COMPETITION LAW IN INDIA: UNDERSTANDING THE BASICS & BEYOND

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Abstract: *Competition Law in India gives a mechanism for ensuring healthy competition in the market by enforcing its provisions and making its enforcement more relevant to the needs of the country's economy. The target of competition law of any country is to maintain an economic order in its market. The legislature, courts/tribunals and researchers look at certain practices which show some possibilities for improvement. The duty of Competition Commission of India (*hereinafter *"CCI") is to get rid of any anti-competitive practices from across the nation as incorporated in Competition Act, 2002 (*hereinafter *"CA"). For an economy to reach at a point where it can be treated as economic super power, it needs to follow certain economic order which have been incorporated in the Competition Act where all the stakeholders of the economy including government, private businesses, consumers, civil society and all market players need to follow the laws laid down in the Competition Act.*

Keywords: Cartels, Price Fixation, Geographical Market, Product Market, Bid Rigging, Anti-Competitive Agreements, Technology Giants.

I. INTRODUCTION

Competition is considered as an engine of free enterprise, competition has been defined as *magna carta*[1] of free enterprise. Competition in a given market is essential for maintaining economic freedom and free enterprise.[2] Competition is seen as an economic rivalry amongst the market players in order to lure more consumers.[3] Need for competition law is felt in any economy when there are instances where market suffers from distortion and failures due to

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[1] UK Parliament, *Magna Carta*, https://www.parliament.uk/magnacarta/#:~:text=Magna%20Carta%20was%20issued%20in,as%20a%20power%20in%20itself.
[2] *United States* v. *Topca Associates Inc.,* (1972) 374 US 321 (369).
[3] Pravin. H. Parekh, "Combating Cartels: Issues and Challenges", *CLR* 107 (2016).

manipulation by the market players. The market players having dominant position indulge into practices which are considered anti-competitive by the law.

A. Defining Cartels

The dominant market players usually make ‘cartels’ where they enter into agreement for price fixation, sharing of the geographical area or product market, bid rigging and production controlling for maximising profits. An enterprise can enter into domestic or international cartel. In case of international cartel the agreement is made between producers of a commodity which are located at various countries and through this agreement they agree to predetermine price of the commodity, terms of sale and market share for restricting the market for other players. In case of International Cartels the agreement can also take place amongst the governments of different nations which share a common resource like petroleum which is in high demand across the globe.[4] Organisation for Petroleum Exporting Countries (OPEC) usually enter into an agreement for fixation of oil prices amongst its member countries.[5] An agreement which is amongst the private players of a same product at various countries in the world is called as ‘private international cartel’. Whereas a domestic cartel is an agreement where enterprises of same country enter into an agreement for manipulating the market through its products.[6] The UN Set of Principle and Rules on Competition provides for equitable principles and rules for controlling practices which might restrict business.[7]

Cartelization usually leads to distortion in price of the product which can have an adverse effect on the overall competition in the market.[8] Due to this reason cartels have been penalised under the competition act across the globe. Under Indian Competition Act, 2002, s. 2 (c) specifically defines cartels as “an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provisions of services.” Further s. 3(3) of the act says that any person(s), enterprises, associations if found to be engaged in cartels or any agreement

[4] *Id.*
[5] *Id.*
[6] Tarun Mathur, *Merger Control in India Law and Practice* (Eastern Book Company, First Edition, 2018) 45.
[7] UNCTAD, *Eighth United Nations Conference on Competition and Consumer Protection,* (19-23 October 2020), https://unctad.org/meeting/eighth-united-nations-conference-competition-and-consumer-protection#:~:text=The%20UN%20Set%20on%20Competition,and%20exchange%20of%20best%20practices.
[8] Abir Roy & Jayant Kumar, *Competition Law in India* (Eastern Law House, Second Edition, Fourth Impression 2023) 53.

which adversely affects the competition in India will be deemed as anti-competitive and can be punished as per the provisions of the act.[9]

II. EVOLUTION OF COMPETITION IN INDIA

The constitutionality of the CA can be traced from Article 38 and Article 39 of the Constitution of India where it is mandated that the state is to 'secure a social order for the promotion of welfare of the people' and according to Article 39 which directs the state to ensure equality in livelihood of men and women, distribution of resources amongst the people so that the concentration of wealth is not left in the hands of limited people of the country.[10] By 42nd amendment of the Indian Constitution the word 'socialist' was inserted which implies that there should be social and economic equality amongst the people of the country. In the matter of '*D.S. Nakara v. Union of India',*[11] the Hon'ble SC of India has held that "*the objective of a socialist state is to wipe out the inequality in economic conditions, status and standards of life*." In the case of *Central Inland Water Transport Corporation* v. *Brajo Nath Ganguly,*[12] the Hon'ble Supreme Court of India laid down that "*Article 38 and Article 39 of Indian Constitution embodies the jurisprudence doctrine of distributive justice*." Similarly in the case of *Reliance Industries Ltd. v. Reliance Natural Resources Ltd.,*[13] it was held by the Hon'ble Supreme Court that "*there is an obligation on the state to ensure that the distribution of natural and material resources of the community does not result in heightening of the inequalities amongst the people and amongst the regions*."

For achieving socialist pattern in the Indian society the Indian government decided to promote the 'distribution of wealth and economic power' equitably in hands of the people of the state. Monopolies Inquiry Committee ("MIC") was appointed in the year 1964 by the Indian government to investigate into the extent of concentration of power and wealth in the hands of private players and its effect on the society and market. The tasked assigned to MIC was to suggest necessary legislative reforms in the light of the findings by the committee. The first legislation which was passed by the Indian government was called 'Monopolistic and

[9] The Competition Act, 2002 (Act 12 of 2003), s. 3(3) (India).
[10] Tarun Mathur, *Merger Control in India Law and Practice* (Eastern Book Company, First Edition, 2018) 2.
[11] D.S. Nakara v. Union of India, (1983) 1 SCC 305.
[12] Central Inland Water Transport Corporation v. Brajo Nath Ganguly, (1986) SC 1571.
[13] Reliance Industries Ltd. v. Reliance Natural Resources Ltd., (2010) 7 SCC 1.

Restrictive trade Practices Act, 1969' (hereinafter "MRTP Act"). The MRTP Act[14] was made with an intention to make rules for regulating unfair trade practices and restricting the monopolistic business in Indian economy. MRTP Act's aim was to check the concentration of economic wealth, to control the growth of monopolies and prevent detrimental to public interest. After 1991 when the Indian economy was opened and liberalisation, privatization and globalisation were adopted by the Indian Government under its new economic policy[15] which made MRTP Act obsolete as it lacked provisions for controlling mergers and acquisition.[16]

In the year 1999, the finance minister of India made a declaration to bring in a new law to combat international economic developments and a need was felt to bring in a new competition law replacing the MRTP Act.[17] The Indian Government appointed SVS Raghavan committee[18] to assess the relevance of MRTP Act and to suggest a new competition law for India. In the year 2002 the parliament brought in Competition Act, 2002 ("CA")[19] which got the Presidential assent in January 2003. The validity of the CA was challenged by a writ petition filed in the matter of '*Brahm Dutt* v. *Union of India'*,[20] in this case the writ petition was against the rule for selection of chairman and other members of CCI under CA. As the CCI is more of a judicial body which is conferred with adjudicatory powers. Therefore, the right of appointment of the members to CCI must be given to the CJI or Judges of High Court rather than any other member from the bureaucrat or a person appointed by the executive without any reference to the judiciary. The court observed that *"if a judicial body is to be created as submitted on behalf of the Union of India consistent with what is said to be an international practice, it might be appropriate for the respondent to consider the creation of two separate bodies, one with the expertise that is advisory and regulatory and the other adjudicatory. This followed up by an appellate body as contemplated by the proposed amendment, can go a long way, in meeting the challenge sought to be raised in this writ petition based on the doctrine of*

[14] The Monopolies and Restrictive Trade Practices Act, 1969, No. 54, Acts of Parliament 1969 (India).

[15] India gave its assent to World Trade organisation treaties, namely, the General Agreement on Tariffs and Trade (GATT) and the Trade related aspects to Intellectual property Rights (TRIPS).

[16] Anita Khurana, *Evolution of Competition Law in India: An Analysis*, Competition Law in Indian Economy, 80 (2016).

[17] Saniya Khanna, "Tracing the Competition Law: A Historical Backdrop to India", 3 *INDIAN J.L. & LEGAL RSCH*. 1 (2021).

[18] High level Committee under the Chairmanship of S. Raghavan , Report of "The High Level Committee on Competition Policy and Law".

[19] Pradeep S. Mehta, "Competition Law Regime in India: Evolution, Experience and Challenges Concurrence" N4,(2006) at 155.

[20] Brahm Dutt v. Union Of India, AIR 2005 SC 730.

separation of powers recognised by the constitution." Considering the judgement of *Brahm Dutt* case an amendment was made in CA in the year 2007 where a body for hearing appeal was created i.e. Competition Appellate Tribunal (hereinafter "COMPAT"). The COMPAT created after *Brahm Dutt* case ceased to exist from 26th May, 2017 when powers and functions of COMPAT were transferred to National Company Law Appellate Tribunal (hereinafter "NCLAT").

III. KEY FEATURES OF THE COMPETITION ACT

The Competition Act, 2002 is comprehensive law which regulates the business practice in a market. It provides a mechanism to deal with challenges like anti-competitive behaviour, unfair market dominance, impact of larger merger and acquisition. CA helps in creating competitive environment which benefits the consumers, promotes fair trade and which supports economic growth. The Act put a mandate for creation of a regulatory body i.e. CCI which is responsible for enforcing the provisions of the Act. The CCI is led by a Chairperson and can have up to Six (6) members. Its key role is to investigate and penalise any anti-competitive practice which has been entered into by an enterprise. CCI also gives an approval or rejects merger and acquisition which can harm the competition in the market. The CCI helps in promoting awareness regarding competition law and it advises the government on policies related to competition in India.[21]

A. Prohibiting Anti-Competitive Agreements

Section 3 of the CA prohibits any anti-competitive agreements whether written or oral between enterprises which can harm or has the potential to harm competition in the market. Such agreements are:[22]

- **Cartels**: In this groups of enterprises which secretly agree to fix price, limit production or divide markets.
- **Bid-Rigging**: In this companies collude together to manipulate bid-rigging process like a contract advertised by a government
- **Price-Fixing**: Here the enterprises enters into agreement to set a specific price to eliminate competition in the market.

[21] Competition Commission of India, *Legal Framework*, GOVERNMENT OF INDIA, (April 11, 2023), https://www.cci.gov.in/legal-framwork/act.
[22] The Competition Act, 2002 (Act 12 of 2003), § 3 (India).

B. Prevention of Abuse of Dominant Position of an Enterprise

Section 4 of the CA says that an enterprise is said to be dominant in the market if it has significant control over a relevant market i.e. if has larger share in the market or has a strong influence over the market forces.

- The Act prohibits the dominant enterprise from engaging in unfair trade practice such as:[23]
- **Predatory Pricing**: where the producer sells its product at loss to eliminate the competitors out of the market.
- **Denying Market Access:** Here the competitors are blocked from entering into the market or are blocked from operating in the market.
- **Discriminatory Pricing:** Here the enterprise is alleged to have charged customer with different prices without any justification.
- **Tying Arrangements:** In tying agreements the customers are forced to buy one product to get an access to another product. Else a less popular product is tied with a popular product which the customer is forced to buy.
- Here in all these cases the CCI has the power to initiate action against the companies which are found to be abusing their dominant position in the market.

C. Regulating Combinations

Section 5 and Section 6 of the CA regulates the combinations in the market which includes mergers, acquisition and amalgamations. Here two companies combine together to form a new entity to exploit economy of scale. According to the Act the CCI has the power to review any combination which exceeds certain threshold based on the company's assets or turnover so as to ensure that there is no harm done to the prevailing competition in the market and to ensure that there is no monopoly is created in the market. According to Competition (Amendment) Act, 2023 now there is a deal value threshold where any transaction more than 2,000 Cr. INR which has significant business operation in India need to be reported to CCI for its approval.[24]

D. Roles of CCI apart from Enforcing the Act

CCI not just enforce the law through the Act but it also:[25]

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[23] The Competition Act, 2002 (Act 12 of 2003), § 4 (India).
[24] The Competition Act, 2002 (Act 12 of 2003), § 5 (India).
[25] The Competition Act, 2002 (Act 12 of 2003), § 49 (India).

- Advises the Government about the policies which can promote competition in India
- CCI educates the public and businesses about fair competition practices
- CCI helps in conducting research and studies for better understanding of market trends and competition issues.

IV. ENFORCEMENT OF COMPETITION LAW IN INDIA: ISSUES AND CHALLENGES

Competition law is an engine of free market as it forces the market players in any economy to search for more permutations and combinations so that they can enhance their profits which is usually achieved by bringing products having greater efficiency. Apart from this competition law has a social purpose as well, as stated in the case of *United States v. Aluminum Co. of America*[26], it was noted that:[27] "*it is impossible, because of its indirect social and moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few."* Further it was stated that:[28] *"throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organisation of industry in small units which can effectively compete with each other.*" Competition Law is also required to bring in efficiency in the market. Efficiency is all about maximising utilization of resources and best possible management of resources which are scarce in the market. Competition law also aims at providing static as well as dynamic efficiency. Here dynamic efficiency means development of new products which can be done by providing rewards to the inventor of new products and sharing these new invention with the public for rewards. Whereas static efficiency can be achieved by strong price competition. In static efficiency it is not possible for market to provide more goods and resources as economy is producing at maximum output and it cannot allocate resources to produce more goods. The Competition Act was first enacted in response to the oppression and injury inflicted to individuals by the large-scale business enterprises and trust. These trusts and enterprises entered into an agreement for fixation of price of products which was held anti-competitive by the competition act as it was in contravention of the provisions of the act. Further the courts also declared any agreement which was anti-competitive and in contravention of the provision of competition act will be void. The enforcement of Competition

[26] United States v. Aluminum Co. of America, 148 F2d 416 (2d Cir 1945).
[27] *Supra* note 8 at 3.
[28] *Supra* note 8 at 3.

Law in India is done by CCI through Director General (hereinafter "DG") as per the procedure laid down by the Act. The DG submits its report of investigation to the CCI on any complaint received regarding contravention of the Act by an enterprise which is decided by the CCI through it orders. The CCI has power to *suo moto* take cognizance of any practice by an enterprise which contravenes the Act.[29]

A. Challenges in Controlling Anti-Competitive Agreements

The Competition Law of any country takes in the idea that "no enterprise or association of enterprise or person or association of persons, shall enter into any agreement which relates to production, supply or distribution of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition in their country and that such an agreement would be declared void."[30] Competition Law is made in such a way that it imbibes comprehensively the charter of economic liberty. The charter of economic liberty aims at protecting and fostering free & unchained competition as a rule of free trade. The unrestricted dealings between the competitive players will provide the best economic resource allocation to the nation at the minimal price with the best quality for the greatest competitive progress. So, on reading of section 3 of CA, it is clear that all the agreements between enterprises are not under the degree of prohibition rather those agreement which are likely to cause appreciable adverse effect on the competition in the market are to be investigated by the CCI through Director General as per the procedure laid down in the Act.[31]

The CCI is entrusted with the powers to check whether an agreement between the enterprises falls under the prohibited degree and has to check whether it can cause appreciable adverse effect on the competition in the market considering the principles laid down in the s. 19(3) of CA. As per section 19(3) of CA, the CCI is required to consider factors like, has the agreement entered by the enterprises created an entry barrier for the new entrances in the market; else the agreement is made for driving existing competitors out of the market; or the agreement entered by the enterprises is to foreclose competition by way of hinderance to the new players in the market. If these three factors are made out of the agreement then the agreement can be termed as anti-competitive. Such agreements will have appreciate adverse effect on the market and has to be declared void by the CCI following an investigation report via order for such declaration. Apart from these negatives

[29] *Supra* note 8 at 29.
[30] The Competition Act, 2002 (Act 12 of 2003), s. 3 (India).
[31] *Supra* note 8 at 35.

factors there are three positive factors which if proved can make agreement between the enterprises legal as it would ultimately be beneficial to the market and consumers. These positive factors are enshrined u/s 19 (3) (d) to (f) which are 'accrual of benefits to the consumers'; 'improvement 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'. If these factors are proved then the agreement which was investigated upon by the CCI may be declared as valid as it helps in promotion of competition and benefits the customers at large.[32]

There are few challenges while implementing Competition Law through its institutions like CCI and DG. There is a dire need for independent, separation of powers & functions, staff adequacy and availability of resources with transparency for better implementation of Competition Law in the Nation. The Competition Law should be dynamic which can be kept in pace with the changing time and economic circumstances of the nation. These changes which when made should be done keeping in mind the core values and principles of the competition policy.[33]

B. VERTICAL AGREEMENTS AND COMPETITION LAW

Vertical agreements are the agreements which are entered into by the enterprises which are non-competitive and which operate at different level of production/distribution/supply chain. When a product is manufactured it goes through various stages of production before it reaches its customer similar is the case with a service. These agreements are generally between manufacturer of components and manufacturer of products. Vertical agreements are usually between the producer, wholesaler and retailers which are in different markets. These agreements are not considered void per se as these agreements has power to improve the economic efficiency within a chain of production or distribution and these agreements also facilitates coordination between the participating enterprises.[34] Vertical agreements can also lead to reduction in cost of distribution and transmission of the product. To

[32] *Supra* note 8 at 100.
[33] CUTS, "Challenges in Implementing a Competition Policy and Law: An Agenda for Action" ii (March, 2002).
[34] *Supra* note 7 at 125.

conclude vertical agreements helps in optimization of production process which ultimately benefits the sales and investment part of the enterprises.

As per section 3(4) of the CA, vertical agreements are considered to be void only if they have appreciable adverse effect on competition in the Indian markets. Vertical agreements which are specifically defined as void under CA are 'Exclusive dealing and purchasing agreements'; 'Exclusive/ Selective distribution agreements'; 'Tie in sales, full time forcing, quantity forcing and fidelity discounts agreements'; 'Slotting fees agreements' and 'Non-Linear and franchise fees agreements'. If in these mentioned vertical agreements it is established that they cause appreciable adverse effect on the market which in turn causes foreclosure to existing players in the market or has potential of foreclosing competition by way of creating barrier to new entrance in the market. Then such vertical agreements are considered void as per section 3(4) of the Act.

V. G20 SUMMIT OUTCOMES & COMPETITION LAW

Competition Law of any given country aims at curbing activities which can adversely affect the competition in the market or else can be detrimental to the economy of the country. There has been drastic change in-fact transformation in the economies of nations throughout the world due to Globalization, Digitalisation and Climate Change. These changes has helped in creating new opportunities for the enterprises by way of gaining access to market of different countries but it has also led to creation of inequality in the markets.[35] The dominate players get easy access and earns the major chunk of profit from the global markets on the other hand the small enterprises are left with no or minimal profits. Thus, creating huge disparity amongst the enterprises in the market.

The G20 ("The Group of Twenty") countries is a forum for economic co-operation which aims at reshaping and strengthening governance and economic architecture of its member countries.[36] G20 provides a platform to its member countries where they can examine and monitor the challenges in regard to access to opportunities for its member countries and

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[35] United Nations, Department of Economic and Social Affairs, *World Social Report 2020*, Inequality in a Rapidly Changing World, ST/ESA/372 (2020).

[36] India.gov.in (national portal of India), *available at:* https://www.india.gov.in/spotlight/group-twenty-g20#:~:text=The%20Group%20of%20Twenty%20(G20)%20is%20the%20premier%20intergovernmental%20forum,all%20major%20international%20economic%20issues. (last visited on June 10, 2024).

enhances equal access to opportunities to its member countries in the markets across the region. The G20 summit which was organised at New Delhi, India in the year 2023 had the motto '*Vasudhaiva Kutumbakam'* which means 'One Earth One Family One Future'. The motto of '*Vasudhaiva Kutubakam'* can be implemented through Competition Law where dominant players are regulated by the Act on abusing their position of dominance which can have adverse effect on the competition in the market. By way of Competition Law different enterprises (big and small) get an equal access to the global markets. Thus, Competition Law helps in promoting fair and equitable competition throughout the world.

India's G20 presidency was successfully concluded and achieved full consensus which focused on 'Sustainable Development Goals, Climate Action & Green Development Initiatives, Digital Public Infrastructure, Multilateral Financing, Artificial Intelligence (AI), and Interstates Taxation'.[37] There were 83 paragraphs in the New Delhi Leaders' Declaration which got approved unanimously achieving 100% consensus. Team Modi by way of multiple agreements in these paragraphs cleared path for regulation of cryptocurrencies, strategies for strengthening of multilateral development banks and deployment of digital public infrastructure for enhancing financial inclusion. It also put an emphasis on faster debt relief plan for vulnerable states.[38] The Delhi Declaration also emphasised on the climate change by mobilising '$ 5.8-5.9 trillion in pre-2030 period for developing nations' & $4 trillion per year for technologies used to have clean energy by the end of 2030 for achieving net-zero greenhouse gas emission by the year 2050.[39] The Summit saw a Memorandum of Understanding for establishing 'India-Middle East-Europe Economic Corridor' (IMEC) for promotion and fostering of economic development and integration between Asia, the Arabian Gulf, and Europe.[40]

VI. CONCLUSION AND THE WAY FORWARD

To conclude it can be said that under competition law the main aim of the act is to provide free market to the enterprises. The enterprises can also enter into agreement with one another horizontally or vertically to utilise the economy of scale. These agreements entered by the enterprises can have appreciable adverse effect on the competition in the market. Such agreements are considered void if they have potential for foreclosure of the market for entry of new players. Whenever an enterprise is alleged to have indulged into anti-competitive practice the Act provides for a scheme for investigation as whether the enterprise has violated any

[37] Narender Modi, "What Positive Outcomes Did India's G20 Presidency Have?", February 15, 2024 *available at:* https://www.narendramodi.in/what-positive-outcomes-did-indias-g20-presidency-have-579495 (last visited on June 10, 2024).
[38] *Id.*
[39] *Id.*
[40] *Id.*

provisions of the Act. CCI under CA is entrusted with the task of investigating agreements which can have appreciable adverse effect on the competition in the Indian market. In a scenario where as per the report of the DG the enterprise has violated the Act, CCI may directly impose a penalty or pass an order as per the provisions of the Act.

In the era of 'surveillance capitalism'[41] where companies make money by capturing data of people's movement and behaviour and with growing power of technology giants in digital markets there is a concern amongst the policymaker around the globe to tackle the problems related to abuse of dominance by these tech. giants. There is a dire need for ensuring level playing field for all the enterprises in the market. There is a possibility of exploitation of data by the intermediaries to gain access to the market. The recent challenge with implementing competition law in India is with the advancing technology and the way digital market is developing where tech giants are gaining access to the markets due to their access to big data. CA needs amendment to deal with these tech giants and there is a dire need to bring in a 'Digital India Competition Act'[42].

[41] Nick Barney, *surveillance capitalism*, TECHTARGET (December 20, 2022), https://www.techtarget.com/whatis/definition/surveillance-capitalism.

[42] Trishee Goyal, *What is the draft Digital Competition Bill? | Explained*, THE HINDU, July 09, 2024 10:55 pm IST, https://www.thehindu.com/sci-tech/technology/what-is-the-draft-digital-competition-bill-explained/article68386341.ece.