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ANALYSIS OF THE COMPETITION ACT, 2002

~Ansh Pal Singh

“Antitrust law isn’t about protecting competing businesses from each other, it’s about protecting competition itself on behalf of the public.” – AL Franken

ABSTRACT

Antitrust laws prevail all over the world, and hence, it becomes paramount to have these laws in existence. Wherever there exists a market with firms and companies, it becomes important to have antitrust laws prevailing in that market environment to ensure fairness of competition between all the market forces prevailing in the market. Antitrust laws, in the most generic sense, refer to the laws designed to ensure fair competition in the market by preventing anti-competitive practices that have a wider ambit. In India, such Antitrust laws are governed and brought under legislation by virtue of The Competition Act of 2002. This Act establishes the Competition Commission of India (CCI) as the statutory authority responsible for enforcing these provisions and fostering a competitive business environment in India. The Competition Commission of India oversees the rules laid out in the Competition Act. They keep an eye on the companies to make sure everyone plays by the same fair rules, which helps to ensure that consumers have choices, prices stay reasonable, and innovations keeps prevailing. The Competition Act, 2002 provides antitrust laws that safeguard consumers from exploitation and limited choices. Overall, antitrust laws serve as an essential to ensure the health and dynamism of free markets, benefiting both, businesses, and the consumers alike.

INTRODUCTION

To get a better and deeper understanding of the Competition Act of 2002, it is pertinent to get a preliminary understanding of the same initially. So, Imagine the Competition Act of 2002 as a set of rules created to make sure that everyone plays fair in the big game of business. Just like how there are rules in a playground to make sure everyone gets a chance to play, this Act sets

out rules for companies so that they cannot unfairly dominate in the market or team IP to block other out. It is like having a referee to make sure the game is fair and everyone has a fair shot at winning. This act keeps companies from hogging all the customers or unfairly squeezing out smaller businesses. The Act acts a medium to ensure that everyone has a fair chance to succeed in the business world. Here, the word “Competition” means economic rivalry between the market players.

WHY SHOULD COMPETITON EXIST IN THE FIRST PLACE?

Looking from a broken glass, it may provide a glimpse of how competition is unnecessary and unhealthy for the market or for the economy at large. But looking from a rationale perspective, competition acts as a paramount to the market and economic environment as it is beneficial to the market in a multi-faceted manner. Moreover, it is as significant for the consumers as it is for the market environment. As it provides a wide range of options and room for comparability to consumers. It also promotes Innovation and the quality of the goods sold or services offered; all these platforms provide an undoubted need for the existence of competition in the market environment under the umbrella of fairness and equity, which will further facilitate allocative and productive efficiency.

AIM AND OBJECTIVE OF THE COMPETITON ACT, 2002

The Competition Act of 2002 was passed in December 2002, repealing the Monopolies and Restrictive Trade Practices Act 1969. Primarily, the MRDP Act of 1969 was repealed because of the limitations prevailing in it. The Act restricted competition, and multiple cases revealed the inadequacy of the MRTP Act with regard to practices like big rigging, cartels, collisions and price fixing, predatory pricing, and abuse of dominant position. Hence, The Competition Act of 2002 came into existence with the aim and objective to;

- Prevent practices having adverse effects on competition
- Promote and sustain competition in markets
- Protect Consumer’s Interest
- Ensure Freedom of Trade

FEATURES OF COMPETITION ACT, 2002

- **Prohibition of Certain Agreements** – that are considered to be anti-competitive in nature. Such agreements shall be presumed to be as anti-competitive if they cause or are likely to cause an appreciable adverse effect on competition with India.
- **Prohibition of abuse of Dominant Position** – If an enterprise by imposing unfair or discriminatory conditions or limiting or restricting production of goods of services or indulging in practices resulting in denial of market access or through in any other mode are prohibited.
- **Regulation of Combination** – which cause or are likely to cause an appreciable adverse effect on competition with the relevant market in India is also considered to be void.
- **Entrust Competition Commission of India** – the responsibility of undertaking competition Advocacy, awareness, and training about Competition issues.

AGREEMENT – SECTION 2(b)

An Agreement under the Competition Act, 2002 includes any arrangement, understanding or action in concert;

- Whether or not it is formal or in writing, or
- Whether or not is intended to be enforceable by legal proceedings

Therefore, the definition of agreement under the Competition Act, 2002 provides a broader ambit to agreements as it also focuses on negative or illegal agreements as well which further raises anti-trust concerns.

Arrangements refers to a common course of conduct or behavior involving some sort of communication or exchange of views between the parties, each of whom is led to expect that the other or others will act in a certain way.

Understanding refers to some sort of behavioral communication between two or more parties resulting in a particular course of conduct by them

Action in Concert refers to a situation where two or more persons having regard to their relation, their conduct and common interest and on the basis of such evidence, it may be inferred that they are acting in Concert.

CARTEL – SECTION 2(c)

Cartel under the Competition Act, 2002 includes an association of –

- Producer
- Sellers
- Distributors
- Traders
- Service Provider

Who by agreement amongst themselves limit, control or attempts to control the production, distribution, sale, or price of or trade in goods or provisions of service. A cartel is said to exist when two or more enterprises enter into an explicit or implicit agreement to fix prices, to limit production and supply, to allocate market share or sale quotas, to engage in collusive bid rigging in one or more markets.

High concentration in the market, High entry or exit barriers, Homogeneity of the products, High dependence of the consumers on the product, History of collusion, Active trade association are some of the conditions which are conducive to the formation of cartel in the generic sense.

An act of cartelization done by companies by the virtue of acting together to limit, control and to attempt to control the production or the prices of commodities in the market amounts to cartelization and the same is violative of and prohibited by the Competition Act, 2002.¹

ENTERPRISE

An Enterprise, under the Competition Act of 2002, means a person or department of government who or which is, or has been, engaged in any activity relating to the production, storage, supply, distribution, acquisition, or control of articles or goods or the provisions of services, of any kind. As a result, almost any entity prevailing its functions in the market environment is an enterprise because the meaning of “enterprise” under the Competition Act, 2002 is not exhaustive which further, gives it a wider ambit. Even a body or organization, organizing events also comes within the ambit of “Enterprise” under the Competition Act, 2002. Any activity which is commercial facilitates an enterprise.²

RELEVANT MARKET

¹ Builders Association of India v. Cement Manufacturers Association and ORS, (2010) 92 COMP LR CCI

² Surendra Singh Barmi v. BCCI, (2013) 297 COMP LR CCI, (2013) 118 SCL 226

As per Section 2(r) of the Competition Act, 2002, Relevant market means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographical market or with reference to both the markets. Relevant Market is of two types;

- Relevant Geographical Market – Section 2(s): It refers to the market comprising the area in which the condition of competition are similar and can be distinguished from the conditions prevailing in the neighboring areas. Relevant Geographical Market must always be location specific.³
- Relevant Product Market – Section 2(t): It refers to a market that consists of all products and services that are considered interchangeable or substitutory by the consumer by the reasoning of Characteristics of the Product or Service, Production, or Supply.

ANTI-COMPETITIVE AGREEMENTS

Provisions regarding the Anti-Competitive Agreements under the Competition Act, 2002, are incorporated under Chapter II of the Act. Section 3 of the Competition Act, 2002 provides provisions regarding the Anti-Competitive Practices. The Act prohibits the Agreements which are anti-competitive in nature. Here, the word “Agreement” does not necessarily mean a written agreement, it could be oral or it could be the mere understanding and meeting of the minds. Any such agreement is never presumed to be anti-competitive in nature, it must always be proved that an agreement is anti-competitive in nature, and the burden of proof will also be on the complainant who is alleging such anti-competitive nature of the agreement. An Agreement will be considered as Anti-Competitive in nature if it brings appreciable adverse effect on the competition. (AAEC).

The Act does not define the meaning of AAEC. However, only the probable factors that need to be investigated while determining whether an agreement is likely to have an AAEC in the market is provided in the Act. These factors mentioned under section 19(3) of the Act, provide that the Commission while deciding whether an agreement is likely to have an AAEC in the market shall bring into consideration any or all of the following factors:

- Creation of barriers to new entrants in the market
- Driving existing competitors out of the market
- Foreclosure of Competition by hindering entry into the market

³ *Belaire Apartment Owner’s Association v. DLF*, (2011) 239 COMP LR CCI

- Accrual of Benefits to Consumers
- Improvements in production or distribution of goods or provision of services; and
- Promotion of Technical, Scientific and Economic Development by means of production or distribution of good or provision of services

If there exists any enterprise who is anti-competitive in nature which brings Appreciable Adverse Effect on the competition by formulating Anti-Competitive Agreements, then in such cases those agreements will be void agreements under Section 3(2) of the Competition Act, 2002.

Any Sort of term imposed with acts against the interest of the buyers or any delays and unauthorized changes made by the enterprise amounts to unfair trade practices under the Competition Act, 2002

ABUSE OF DOMINANCE

As per Section 4(1) of the Competition Act, 2002, The Abuse of Dominant Position is Prohibited.

Dominance per say is not bad, although, its abuse is. Abuse starts to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary position in the relevant market in an exclusionary or/and an exploitative manner. Which implies that for a firm to abuse its dominant position, it must be dominant in the first place. Therefore, setting up a pre-requisite for it and even a prior requisite is that the enterprise must be in a relevant market.

LIST OF PRACTICES THAT CONSTITUTE ABUSE OF DOMINANT POSITION – SECTION 4(2)

There shall be an abuse of dominant position under sub-section (1),

- If an enterprise or a group of enterprises directly or indirectly, imposes unfair or discriminatory conditions ⁴in purchase or sale of goods or service **or** if it imposes unfair or discriminatory conditions on price in purchase or sale (including predatory pricing) of goods or service. A conduct is said to be unfair or unreasonable if it is one-sided.⁵
- If an enterprise or a group of enterprises directly or indirectly, limits or restricts

⁴ Maharashtra State Power v. Mahanadi Coalfields Ltd. And Others, (2017) 525 COMP LR CCI

⁵ Central Inland Water Transport v. Brojo Nath Ganguli and Anr., (1986) 2 SCR 278

- Production of goods/services; or
- Technical or Scientific development relating to goods or services; or
- Indulges in practice or practices resulting in denial of market access in any manner;
or
- Makes conclusions of contracts subject to acceptance by other parties of supplementary obligations which, by nature or according to commercial usage, have no connection with the subject of such contracts; or
- Uses its dominant position in one relevant market to enter into, or protect, other relevant market

FACTORS DETERMINING DOMINANCE

Dominance has been traditionally defined in terms of market share of the enterprise or group of enterprises concerned. The market share of an enterprise serves as the primary factor to determine the dominance by an enterprise⁶. However, it cannot be the sole determining factor of determining dominance. Several other factors also play a role in determining the dominance of an enterprise or a group of enterprises in the market. Factors like, Market share, size and resources of the enterprise, size and importance of competitors, economic power, vertical integration, dependency of the consumers on the enterprise, extent of entry and exit barriers in the market, countervailing buying power, market structure and size of the market, source of dominant position viz. whether obtained due to statute, etc. All these factors are non-exhaustive, any other factor can also be taken under consideration while determining dominance of an enterprise at the discretion of Competition Commission of India.

ESTABLISHMENT AND COMPOSITION OF THE CCI

The Competition Act of 2002 provides a statutory mandate with regard to the establishment of the Competition Commission of India. The Commission shall be a body corporate, having perpetual succession and a common seal, with powers to acquire, hold and dispose of property, both movable and immovable, to contract and to sue or be sued, subject to any provision of the Act. The legislature provides the CCI to be the statutory regulator for all the provisions of the statute of the Competition Act, 2002. The Head Office of the Commission is not location specific as it can be changed by the Central Government from time to time. However, presently

⁶ Umar Javeed v. Google LLC, (2022) 61 COMP LR CCI

the Head Office of the Commission is at New Delhi⁷, the commission also has the privilege to establish offices at other places in India.

According to the Competition Act, 2002, the Commission shall consist of the Chairman and 2 to 6 other members which are to be appointed by the Central Government. The Chairman and every other member shall be a person of ability, integrity and standing. Who has special knowledge of, and such professional experience of not less than fifteen years in;

- International Trade
- Economics
- Business and Commerce
- Law
- Finance and Accountancy
- Management and Industry
- Public Affairs or Competition matters including Competition law and policy, which in the opinion of the Central Government, may be useful to the Commission.

The Union Cabinet in 2018 changed the Composition in pursuance of the Government objectives of minimum government, maximum governance, and the Composition was changed to a chairman, along with 3 maximum other members. Although, it is passed by both the houses, the same was not Amended by the way of Legislation through the Competition Act, 2002.

DUTIES AND POWERS OF THE CCI

The Commission, under the Competition Act, 2002 is bound to perform duties to serve, safeguard and uphold the Aim and Objective of the Competition Act, 2002.

The Commission has the powers to;

- **Cease and Desist Order** – Direct such enterprise to discontinue and not to re-enter such agreement or discontinue such abuse of Dominant Position as the case may be.
- **Impose Penalty – Section 3(3)** – Not exceeding 10% of the Average relevant turnover of the last 3 preceding financial years to each party OR up to 3 times the profit made in each year of contravention, whichever is higher. The penalty must always be imposed

⁷ Notification No. G.S.R. 666(E), Ministry of Corporate Affairs, Government of India, Oct. 14,2003,[https://www.mca.gov.in/Ministry/notification/Notifications_2003/noti_14102003_1198\(E\).html](https://www.mca.gov.in/Ministry/notification/Notifications_2003/noti_14102003_1198(E).html)

on the entity's relevant turnover that is pertaining to products and services that have been affected by such contravention.

- Direct that the agreements shall stand modified to the extent and in the manner as may be specified by the Commission
- Direct the enterprise to abide by such orders as the commission may pass and comply with the directions.
- Pass such other orders or issue such directions as it may deem fit.

CONCLUSION

The Competition Act of 2002 is crucial legislation in India aimed at promoting fair competition and safeguarding consumer interests. It establishes the Competition Commission of India (CCI) as the regulatory body responsible for its enforcement. The Act prohibits unfair business practices like anti-competitive agreements and abuse of dominant market positions while also regulating mergers and acquisitions that could harm competition.

Under the Act, agreements that restrict competition are prohibited, and cartels, which collude to control prices or limit production, are closely monitored. The Act also prohibits businesses from abusing their dominant market positions through practices like unfair pricing or discriminatory conditions.

The CCI, comprising a chairman and members appointed by the Central Government, has the authority to issue orders, impose penalties, and ensure compliance with the Act's provisions.

In essence, the Competition Act, 2002, plays a crucial role in maintaining a level playing field in the Indian market, promoting fair competition, and protecting consumer welfare.