DEVELOPMENT OF COMPETITION LAW IN INDIA

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With the advent of globalization and liberalization, there was a sudden rise in the growth of new ideas and trade practices. This lead to an increased competition between the market players, thus the whole proposition on which the basics of competition law are based is that "the purpose of competition law is to foster and promote competitive practices and to avert business practices that are anti-competitive in spirit and detrimental to the general interests of the consumers. The whole rationale behind inception of this law is that there should be fair competition in the market. Every market player should be capable of contributing to the inclusive growth of the country by exercising his or her freedom of trade. The evolution of Competition law would be incomplete without the discussion on the kind of economy we had after independence. So after independence in 1947, the Indian economy was based on the Nehruvian Model, which is primarily a mixed economy model in which the private sector and the state co-existed. This kind of economy has a blend of Capitalism and Socialism. It focuses on progressive economic growth along with social welfare.

With passage of time, the whole persona of the mixed economy started changing to monopoly of resources by the private entities. This affected the fulcrum and balance that existed between the public and the private sector. To restrain this concentration of power in private sector, a new enactment was passed i.e., The MRTP Act. Its objective was to control the monopolistic trade practices and regulate the accumulation of resources in common hands. The MRTP Act is called the antecedent of the present Competition Act, 2002. The key difference between the two legislations is that the latter promotes competition while the other restricts monopolistic trade practices.

PREFERRED CITATION

- Pragya Yadav, Development of Competition Law in India, *The Lex-Warrier: Online Law Journal* (2019) 3, pp. 139 - 145, ISSN (O): 2319-8338

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Pitfalls of the MRTP Act

There were many drawbacks of the Act, which ultimately resulted in the enactment of the Competition Act, 2002. One of the biggest drawback was the inability to impose penal sanctions on the defendants. The approach of the Act was very restrictive, as it did not provide for the extra-territorial jurisdiction in the domestic market. There was great difficulty in the interpretation of the sections as the terms used were non-specific and not clearly defined. For instance, there was no explicit definition of terms like predatory pricing, abuse of dominant position, bid rigging and collusions. On the contrary, the Competition Act imposes penal liability under section 27 and 43A. The CCI is the key adjudicatory body for all the cases relating to anti-competitive practices which has the requisite authority to adduce relevant evidences and conduct testimonies in accordance to the Indian Evidence Act. Thus, the present structure is well organized and regulated under a proper framework.

Understanding the Customer-Consumer Relationship

Before delving into the detailed concepts under the Act, it is important to understand the generic terms used in it. It is well established that the inclusive growth of the economy starts from a very basic level where we have a customer and a consumer who are availing the services and thus become a part of the economic growth. These two terms at the facet may appear to be similar but are distinct from each other as a customer is a person who avails a particular service like buying a car would be covered under this ambit. Once the person starts driving the car, his position gets altered, now he becomes a consumer. Thus, every consumer is a customer but every customer may not be a consumer. Each one of them is at the lowest level in an economic structure and one of the major objectives of the enactment is to protect the interests of the consumer by preventing concentration of resources in one common hand. The focus of the act is to provide quality services to all the consumers whereas simultaneously regulating the anti-competitive practices.

KINDS OF MARKET STRUCTURES

Any firm or a company that wishes to enter into the business world has to first understand that what a market is and what are the types of market structures. So, basically a market is a place where the buyers and the sellers are interrelated to each other with reference to one product wherein the price of the commodity is fixed so that there is fair and healthy competition between the entities. There are various parameters for determining the kinds of market structure where one of the parameter is on the basis of the existing competition. On the basis of this, a market can be classified as follows:

MONOPOLY

This is a market structure in which there is only one particular seller of a commodity. There are no available substitutes of that commodity and thus there is absence of competition. The monopolistic players can fix the price of the commodity but the outcome of this is not controlled by them as it directly depends upon the consumers will to purchase the commodity. However, they have complete autonomy over the sale of the commodity.

PERFECT COMPETITION MARKET

In this type of market structure, there are many sellers and buyers of a particular commodity with immense knowledge about the entire market structure. Here, none of the seller has freedom as to the fixation of price because if a seller fixes the price his customers tend to move to another seller who sells it at a reasonable price. Thus, the aim of every seller is to have maximum profits by adhering to the reasonable price limit. One of the most significant feature of this structure is that there are no transportation costs and this the reason why the 'price of the product remains fixed' at every place.

OLIGOPOLY

In this type of market structure, there are limited sellers of a product, which can be heterogeneous or homogeneous. Since there are limited producers of the product, thus any change in the price or product feature by one of them affects the others. Thus, there is an interconnection between the sellers and there exists a fair competition between all of them.

MONOPSONY

This kind of market structure is also called the monopoly of a buyer. There is a single buyer of a commodity and the entire price regulation depends on him. There is complete exclusivity to the buyer to regulate market conditions by changing the production factors like labor, management, materials etc.

COMPETITION POLICY V/S COMPETITION LAW

The competition law and competition policy are two different concepts wherein the competition law is well codified to include provisions dealing with anti-competitive agreements, abuse of dominance and mergers or combinations. On the contrary, the competition policy depends on the prevailing economic conditions and it regulates the activities, which are anti-competitive in spirit. It also regulates the policies relating to foreign investment, economic-trade policies and revision in old policies to improve competition in market. The main objective of the Competition law is to promote and foster competition amongst the market players and control the anti-competitive arrangements of these players. Under Competition Act, 2002 this aspect is dealt under Section 3, 4 and 5.

Section 3 of the Competition Act, 2002

This section deals with the anti-competitive agreements which are per se those agreements between the market players through which they directly or indirectly prohibit another market player to enter the business and thereby reducing the competition in the market. These agreements are of two types: HORIZONTAL AND VERTICAL. The former one is formed by the firms or the enterprises operating at the same level i.e at the periphery they are dealing with the same kind of business activity. Whenever this agreement is formed there is a presumption of appreciable adverse effect on competition. The latter is formed between entities that are operating at distinct production process. The direct consequence of this is not appreciable adverse effect on competition because here the probable impacts have to first analyzed and then presumptions are to derived.

Understanding Cartels through prism of horizontal agreements

The salient features of a horizontal agreement is that the whole objective stated in agreement is unlawful and the effect of such agreement is that it causes or likely to cause an adverse effect on the competition[1]. The second most important requisite is that there 'should be an adverse effect' on the competition. In ***Haridas export v. All India float gas manufacturers*** [2],the commission said that 'it is immaterial in this regard that where the agreement is interred into by or who are the parties of the said agreement, if that particular agreement has some adverse effect on the Indian market that is enough for considering that agreement as anti competitive'.

Cartel is a kind of horizontal agreement. Section 2 (c) of the Competition Act, 2002 defines cartel as an association or arrangement of traders that form an agreement to control or restrict the sale or distribution of goods/services. For instance if a group of traders unanimously form an understanding whereby they fix the price of a product in the market then this comes under the ambit of Section 2(c). In one of the leading case of ***Competition Commission of India v. SAIL***

[1] 141 U.S. 212 (1890).

[2] (2002) 6SCC 600.

and another[3], wherein the Jindal Steel & Power Ltd. had filed a complaint before the CCI contending that SAIL has entered into an exclusive agreement with the Railway Authority which is per se anti-competitive agreement and abuse of the dominant position.

Ingredients of a cartel and the remedies

In order to prove the existence of a cartel between the parties, one has to show the intention of the parties, an overt act clearly expressing the intention and the agreement limits the production/sale of services. In order to file a complaint of a cartel between the market players, the aggrieved party can take the following recourses:

a. Under Section 19 which deals with the grounds of inquiry by the CCI.
b. Under Section 32 which deals with the extra-territorial jurisdiction under the Act.
c. Under Section 33 which deals with the interim order passed by CCI.

The planning and organization of a cartel is hatched in secrecy and thus it becomes very difficult for CCI to adduce the evidences while determining the true intention of the parties. The determination of intention of the parties commences with an investigation followed by an analysis of the probable intention of the parties. Thus, it is very important that the authority derives some more unique ways to detect cartel and impose penal sanctions on the concerned persons.

Section 4 of the Competition Act, 2002

Section 4 of the act deals with the abuse of dominant position in the market. This concept has been borrowed from the European model of abuse of dominance as stated in Article 102 Treaty on the Functioning of the European Union (TEFU). The analysis of the abuse of dominant position commences only once it is shown that the market in question is a relevant market. Under section 19(4) of the act, there are numerous factors that have to considered before declaring a relevant market 'dominant'. Some of these factors are- size and resources of the enterprise, market share of the enterprise ,size of the competitors, economic power of the enterprise including commercial advantages over competitors, size of the market etc[4]. There are various forms by which an enterprise can abuse its dominant position and one of them is Predatory Pricing. Section 4(2)(a) of the act states that imposing a price on the commodity that is unfair or discriminatory (directly/indirectly) is an abuse of the dominant position.

[3] (2010) 10 SCC 744.

[4] Section 19(4), Competition Act,2002.

Predatory Pricing – A MEANS TO EXERCISE ABUSE OF DOMINANT POSITION.

The explanation (b) of Section 4 defines predatory pricing as '***the sale of goods or provision of services, at a price which is below the cost as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors***'. Under the CCI (Determination of Cost of Production) Regulations, 2009 it has been cleared by the CCI that the word 'cost' as used under section 4 means the average variable cost of the product. The CCI observed in the case of ***H.L.S .Asia Ltd. v. Schlumberger Asia Services Ltd. and ONGC***[5] that in order to determine the existence of predatory pricing, the average variable cost is to be considered.

The term predatory pricing was interpreted in – ***In Re: Johnson & Johnson Ltd***[6] to simply mean the reduction of the price of a product to such a lower limit that it eliminates the prevailing competition between the enterprises. This practice of predatory pricing is illegal and unfair because it restricts competition and opposes the object of the Act. It opposes the practice of free trade in the market as it places a barrier on the entry of new business players. In the case of ***Transparent Energy Systems Pvt. Ltd. V. TECPRO Systems Ltd***[7]., the CCI has laid down three essentials for determining predatory pricing which are:

a. The price of the product of the dominant firm is lower than the original cost of production.
b. This has been done with the clear men rea of restricting the entry of new entrants in the market and also driving the present ones out of the market.
c. There is a planned recoup to raise the price of the product once the competitors are driven out of the market.

CONCLUSION

The Competition Act is unique legislation to investigate all the breaches committed by the business players in the market. The Act is comprehensive to include most of the illegal activities done by the enterprises to restrain the competition in the market. The prima facie goal of the act is to foster the competition as it is pivotal for freedom of trade and profession. There are activities that vitiate the whole

[5] https:// www. cci. gov. in /sites/default /files/802012_0.pdf.
6 (1988) 64 Comp Cas 394.

[7] https:// www. cci.gov .in /sites/default/files/092013_0.pdf.

purpose for which the act was created like the one discussed above (predatory pricing) which enables the dominant enterprises to evict small business groups as they lower their product price the direct consequence of it is that these groups incur heavy losses as a result they either amalgamate with the dominant enterprise or are driven out of the market gradually. So this will result in monopolistic economic structure which opposes the spirit of the Competition Act. Thus, the provisions of the Act are a safety valve to such small groups.