# “CRITICAL ANALYSIS OF SECTION 3 & SECTION 4 OF THE COMPETITION ACT, 2002”

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**ABSTRACT**

In 2002, India unveiled its new Competition Act. The Act substantially improves upon the previous competition regime, which regulated and condemned dominance even absent culpable conduct. Despite improvements, provisions of the Act have proven difficult for the fledgling Competition Commission (“the Commission”) to implement. For one, the Act overwhelmingly prefers rule of reason analysis to per se illegality for horizontal and vertical agreements. While this approach gives the Commission the flexibility toconduct a nuanced inquiry, the economic analysis required is challenging. So far, the Commission has struggled when applying basic antitrust economics in the hundred or so orders that it has issued. Going forward, the Commission should develop systematic approaches grounded in economic principles in order to create clear rules and precedents that will support a competitive market place and promote economic growth. It may be necessary to train the Commission members or replace them with individuals who havea background in antitrust economics. After the Commission has addressed limitations on resources and staff expertise, it should develop enforcement priorities and interpret its guiding statute in a way that is congruent with India’s unique economic situation. Most importantly, the Commission should focus on cartel abuses, which would beneficially affect a broad base of consumers.

The Competition law prohibits the use of market controlling position to prevent individual enterprises or a group from driving out competing businesses from the market as well as from dictating prices. The concept of abuse of dominant position of market power refers to anticompetitive business practices in which dominant firm may engage in order to maintain or increase its position in the market. This paper includes a study on what is dominance in market and how this dominant position is abused it also deals with collective dominance and the concept of predatory pricing.

Key Words: *Vertical Agreement, Horizontal Agreement, Dominance, Abuse of Dominant Position, Predatory pricing.*

# INTRODUCTION

## HISTORY OF INDIAN COMPETITION POLICY

* 1. MRTP ACT (Monopolies Restrictive Trade Policies Act)

The MRTP Act is regarded as the extant competition law of India. The MRTP Act came into existence on December 27, 1969. The principal objectives sought to be achieved by its enactment were:

(1) prevention of concentration of economic power to the common detriment;

(2) control of monopolies;

(3) prohibition of monopolistic trade practices (‘MTPs’);

(4) prohibition of restrictive trade practices (‘RTPs’); and

(5) prohibition of unfair trade practices (‘UTPs’).

With subsequent developments in the Indian economy, there were nine amendments to the MRTP Act before it was finally repealed by the Act.

Of these, the amendments of 1984 and 1991 are significant. Prior to 1984, the MRTP Act contained no provisions for the protection of consumers against false or misleading advertisements and other similar UTPs. It was felt necessary to protect them from such practices resorted to within trade and industry to mislead or dupe them.

The *Sachar Committee* therefore recommended that a separate chapter be added to the MRTP Act defining the various UTPs so that consumers, manufacturers, suppliers, traders and others in the market could conveniently identify practices that are prohibited. The provision as to UTPs in the MRTP Act was introduced in 1984.

* 1. RAGHAVAN COMMITTEE

The Raghavan Committee observed that the MRTP Act was limited in its sweep and failed to fulfil the needs of competition law in the present competitive milieu. A key reason for the ineffectiveness of the MRTP Act was that it was poorly resourced.

Some of the lacunae under the MRTP Act which were sought to be remedied by the new competition law were:

1. The basic philosophy of the Act, being based on a post-reform scenario, is different. It seeks to replace the rigidity under the MRTP Act with pro activeness and flexibility. The new law is simply arranged and easily comprehensible, categorizing the areas of concern into three, i.e., prohibition of anti-competitive agreements, prohibition of abuse of dominance and regulation of combinations.

2. The control of the government over the regulatory body, the Competition Commission of India (‘CCI’), is minimal as compared to the MRTP Commission, as is evident from the provisions regarding selection of members and the chairman of the CCI and further autonomy granted under the Act.

3. Holding of dominant position is no longer a concern so long as it is not abused under the new law.

4. Concepts like cartels, collusion and price fixing, bid rigging, boycotts and refusal to deal, and predatory pricing have been introduced which were not present in the MRTP Act.

5. Provisions relating to mergers were repealed from the MRTP Act in 1991, thus leading many cases of mergers to escape from the clutches of the law. The new law provides for regulation of combinations beyond a particular threshold.

6. Competition advocacy has been introduced for creating awareness and imparting training about competition issues. This is with the aim to introduce a competition culture in the country.

7. The new law has moved from the earlier ‘cease and desist’ regime to stricter penalties and even jail terms for non-compliance of the orders of the Commission.

8. The Act has an extra-territorial reach based on the ‘effects doctrine’. This lacuna was identified by the Supreme Court in the ANSAC case, in which it was held that under the MRTP Act, 1969, the MRTP Commission could take action only against the Indian leg of a restrictive trade practice.

1.3.THE COMPETITION ACT, 2002

#### 1.3.1 Main Features of Competition Act, 2002:

Following are some important features of the Competition Act:

1. Competition Act is a very compact and smaller legislation which includes only 66 sections.

2. Competition commission of India (CCI) is constituted under the Act.

3. This Act restricts agreements having adverse effect on competition in India.

4. This Act suitably regulates acquisitions, mergers and amalgamation of enterprises.

5. Under the purview of this Act, the central Government appointed director General for conducting detail investigation of anti-competition agreements for arresting CCI.

6. This Act is flexible enough to change its provisions as per needs.

7. Civil courts do not have any jurisdiction to entertain any suit which is within the purview of this Act.

8. This Act possesses penalty provision.

9. Competition Act has replaced MRTP Act.

10. Under this Act, “Competition Fund” has been created.

## *1.3.2 Objective of the Indian Competition Act, 2002:*

The main objective of the act is to promote fair practices and act as a forum for grievances and conflicts regarding the state of competition and economic cooperation among companies operating in India.

1. To promote healthy competition in the market.

2. To prevent those practices which are having adverse effect on competition.

3. To protect the interests of concerns in a suitable manner.

4. To ensure freedom of trade in Indian markets.

5. To prevent abuses of dominant position in the market actively.

6. Regulating the operation and activities of combinations (acquisitions, mergers and amalgamation).

7. Creating awareness and imparting training about the competition Act.

## *1.3.3 Scope of the Indian Competition Act, 2002.*

1. Prohibition of certain anti-competitive agreements.
2. Prevention of abuse of dominant market position, and
3. Regulation of combinations.

## THE STRUCTURE OF THE COMPETITION ACT

2.1 *Section 3: Vertical and Horizontal Agreements*

Section 3 of the Competition Act states that any agreement which causes or is likely to cause an appreciable adverse effect (AAE) on competition in India is deemed anti-competitive. Section 3 (1) of the Competition Act prohibits any agreement with respect to “production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India” . Although the Competition Act does not define AAEC and nor is there any thumb rule to determine when an agreement causes or is likely to cause AAEC, Section 19 (3) of the Act specifies certain factors for determining AAEC under Section 3:

i. creation of barriers to new entrants in the market;

ii. driving existing competitors out of the market;

iii. foreclosure of competition by hindering entry into the market;

iv. accrual of benefits to consumers;

v. improvements in production or distribution of goods or provision of services; promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

The language in Section 19(3) states that the CCI shall have ‘due regard to all or any’ of the aforementioned factors. In the adjudications that have been analyzed by us below, we note that the CCI has examined the allegations and material on record as against the elements of Section 19(3) of the Act as set out above. However, in *Automobiles Dealers Association v. Global Automobiles Limited & Anr*., CCI held that it would be prudent to examine an action in the backdrop of all the factors mentioned in Section 19(3).

The Competition Act does not categorize agreements into horizontal or vertical however the language of Sections 3 (3) and 3 (4) makes it abundantly clear that the former is aimed at horizontal agreement and later at vertical agreements.

2.1.1 Horizontal agreements relating to activities referred to under Section 3 (3) of the Competition Act are presumed to have an AAE within India. The Supreme Court in *Sodhi Transport Co. v. State of U.P*as interpreted ‘shall be presumed’ as a presumption and not evidence itself, but merely indicative on whom burden of proof lies.

2.1.2 Vertical agreements relating to activities referred to under Section 3(4) of the Competition Act on the other hand have to be analyzed in accordance with the rule of reason analysis under the Competition Act. In essence these arrangements are ant-competitive only if they cause or are likely to cause an AAEC in India.

Section 3(3) of the Competition Act provides that agreements or a ‘practice carried’ on by enterprises or persons (including cartels) engaged in trade of identical or similar products are presumed to have AAEC in India if they:

1. Directly or indirectly fix purchase or sale prices;
2. Limit or control production, supply, markets, technical development, investments or
3. Provision of services; \
4. Result in sharing markets or sources of production or provision of services;
5. Indulge in bid-rigging or collusive bidding.

The first three types of conducts may include all firms in a market, or a majority of them, coordinating their business, whether vis-à-vis price, geographic market, or output, to effectively act like a monopoly and share the monopoly profits accrued from their collusion.

The fourth type of cartelized behavior may involve competitors collaborating in some way to restrict competition in response to a tender invitation and might be a combination of all the other practices.

The only exception to this per-se rule is in the nature of joint venture arrangements which increase efficiency in terms of production, supply, distribution, storage, acquisition or control of goods or services. Thus there has to be a direct nexus between cost / quality efficiencies the agreement and benefits to the consumers must at least compensate consumers for any actual or likely negative impact caused by the agreement.

Section 3(4) of the Competition Act provides that any agreement among 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 (a) tie-in arrangement;

(b) Exclusive supply agreement;

(c) Exclusive distribution agreement;

(d) Refusal to deal;

(e) Resale price maintenance,

Shall be an agreement in contravention of Section 3(1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. As can be reason, these agreements are not deemed anti-competitive. Only if they cause or are likely to cause an AAEC in India will these agreements be in violation of section 3(1) of the Competition Act. The rule of reason must be applied in this determination.

In *M/s Jasper lnfotech Private Limited (Snapdeal) v.M/s Kaff Appliances (India) Pvt. Ltd*. , the CCI held that display of products at prices less than that determined by the dealers/distributors, hinders their ability to compete and is thus a violation of Section 3(4)(e) read with 3(1) of the Act. Similarly, imposition of restrictions on the dealers to deal with competing brands in the market and thereby restricting the interbrand competition too is a breach of Section 3(4) with section 3(1) of the Act. However, as decided in *XYZ vs. M/s Penna Cements, M/s India Cements M/s Bharathi Cements M/s Dalmia (Bharat) Cements etc*. the mere allegation of increasing the prices of a product would not make the transaction anti-competitive.

The Competition Act does recognize that protectionist measures with respect to rights granted under intellectual property laws need to be taken by the holder thereof in the course of activities and entering into agreements and arrangements. Consequently, the Competition Act specifically states that the contours of anti-competitive restraints will not apply with respect to those horizontal and vertical agreements which impose reasonable conditions to protect or restrain infringement of, the rights granted under intellectual property laws. For instance, in the case of *Shri Ashok Kumar Sharma v. Agni Devices Pvt. Ltd,* it was held that a mere restriction on the use of trademark would not be in violation of Sections 3 or 4 of the Competition Act, 2002.

The Commission examines agreements and its effects in two stages. First, an order passed under Section 26 (1) of the Act directing DG to conduct further investigation when a prima facie view is taken about the agreement and its possible effects. Second, when an order is ultimately passed after DG submits a report and at this stage, Commission may pass an order under Section 26 (6) of the Act closing the case or an order under Section 27 of the Act when Commission comes to the conclusion that there is a contravention of Section 3 of the Act.

## CRITICAL ANALYSIS OF SECTION 3 OF THE COMPETITION ACTWITH REFERENCE TO CASE LAWS

CASE LAW I ‘Tata Engineering and Locomotive

V.

The Registrar of Restrictive Trade Agreements’

In *Tata Engineering and Locomotive v. the Registrar of Restrictive Trade Agreements[[1]](#footnote-2)*, if territorial restrictions are removed, there will be shortage in some territories, and there will be larger supplies in others.

In the same case, it was held that territorial restrictions will promote competition whereas the removal of territorial restriction would reduce competition. If the territorial restrictions are removed there will be pockets without competition in parts of India. In this case, the restriction imposed by Telco on dealers no to sell bus and chassis outside their territories does not restrict competition for the foregoing reason.

CASE LAW II ‘Raymond Woolen mills Ltd.

V.

Director General Income Tax’

In *Raymond Woolen mills Ltd. v. Director General Income Tax*[[2]](#footnote-3), it has been held that the agreement to not sell outside the defined territory, does not amount to a restriction in competition because manufacturers can appoint other persons to deal in other territory. It is also in public interest to see that the vehicles of other manufacturers are sold in the same territory by other dealers. Therefore, there will be competition between various manufacturers and not restriction of competition.

CASE LAW III ‘Bajaj Automobiles

V.

Director General (Investigation and Registration)’

It was mentioned in case *Bajaj Automobiles v. Director General (Investigation and Registration)[[3]](#footnote-4),* that appointing a dealer at a geographical location in no way restricts, prevents or distorts competition in any manner, as a customer has a choice of buying any makes he likes or going to any person he likes for purchase or repair or servicing.

CASE LAW IV ‘M/s. Rangi International Pvt. Ltd.

V.

Nova Scotia Bank’

Placing reliance on *M/s. Rangi International Pvt. Ltd. v. Nova Scotia Bank,[[4]](#footnote-5)*it was absolutely necessary to produce the material to show that the impugned practice had the actual or probable effect of diminishing or destroying competition.

CASE LAW V ‘Tata Engineering and Locomotive

V.

The Registrar of Restrictive Trade Agreements’

Further placing reliance on *Tata Engineering and Locomotive v. The Registrar of the Restrictive Trade Agreements[[5]](#footnote-6)*, that restriction on dealer to not sell vehicles of other of other manufacturers does not amount to a restriction in competition because other manufacturers can appoint other persons to deal in their commercials.

1. *Tata Engineering and Locomotive v. the registrar of restrictive trade agreements, 1977 2 SCC 55* [↑](#footnote-ref-2)
2. Raymond woolen mills Ltd. V. Director General Income Tax, civil appeal no. 1120 of 2001 [↑](#footnote-ref-3)
3. *Bajaj Automobiles Ltd. v. Director General (Investigation and registration),* [2008] INSC 883 (12 May 2008) [↑](#footnote-ref-4)
4. *M/s. Rangi International Pvt. Ltd. v. Nova Scotia, (2013)7 SC 160* [↑](#footnote-ref-5)
5. *Tata Engineering and Locomotive v. The Registrar of the Restrictive Trade agreements, 1977 2 SCC 55* [↑](#footnote-ref-6)