such goods for resale or for any other such commercial purpose⁶. However, under the Competition Act, 2002 a consumer can be recognised as a person who purchases or uses such goods or services for commercial purposes or for resale⁷. Taking note, we can observe that the Competition Act provides expansive protection to all from any instance of unfair trade practices followed in the marketplace.

Section 3 of the Consumer Protection Act, 2019 empowers the central government to establish a central consumer protection council which aims to address the needs of the consumers and protect their interests from unfair practices besides ensuring the quality and standards of goods and services. Moreover, Sections 6 and 8 of the act empower the state governments to establish State consumer protection councils at the state level as well as the district level. This is done to provide advice on the promotion as well as to protect the rights of consumers under this act, both at the state and the district level⁸. Under the purview of the act, the Central Consumer Protection Authority was set up as the adjudicating authority which will be authorised to hold investigations into consumer rights violations, lodge complaints, seize unsafe goods and services, ban unfair trade practises, remove misleading ads and even impose penalties.⁹

Besides, when a consumer is aggrieved, they can approach the Consumer disputes redressal commissions present at the district, state and central level based on the pecuniary jurisdiction of their claim values. If the claim amount extends upto Rs. One crore, then the aggrieved party can approach the district commissions; if the claim amount is more than Rs. One crore but less

⁶ Hemant Singh and Radha Naruka, 'COMPETITION COMMISSION OF INDIA AND CONSUMERS' WELFARE: an analysis' (2013) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252526> accessed 12 March 2024

⁷ *Ibid*

⁸ Dr. Aditi Didwal and Dr. Rachita Negi, 'Legal and Economic Perspective of the Consumer Protection Act, 2019 in India: An Overview' (2022) International Journal of Scientific Research and Management 10(8) 375-383 <<https://ijsrm.net/index.php/ijsrm/article/view/4139>> accessed 12 March 2024

⁹ Ministry of Consumer Affairs, Food & Public Distribution, *Central Consumer Protection Authority Established to Promote, Protect and Enforce the Rights of Consumers; Will Function from Indian Institute of Public Administration Premises* PIB (2020)

than Rs. Ten crores then the aggrieved party can approach the state commission and lastly, the consumer can approach the national commission if the claim value exceeds Rs. Ten crores. The aggrieved consumer has to accordingly evaluate the claim amount so as to properly approach the relevant forum for dispute redressals based on the hierarchy of the commissions.

In case, the consumer is dissatisfied with the judgement passed by the national commission, then the aggrieved consumer can approach the Supreme Court by way of appeal as under Section 67 of the act¹⁰. This appeal can be filed within 30 days from the date of passing of judgment unless it can be proved that there was sufficient cause for not being able to file within the said period. If the appealing party pays half the amount of cost in terms of the order passed by the national commission, only then can the party's appeal be entertained¹¹. Lastly, the aggrieved party has the option to resolve the conflict by way of an alternate dispute resolution mechanism instead of opting for litigation. For this arrangement, the State Government shall establish a consumer mediation cell for each district and state commission along with the establishment of such cell in the national commission and other regional benches as under section 74 of the Consumer Protection Act, 2019¹².

CHALLENGES & CRITICISMS IN ENFORCEMENT

Both the acts namely- the Competition Act, of 2002 as well as the Consumer Protection Act, of 2019 have a common objective which is to ensure the welfare and safety of the consumers. In the context of the Competition Act, it is done by preventing collusive practices that may occur between entities and the Consumer Protection Act protects the consumers from such unfair practices. Though both statutes extensively cover all the challenges and issues that may arise in the contemporary era, there exist a few grey areas that have not been exclusively covered by the statutes. Take for instance, in the Competition Act, 2002 the term predatory pricing as described

¹⁰ Competition Act 2002, s 67

¹¹ Manhar Mahajan, 'How to Draft an Appeal under Section 67 of the Consumer Protection Act, 2019' (*iPleaders*, 24 September 2020) <<https://blog.iplayers.in/draft-appeal-section-67-consumer-protection-act-2019/>> accessed 13 March 2024

¹² Yash Agarwal, 'UNFAIR TRADE PRACTICES IN INDIA: A COMPARATIVE ANALYSIS BETWEEN THE COMPETITION AND CONSUMER LAWS' (2022) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3619075> accessed 13 March 2024

in section 4¹³ refers to a situation where the price is often fixed below the actual cost of goods and services and such a pricing method is prohibited if it is done by a company exercising a dominant position¹⁴. So, in case the company is not dominant and enforces such pricing method as a new entry firm to establish control in a new market segment, they would not be liable even though such pricing allows them to establish control and restrict newer entries due to the absence of a dominant position. As according to the statute, the enjoyment of a dominant position is allowed by entities as opposed to the abuse of such dominant positions. The CCI classifies such abuse in terms of product and geographical markets taking into consideration various factors such as costs, supply, preferences etc to determine their respective positions. However, with the rise of digital markets, it becomes difficult to adequately define relevant product and geographical markets due to the variety of online platforms, network effects etc which may hinder this classification.

CONCLUSION

The Competition Act which was passed in 2002 plays a vital role in ensuring the smooth flow of business in India. With its adequate framework, it regulates fair competition by loosening barriers to entry and exit and promoting healthy competition between business entities. The act goes in line with the Consumer Protection Act, 2019 which safeguards and empowers the interests of the consumer ensuring that they are not duped by the unfair practices which may arise in the marketplace. Though every day there is a rapid increase in the number of businesses, the statutes address market competition keeping in mind fair trading practises of businesses, thereby having a correlation with consumers being provided with a wider number of choices and increasing authenticity in everyday transactions.

Moreover, the enforcement of these laws helps foster an environment where innovation thrives, as businesses are encouraged to compete on the merits of their products and services rather than through manipulative tactics. By maintaining a level playing field, both acts contribute to a dynamic and resilient market landscape that adapts to global changes while preserving local

¹³ Competition Act 2002, s 4

¹⁴ Anant Agarwal, 'Grey Areas of Competition Law Policies' (*Simply Biz*, 26 April 2023) <<https://simplybiz.in/grey-areas-of-competition-law-policies/>> accessed 13 March 2024

interests. The evolution of these legal frameworks is essential to address emerging challenges, particularly in the digital economy where boundaries of market definition are increasingly blurred.

Despite these strengths, there are areas that require further emphasis. The rise of digital platforms and e-commerce has introduced complexities in market regulation that demand updated legislative measures. The dynamic nature of online markets necessitates a more flexible approach to defining market dominance and assessing anti-competitive behaviour. Furthermore, the integration of artificial intelligence and big data analytics in business operations presents new frontiers for competition law, requiring ongoing vigilance and adaptation by regulatory authorities.

In conclusion, while the Competition Act and the Consumer Protection Act provide robust mechanisms for fostering fair competition and protecting consumer rights, their continued relevance clings to the ability to evolve with changing market dynamics.