
CRITICAL ANALYSIS OF SECTION 3 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 to conduct 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 have a background in antitrust economics.

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.

RESEARCH AIM

The purpose of the study is to inaugurate the belief that, the Competition law varies from case to case and with each circumstance of ‘Protecting Competition’ rather than ‘Protecting Competitors’. The Competition Appellate Tribunal had passed judgment on various notes looking into the circumstances of each case and thus controversial judgments had come up only owing to the fact to save and protect the competition on the scale of fair practices.

SCOPE OF RESEARCH

The scope of the research topic revolves around the study of the fact that ‘Challenge’, ‘change’ and ‘uncertainty’ are the new norm in today’s competition cases. 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.

OBJECTIVES OF RESEARCH

The below listed objectives are deduced from the research questions in order to have comprehensive answers to them.

1. To reconnoiter the causes behind such controversial judgments in the Competition cases;
2. To diagnose the different circumstantial evidences in various cases;
3. To trace the changing trends of competition law;
4. To promote development in economic competition tendencies;
5. To remove the misinterpretation of controversial circumstantial evidences.

REVIEW OF LITERATURE

Many working papers have been proposed to establish the fact of disagreement judgment between the Competition laws.

In this research work, the work of the following journals have been taken in account to extract the aim of my research paper. The following pivotal research papers are henceforth acknowledged:

- Patwari, Sumita, Competition Law - A Trans-National Perspective (January 18, 2014).

RESEARCH METHODOLOGY

Research Key

“Critical Analysis of Section 3 of the Competition Act, 2002”

Methodology adapted

The method adopted for the research by the researcher is content analysis and interpretation of available secondary data so it is solely based on ‘Doctrinal Method’ of research methodology.

The methodology of content analysis is used in this report for analyzing the available data from books, journals and internet. Keeping this in view, the researcher has gone through different books, journals, Web references, E-journal, reports etc. The relevant material is collected from the secondary sources. Materials and information are collected both legal sources like books on the relevant topic to bring forth useful and appropriate information for the reader of this research-report.

CENTRAL ARGUMENT

There is conflict of judgments between the law and circumstantial evidence of every case in Competition Law. Whether circumstances weigh out the law in certain cases of Competition? The Competition law in India has witnessed a proportion number of occasions where circumstantial evidence have over weighed the law.

RESEARCH QUESTIONS

- What are the major conflicts between the law and the circumstantial evidences in the Competition law?
- Whether such conflicts dismantle or bring in fair practices in the economic performa?

INTRODUCTION

HISTORY OF INDIAN COMPETITION POLICY

Monopolies Restrictive Trade Policies Act (MRTP 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’).¹

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.²

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 1984.³

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:

¹Dr. A. Rajendra Prasad, Historical Evolution of Consumer Protection and Law in India: A Bird’s Eye View, 11 JOURNAL OF TEXAS CONSUMER LAW 132- 136 (2008).

²Ibid

³V. BALAKRISHNA ERADI, CONSUMER PROTECTION JURISPRUDENCE, (LexisNexis, Nagpur, 2005) Pg 32

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.⁴

CHAPTER I: THE COMPETITION ACT, 2002

1.1 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.⁵

⁴MAN CHAND KHANDELA, CONSUMER PROTECTION IN INDIA, 10 (ShyamPrakashan, Kanpur 2001).

1.2 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.⁶

1.3 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.⁷

CHAPTER II: THE STRUCTURE OF THE COMPETITON

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 (AAEC) on competition in India is deemed to be 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

⁵V. D MAHAJAN, JURISPRUDENCE AND LEGAL THEORY, 146 (Eastern Book Co., Luck now, 5th ed. 2005).

⁶Aneesh V. Pillai, Criminal Law: A Tool for Consumer Protection in India, 1 (6) INDIAN JOURNAL OF APPLIED RESEARCH, 131 (2012)

⁷Ibid

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.⁸

CHAPTER III: CRITICAL ANALYSIS OF SECTION 3 OF THE COMPETITION ACT WITH 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*⁹, 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 not 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*¹⁰, it has been held that the agreement to not sell outside the defined territory, does not amount to a restriction in competition

⁸*Iridium India Telecom v. Motorola Inc*(2011) 1 SCC 74.

⁹*Tata Engineering and Locomotive v. the registrar of restrictive trade agreements*, 1977 2 SCC 55

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)*¹¹, 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*,¹² 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*¹³, 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.

CONCLUSION

The Competition law analysis entail complex legal and economic considerations. The Competition Commission of India (CCI) orders discussed above suggests that the CCI has been

¹⁰ Raymond woolen mills Ltd. V. Director General Income Tax, civil appeal no. 1120 of 2001

¹¹ *Bajaj Automobiles Ltd. v. Director General (Investigation and registration)*, [2008] INSC 883 (12 May 2008)

¹² *M/s. Rangi International Pvt. Ltd. v. Nova Scotia*, (2013)7 SC 160

¹³ *Tata Engineering and Locomotive v. The Registrar of the Restrictive Trade agreements*, 1977 2 SCC 55

called upon very early in its existence to determine complex antitrust issues arising from the conduct or enterprises engaged in very complex market.

There has not yet been any final order from the COMPAT or Supreme Court on any of the major Section 3 or 4 cases decided by the CCI, where the parties have gone in to appeal from the order of the CCI. Therefore to analyze and identify jurisprudential trends at this early stage of development of competition law in India is difficult. However our study has highlighted certain key trends in the orders passed by CCI.

It has been found that CCI has shown determination in initiating inquiry against such conflicts arising in the competition cases, there is also steady increase in the number of information received by the CCI and informants from various sections of society have come forward to provide the information the commission, which indicates growing awareness about this new piece of legislation. In terms of relying on foreign authorities, the CCI tends to rely more on European Union (EU) authorities, primarily because the Competition Act is fashioned on the lines Treaty on the functioning of the European Union (TFEU).

The analysis points certain inconsistencies in the order passed by the CCI, such as the CCI orders have been inconsistent in the application of economic principles in analysing the market, establishing abuse of dominance. CCI's inconsistent standards in imposing penalty and excessive reliance on circumstantial evidence have been a major area of concern for the industry.

The Competition Act is a big step in India's competition law framework from MRTP regime focused on 'curbing of monopolies' to promote competition in market by proscribing practices that have 'appreciable adverse effect on competition'. The CCI has to be cautious and consistent with respect to its approach in terms of its operations and advocacy exercise. A consistency in CCI's approach in will go long way in enabling the industry in planning pro-competitive business strategy within the framework of the Competition Act.