

INSIGHT COMPETITION LAW

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ABSTRACT

The newly enacted Competition Act of India marks a shift in the Indian Economic Policy from prevention of monopoly to the promotion of competition in its behaviour in the domestic market. The Indian economy has been one of the strongest performers in the world. With our country progressing technologically, politically and socially, new laws and policies had to be enacted and the old ones to be replaced with better provisions, as competition became a driving force in the country. This research paper deals with the evolution of Competition Act, how it came into force with the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP) being replaced by Competition Act. The Competition Act, 2002 keeps 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 fair competition in the market and ensure freedom of trade. The Indian economy had always remained subject to controls and regulations for several decades such as Industrial licensing, Foreign exchange control on foreign investment, quantitative restrictions on imports, administered prices and control on capital issues. The domestic industry was thus insulated from competition. The scenario completely changed with the onset of the National Economic Policy, 1991 in the country. With this the need for liberalisation processes were recognised and the need for a quasi judicial authority was felt and hence The Competition Commission of India was formed (herein referred as CCI). The CCI ensures that free and fair competition is maintained in the market by keeping a regular check on companies and other business enterprises. The four main issues that the Competition Act, 2002 deals are Anti Competitive Agreements, Abuse of Dominance, Combinations and Regulations & Competition Advocacy. These four major issues are dealt with in great length in this research paper and include case laws where required.

Introduction

Competition etymologically comes from a Latin word “*Competitio*” which means rivalry. Oxford dictionary defines Competition as “The activity or condition of striving to gain or win something by defeating or establishing superiority over others.”

Competition is a market situation in which every business entity tries to achieve a particular position to make higher profits and better sales. However, this isn't enough for achieving the objectives and goals of the

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economy as a whole. Welfare and Economic Objectives should be taken into consideration for an Utopian society.

After Independence, India followed the strategy of planned economic development which means that the Government imposed controls over entry and exit in the market. Plant and firm size were subject to the statutory limitations, imports & exports, foreign investment etc. were restricted. In other words, the market was partially dominated by the government. In this system there was little place for the Competition policy². But, in 1991 the National Economic Policy was introduced in which the regulation of market became a necessity in the economy. The economy was open to competition from within the country and from Abroad. There had to be an effective system implemented.

Ensuring a smooth and effective society, having sustained fair and healthy competition in the market, a mechanism was adopted that would deal with the arising market complexities in a fair manner. Hence, Competition Act, 2002 was enforced.

Competition Law enacted seeks to maintain effective and healthy competition in the market and to ensure that no anti-regulatory practices take place.

Talking about India's fair trade watchdog the "**Competition Commission of India**" (herein referred as CCI) is one such body which is responsible for enforcing the Competition Act 2002 throughout the country to prevent activities like Anti Competitive Agreements, Abuse of Dominance, Combinations, Competitive Advocacy etc.

The Competition Act, 2002 provides keeping in view economic development of the country for Competition, to promote and sustain Competition in the market, to protect the interests of the consumers and to ensure freedom of trade carried on by other participants in the market in India and for matters connected therewith or incidental thereto.³

However, the first Indian Competition Act was enacted in 1969 and was christened as the Monopolies and Restrictive Trade Practices Act, 1969 (herein referred as the MRTP Act). The genesis of the MRTP Act 1969 is traceable to Articles 38 & 39 of the Constitution of India. The Directive Principles of State Policy in those articles lays down inter alia 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-

² Antitrust, Vol. 21 No. 2, Spring 2007 by the American Bar Association.

³ Economic and Commercial Laws (Pg 101) (The institute of Company Secretaries of India)

1. That the ownership and control of material resources of the community are so disturbed as best to subserve 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.⁴

However, MRTP Act was all teeth and no bite. It failed to fulfill various objectives of the Act. The MRTP Act only dealt with Monopoly, Restrictive Trade Practices & Unfair Trade Practices which was not just enough to deal with other issues cropping up. There was a tremendous need felt to widen the scope of MRTP Act because it only created space for few aspects and did not include issues like Abusing Dominance which is the current hyped legal issue these days, Anti Competitive Agreements, Competition Advocacy etc.

Hence, the MRTP Act was an incomplete Act and on the recommendation of Raghavan Committee which was constituted by the Central Government was dissolved and Competition Act, 2002 came into force.

Major Areas in Focus

Chapter II (PROHIBITION OF CERTAIN AGREEMENTS, ABUSE OF DOMINANT POSITION AND REGULATION OF COMBINATIONS) of the Competition Act, 2002 deals with:

- A. Anti-Competitive Agreements (Section 3)
- B. Abuse of Dominant Position (Section 4)
- C. Combinations Regulations (Section 5 & 6)
- D. Competition Advocacy (Section 49)

These are the four main issues included in the Competition Act, 2002 and are dealt by the CCI.

(A) Anti-Competitive Agreements:

This statement of Adam Smith makes it abundantly clear for a need to have a proper regulatory mechanism for prevention of anti-competitive agreements which not only affect the market economy leading to monopolistic approach but also victimizes the consumers and thereby cause harm to the entire economy creating hindrance to the competition in the market.

⁴ Supra

Anti-Competitive Agreements are those agreements which cause or are likely to cause appreciable adverse effect on competition in markets in India. They are void agreements while some Anti-Competitive Agreements are presumed to cause appreciable adverse effect on Competition. Others are to be proved so by Rule of Reason. The provisions of the Competition Act relating to anti-competitive agreements were notified on 20th May, 2009.

It is provided under Section 3(1) of Competition Act 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.

Section 3(2) further declares that any Competitive Agreement within the meaning of sub-section 3(1) shall be void. Under the law, the whole agreement is construed as void, if it contains Anti-Competitive clauses having appreciable adverse effect on competition.

Section 3(3) provides that following kinds of agreements entered into between enterprises or association of enterprises or persons or association of persons or person or enterprise or practice carried on or decision taken by any association of enterprises or association of persons including cartels⁵ engaged in identical or similar goods or services which shall be presumed to have an appreciable adverse effect on the competition and the onus to prove otherwise lies on the defendant.

1. Directly or Indirectly determines purchase or sale prices;
2. Limits or controls production, supply, markets, technical development, investment or provision of services;
3. Shares the market or source of production or provision of services by way of allocation of geographical area of market or type or goods or services or number of customers in the market or any other similar way; and
4. Directly or Indirectly results in bid rigging⁶ or collusive bidding;

Efficiency enhancing joint ventures entered into by parties engaged in Identical or similar goods or services, shall not be presumed to have appreciable adverse effect on Competition but judged by rule of reason.

Bid rigging takes place when bidders collude and keep the bid amount at a pre-determined level. Such pre determination is by way of

⁵ Section 2(c) of Competition Act, 2002

⁶ Any Agreement between enterprise or persons which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding.

intentional manipulation by the members of the bidding group. Bidders could be actual or potential ones, but they collude and act in concert.

Bidding as a practice is intended to enable the procurement of goods and services on the most favourable terms and conditions but the objective of securing the most favourable prices and conditions may be negated if the prospective bidders collude or act in concert. Such collusive bidding or bid rigging contravenes the very purpose of inviting tenders and is inherently anti competitive.

Section 3(4) provides that 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-

1. Tie in agreement- It includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other good.
2. Exclusive supply agreement- It includes any agreement restricting in any manner from acquiring or otherwise dealing in any goods other than those of the seller or any other person.
3. Exclusive distribution agreement- It includes any agreement to limit, respect or withhold to output or supply of any goods or allocate any area or market for the disposal or the sale of goods.
4. Refusal to deal- It includes any agreement, which restricts, or is likely to restrict, by any method the person or classes of persons to whom goods are sold or from whom goods are brought.
5. Resale price maintenance- It includes any agreement to sell goods on condition that the prices to be charged on resale by the purchaser shall be the price stipulated by the seller unless it is clearly stated that the price lower than those prices may be charged.

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.

However, Section 3 does not restrict 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 Designs Act, 2000;
- c. The Patents Act, 1970;

- d. The Trade and Merchandise Marks Act, 1958;
- e. The Geographical Indication of Goods (Registration and Protection) Act 1999;
- f. The Semi-conductor Integrated Circuits Layout-Designs Act 2000.

Apart from that, the Act does not restrict any person right to export from India goods under an agreement which requires him to exclusively supply, distribute or control goods or provision of services for fulfilling export contracts. The exclusion of export business is in view of 'effect theory', and doctrine of "relevant market".

(B) Abuse of Dominant Position:

The Competition laws all over the world are primarily concerned with the exercise of market power and its abuse. Exercising market power by enterprises comprises as acting in a dominant position and having monopoly power. The Competition Act, 2002 also aims in preventing enterprises to act as dominant in their countries and maintain fair competition between the firms. The CCI does not restrict a business enterprise to hold a dominant position. What is restricted is the abuse of such market power which would have a detrimental effect on the consumers.

Dominance - The Act defines dominant position in terms of a position of strength enjoyed by an enterprise in the relevant market in India, which enables it to:

1. Operate independently of the competitive forces prevailing in the relevant market, or
2. Affect its competitors or consumers or the relevant market in its favour.

It is the ability of the enterprise to act independently of the market forces that determines dominant position.

Abuse of dominance - An abuse occurs when a business enterprise acts in a dominant position in the relevant market. Abuse of dominance restricts fair competition between firms, exploits consumers and makes it difficult for other companies to compete with them. Abuse of dominance includes:

1. Imposing unfair conditions or price
2. Predatory pricing
3. Limiting production/market or technical development
4. Creating barriers to entry

5. Applying dissimilar conditions to similar transactions
6. Denying market access
7. Using dominant position in one market to gain advantages in another market.

Abuse as specified in the act fall into two broad categories:

1. Exploitative – such as excessive pricing
2. Exclusionary – such as denial of market access

Determining abuse of dominance of an enterprise is a pre requisite to enquire into abuse. The criteria of 25% market share as it existed in the MRTP Act do not exist anymore. The Competition Act mandates the CCI to look into a host of factors which gives rise to multiple issues in deciding dominance. Abuse of dominance bears upon unilateral behaviour of dominant enterprise.

In order to know, that a particular group is abusing dominance, it involves a three stage process:

1. Determination of relevant market which is based on Relevant Market/ Geographic market

The relevant market means “the market that 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” ⁷

The relevant product market is defined in terms of substitutability. ⁸

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 homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas.” ⁹

2. Determination of dominance in that relevant market
3. Determination of an abuse of the dominant position

Dominance of an enterprise is to be judged by its power to operate independently of competitive forces or to affect its competitors or consumers in its favour. Thus, an enterprise with a share of less than 25% of the market could also possibly be determined to be dominant.

⁷ Section 2 (r) of Competition Act, 2002

⁸ Section 2 (t) of Competition Act, 2002

⁹ Section 2 (s) of Competition Act, 2002

In case, an enterprise is held by CCI to have abused its dominant position, there will be penalties that shall be imposed. It can impose a penalty of not more than 10% of the turnover of the enterprise. Also, the CCI would have the power to direct the enterprise to disclose information to its competitors.

In exercise of powers vested under section 19 of the Act, the Commission may inquire into any alleged contravention of section 4 (1) of the Act that proscribes abuse of dominance. Section 19 (4) gives a detailed list of factors that the Commission shall consider while inquiring into any allegation of abuse of dominance. Some of these factors are market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, dependence of consumers, entry barriers, and social obligations and costs in the relevant geographic and product market. The Commission, on being satisfied that there exists a prima facie case of abuse of dominance, shall direct the Director General to cause an investigation and furnish a report. The Commission has the powers vested in a Civil Court under the Code of Civil Procedure in respect of matters like summoning or enforcing attendance of any person and examining him on oath, requiring discovery and production of documents and receiving evidence on affidavit. The Director General, for the purpose of carrying out investigation, is vested with powers of civil court besides powers to conduct 'search and seizure'.¹⁰

There have been many cases of Abuse of Dominance that have been dealt by the CCI and other countries Competition Laws. Some of them are mentioned hereunder:

1. Belaire Owner's Association v. DLF Limited and Huda

Informant: Belaire Owners Association

Opposite Party: DLF Ltd and Huda

Contentions of the Informant:

The Informant (Belaire Owners Association) contended that DLF had abused its dominant position and inflicted several unfair and arbitrary terms of contract on the apartment allottees.

Each of the five multi storied buildings was to originally have 19 floors each with a total of 368 apartments. However, ignoring the fact, that this was the basis that the allottees booked their flats, DLF constructed 29 floors in each building.

¹⁰ <http://www.cci.gov.in/May2011/Advocacy/AOD.pdf>

DLF had conferred on itself the exclusive right to reject and refuse to execute any Apartment Buyers Agreement without assigning any reason for doing so. It could further carry out changes in the layout plan for which the consent of the allottee shall not be a necessity.

In case of failure by the DLF to deliver possession, the allottee is obligated to give a notice to terminate the agreement. DLF is not bound to refund the money.

Between the date of booking and the date of execution, the allottee had paid amounts to the tune of Rs 85 lakh without knowledge of the unfair terms and conditions that would be included.

DLF had reserved unilaterally the right to create any lien or mortgage to raise finances.

Contentions of the Opposite Party:

DLF contended at length that it is not a dominant player in the relevant market. It pointed out that there exist many competitors in the market and there is also stiff competition. They also contended that the conditions included in the agreement are 'usual practices' adopted by builders and are part of Industry Practice.

Order:

The CCI observed that while assessing dominant position of an enterprise, the sole factor is not only the market share of the enterprise but also a host of other factors were to be taken which are mentioned under Section 19(4) of Competition Act, 2002. It finally came to the conclusion that DLF is dominant in the market of Gurgaon. The CCI imposed a penalty of 630 crores for abusing its dominant position in the relevant market of Gurgaon by imposing unfair conditions in its agreement with the flat buyers. DLF was ordered to 'cease and desist' from imposing such unreasonable conditions with buyers in Gurgaon and such conditions within 3 months from the date of receipt of the order.¹¹

2. **DLF Park Residents v. DLF Ltd**¹²: In this case, while the agreement had been made on one premise of building 19 floors in each tower, DLF subsequently scrapped the project and started constructing a new project with 29 floors in each tower without informing the buyers. This led to unreasonable delay in the completion of the project. Since the contravention

¹¹ <http://www.cci.gov.in/May2011/OrderOfCommission/DLFMainOrder110811.pdf>

¹² Case no. 18 of 2010

committed by DLF in this case was similar to that in *Belaire Owners' Association v. DLF* and hence no separate penalty was imposed on DLF.

3. M/s Magnolia Flat Owners Association & Others. v. M/s. DLF Universal Limited & Others: In this case, after the payment of 90 percent of the sale consideration by the buyers, DLF wanted to change the building plan thereby increasing the number of floors. The agreement also contained various one-sided clauses. DLF was ordered to cease and desist from imposing such unfair conditions and to suitably modify the terms of the agreement within three months.

4. Google faces India probe (May 14, 2014): The Competition Commission of India has ordered a fresh probe against Google for alleged abuse of its dominant position in the online search advertising space. The order came on a complaint by Vishal Gupta against Google incorporated. The Adword programme, which allows Google to sell keywords to advertisers and display them in the form of short ads online, is a big money spinner for the company. The Commission came to the decision that Google's practices prima facie stem to a large degree from its undisputable dominance in the online search market.

5. Turkey punishes Diageo over alcohol abuse dominance: The Turkish Competition Authority has fined UK alcoholic beverage company Diageo 41.5 million lira for abusing its dominance in the market for raki.

6. ACCC takes action against Pfizer Australia for alleged anti-competitive conduct: The Australian Competition and Consumer Commission has instituted proceedings in the Federal Court of Australia against Pfizer Australia Private Limited for alleged abuse of market power and exclusive dealing in relation to its supply of atorvastatin to pharmacies in contravention of the Competition and Consumer Act 2010.

7. Poland fines national health fund for abuse of dominance: Poland's Office of Competition and Consumer Protection (UOKiK) has fined the National Health Fund in two parallel decisions for discriminating against smaller companies trying to enter the market.

(C) Combinations Regulations (Section 5 & 6)

Combination under the act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise

where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are set in the Act in terms of assets or turnover in India and outside India. Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void.

Section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give notice to the Commission disclosing details of the proposed combination. Such information should be submitted in 30 days of-

- a. Approval of the proposal relating to merger or amalgamation, referred to in Section 5(c), by the board of directors of the enterprise concerned with such merger or amalgamation, as the case may be;
- b. Execution of any agreement or other document for acquisition referred to in Section 5(a) or acquiring of control referred to in Section 5(b).

A newly inserted sub section (2A) envisages that no combination shall come into effect until 210 days have passed from the day of notice or the Commission has passed orders, whichever is earlier.

The Competition Commission of India (CCI) has been empowered to deal with such notice in accordance with provisions of Sections 29, 30 and 31 of the Act. Section 29 prescribes procedure for investigation of combinations. Section 30 empowers the Commission to determine whether the disclosure made to it under Section 6(2) is correct and whether the combination has, or is likely to have an appreciable effect on the competition. Section 31 provides that the Commission may allow the combination if it will not have any appreciable adverse effect on competition or pass an order that the combination shall not take effect, if in its opinion, such a combination has or is likely to have an appreciable adverse effect on competition.

The provisions of Section 6 do not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant or a loan agreement or investment agreement.

Under Section 6(5) the public financial institution, foreign institutional investor, bank or venture capital fund, are required to file in prescribed form, details of the control, the circumstances for exercise of such control and the consequences of default arising out of loan agreement or investment agreement within seven days from the date of such acquisition or entering into such agreement, as the case may be.

It is noted that under the law combinations are only regulated whereas anti competitive agreements and abuse of dominance are prohibited.

Thresholds for Combinations under the Act:

India is one of the fastest growing economies in the world. The growth process is driven both by organic and inorganic (through the mergers and acquisition route) growth of enterprises. It is neither feasible nor advisable to review all the mergers and acquisitions. It is natural to presume that in the case of small size combinations there is less likelihood of appreciable adverse effect on competition in markets in India.

(D) Competition Advocacy:

Under Section 49, the Central/State Government may seek the opinion of the CCI on the possible effects of the policy on competition or any other matter. Section 49 envisages that while formulating a policy on the competition, the Government may make a reference to the Commission for its opinion on possible effect of such a policy on the competition, or any other matter.

On receipt of such a reference, the Commission shall, give its opinion on it to the Central Government/State Government, within 60 days of making such a reference and the latter may formulate the policy as it deems fit. The role of the Commission is advisory and the opinion given by the Commission shall not be binding upon the Central/State Government in formulating such a policy. The Commission is also empowered to make suitable measures for the:

1. Promotion of competition advocacy;
2. Creating awareness about the competition; and
3. Imparting training about competition issues.

Examples of Competition Advocacy:

1. Department of Posts – Indian Post Office (Amendment bill, 2006) – monopoly of letter mail, USO fee, new regulator, etc.
2. Department of Shipping- Shipping Conferences- tariff fixing; and Shipping Trade Practices Bill, 2005.
3. Department of Telecom and TRAI- number portability, spectrum allocation, additional merger regulation, open access to telecom infrastructure.

4. Department of Road, Transport and Highways- Competition oriented reforms in Passenger Road Transport (in States)
5. Planning Commission- Competition Policy for 11th five year plan document.

Conclusion

The Competition Act, 2002 has ushered a change in the global era of the economy. This new piece of legislation plays a significant role in shaping the country's growth and there has been a paradigm shift to the business environment in India. The Act is comprehensive enough and meticulously is carved out to meet the requirements of the market economy and is made in consonance with other set of policies such as liberalized trade policy, relaxed FDI norms, FEMA regulations etc. The synchronization helps in uniformity in the overall competition policy. The Competition Act is reflective of changing the economic milieu of the country and is well equipped to promote fair competition and safeguard the interests of consumers and bring stability in the Indian market. The Act has made an impact on the Indian Industry and is also anxious that the advantages to various sectors arising out of competition should percolate to consumers and businesses for a level playing field, redressal against anti competitive practices, competitively priced inputs and optimal realization from sale of assets.