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Impact of Competition Law on Business and Overall Analysis of Competition Amendment Bill 2020

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For decades, we have seen that competition in business areas, has been a driving force to restore consumer welfare and give priority to customers' preferences and choices. This brings us to a great question as to then, why was the Competition Act[1] enacted and what was the need for it, which circumstances led to bringing of such an Act and its enforcement in our country. Therefore in this article, we shall get to know the reason behind the origin of various Acts and their participation in helping to curb lingering threats towards competition prevailing in the business areas, and its impact on business and we shall also analyze the Competition Amendment Bill 2020.[2]

Keywords: *competition law, business, competition amendment bill, consumer welfare.*

INTRODUCTION

To have public welfare and a fair market area, there is a thriving need to have sufficient competition, as it leads to reasonable prices, high-quality products and a great variety of choices

[1] Competition Act 2002
[2] Competition Amendment Bill 2020

kept ahead of the public at large. Looking back to the history of the enactment of the law, India had been deemed to be as first South Asian county that had enacted a competition law suiting the modern market area. A simple meaning of competition is a situation where a lot of people or firms or companies put their best effort into achieving a common goal and always try to get rewards more than the other. The overall economy makes a huge success through such thriving competition in the business sector as it leads to the effective and efficient use of limited resources to get maximum quality and quantity in the output attained by using it to produce something for the market. When a market is left with no competition, it results in a monopoly i.e. having only one or very few players in the market who manufactures and sells those particular goods, which results in the abuse of dominant power by the market owner of such monopoly. He may charge exorbitant prices, form cartels, reduce supplies, and shall also limit consumers' preferences and choices. The economy as well as consumers suffer in this condition. Modern economies do not run through a laissez-faire system, and hence the distortion created in today's market is a combination created by organizations that work as a system to exercise control over the entire market. The Competition Act is thus responsible for monitoring the functions of the market and regulating it with a proper application of the law and hence removing obstructions and powers which lead to restriction of competition as well as abuse of monopoly by owners acquiring dominance in the market.

HISTORY AND EVOLUTION OF LAWS REGULATING THE COMPETITION SECTOR

When India was under British power, the East India Company exploited Indian resources for their gains and no Indian-originated business could get a kick hence **no competition** regime existed in India. The policies only focused on the just and equitable distribution of resources. Industrialization somewhere exactly started during the World War era, when India became a major source of supply for defence weapons used by an army of the British regime and this trade helped in creating large organizations to set up in the Indian market. After Independence was established in India, the government introduced a 5year plan and laid down various strategies for the allocation of resources. The plan had a primary focus on fulfilling the aim of Industrial and Economic Development. The major role was played by Industrial Policy Resolution,

wherein the industries had been divided into different Schedules and had been classified into various industries. They were based on **the principle of Command and Control**. In this era, a lot of priority was given to the public sector, and obtaining a license was a very easy task for such public companies as compared to the private sector. This led to the emergence of monopoly as there was a concentration of economic power by a few players who were running the economy. They had started indulging in anti-competitive practices which were deteriorating public interest. This had also been against the principle of the Constitution which promoted equal rights and freedom given to everyone to run a business and also a threat to public welfare and justice.

This scenario led to the formation of the Monopolies and Restrictive Trade Practices Act, of 1969.[3] The Act was passed by the Parliament of India on 18th December 1969 and got President's assent on 27th December 1969. But the Act came into force on 1st June 1970.[4] It was enacted based on the recommendation of the Dutt Committee and had been enacted for the sole purpose of prohibiting anti-competitive practices existing in the market, which included restrictive, unfair, and monopolistic trade practices. The Act extends to the entire India excluding the state of Jammu and Kashmir.

It was very clear in its aims and objectives, which were duly focused on

- Ensuring non-concentration of economic power.
- Creating control over the monopolies existing in the market
- To not let monopoly or unfair practices take undue advantage of the market

The provisions under it introduced the concept of the **MRTP Company**

The Firm with Assets of Rs. 25 Crore or more had to take permission from the government and the limit kept on increasing as per the Amendments which was later settled to only companies having more than 25% market share to be identified as MRTP companies. However, MRTP Act had its loopholes which included. The government had excess control, asking businesses to take

[3] Monopolies and Restrictive Trade Practices Act 1969
[4] *Ibid*

licenses and approval for carrying out any kind of corporate restructuring. It was a lengthy and complex procedure that was affecting the survival of many companies in the market. The act was not absolute as anti-competitive practices had no mention of different horizontal and vertical agreements or combinations that could be a larger threat to competition in a particular industry or a business area.

The Act considered dominance in itself as bad or evil, whether it had been a reason for abuse or added any kind of detrimental value to consumer welfare. The scope for covering the MRTP Company also had limitations as it had a threshold for considering a certain firm or company under the said term. It needed to have no limitations for recognizing a company to be dominant in its position. The Act had a lot of relaxation for companies or firms earning through exports and there were no restrictions and limitations if these enterprises had huge potential for export earnings in the future. It failed to analyze considering whether such export building was a part of anti-competitiveness or was on behalf of monopolistic restrictive practices

The MRTP Act had no space for extraterritorial applications, carried out by the company outside India. So if a company had accessed to a cartel outside India, or was related to any anti-competitive practices through foreign companies, the Commission failed in stopping any such illegal action. There was no provision for imposing harsh penalties or fines under the Act. Hence a party at default was majorly issued or imposed a 'Cease' order or would be charged a nominal fine. There was a rare application of any jail term, given to the defaulter.

Moreover, MRTP had outlived its utility as it was enforced when the Indian government had been dependent on a policy concentrating on the principle of command and control and the entire economy was working under the same practice. When the new era of economic reforms, namely, LPG penetrated its root in the 90s in India, it became very difficult for the Indian business sector as well as the economy to persist under the Act. Hence, India had to make an entirely new law that could regulate competition and accommodate the LPG scheme, hence **Competition Act, 2002[5] came into existence by repealing the old MRTP Act**.

[5] Competition Act 2002

It was passed in 2002 and governs Indian competition law. Its main element was the foundation of the Competition Commission of India which had the significant work of regulating any activity which could hinder competition as well as monitoring various anti-competitive practices that a firm would be performing under a sector or market area and taking necessary actions for the same. It is an independent body that adjudicates and monitors competitions in the country. The Commission plays an important role, by preventing and punishing any anti-competitive practice conducted by a company as well as restricting any government interference which is not required. It has been amended 2 times far i.e. once in 2007[6] and the second in 2009[7].

The objectives of the Competition Act is

- To restrict any kind of agreements or practices conducted by a firm that can lead to deterioration of competition in the market.
- To prohibit abuse by any organization who have acquired a dominant position in the market
- To prohibit any combination or corporate restructuring which could cause a threat to competition.

Moreover, Competition Act is successful in clearing all the ambiguities found in the earlier act.

THE TERM APPRECIABLE ADVERSE EFFECT ON COMPETITION IS CONSISTING OF THREE AREAS

- Anti-Competitive Agreement
- Abuse of Dominance
- Combinations

Sec 3. The Act[8] clearly states what is not accepted under an agreement, highly affecting or causing impediment towards competition and it is stated as follows-

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[6] Competition (Amendment) Act 2007
[7] Competition (Amendment) Act 2009
[8] Competition Act 2002, s 3

- When a company is restricting or putting unnecessary barriers on new entrants
- When it starts eliminating or excluding its potential rivals from the business area
- Excluding competition by blocking entry into the trade.
- Adequate increase in unnecessary benefits to consumers
- A lot of capital and technical investment upgrading production capacity to a large extent which also includes services.

Anti-competitive agreements (all agreements to be avoided by a business undertaking)

It is also known as an agreement among enterprises working in contrast market areas at different levels which include the entire chain of production, distribution, price, and trade of the products and services which includes

1. **Tie-in in arrangement**

Any agreement having a requirement to purchase certain other goods with the same purchase is considered a tie-in arrangement or conditional purchase or sale. It is seen in the case of **Eastman Kodak Co. v Image Technical Services Inc**.[9] Kodak was a manufacturer of photocopies and other necessary equipment and also used to sell parts needed to restore the product and also provided the needed services. Kodak came up with a scheme of selling the recovered part only to those buyers of Kodak equipment who purchased Kodak services to repair their machines. A case had been filed by ISO saying that Kodak had unlawfully tied the service provision for Kodak machines to the parts sold by them. The major part that was to be looked upon, was whether Kodak had a monopoly or abuse of dominance running the market which could cause a threat to competition. Court viewed it as, given the switching cost involved, purchasers were unlikely to shift to other equipment and would rather pay a higher price for services, accordingly, Kodak was held liable and amounted to Kodak's policy under tying violation.

[9] *Eastman Kodak Co v Image Technical Services Inc* 1992 US 451

2. Exclusive supply agreement

Any agreement which prohibits in any form, the purchaser, during his trade from obtaining or else trading in any goods except that of the seller or a related person is called an exclusive supply agreement. It prevents the supplier from distributing inputs or outputs to another buyer. This will especially deter newcomers as they will not have access to inputs. However, all such agreements are per se not bad. For example, very often software developers are restricted from developing similar kinds of applications for other buyers without having a major impact on the competitive element of the market.

3. Exclusive distribution agreement

Any agreement which prohibits or restricts the production or distribution of any product, or assigns an area or market, for dealing with the trade of such goods exclusively for a particular seller is called an exclusive distribution agreement. It includes entire distribution to be attributed to a single brand or the entire territory has only one brand related to a particular product. It results in a hike, in the price of such goods, and affects intra-brand competition as well which would be unfavourable to consumers' welfare.

4. Refusal to deal

Any agreement prohibiting in any manner, person, or class of persons, with whom they do not want to deal, in any way or means, or will deal if they accept certain conditions, is called a refusal to deal. For example, a company may refuse to do business with another company, customer, or supplier unless they cease business with a Competitor company. In a normal sense, it is acceptable that all firms make their decision whether they want to deal with some other business or not, but when it comes to a business that is in a dominant position, a refusal to deal may deter competition in the market.

In Japan, an upstream distributor of glass pipes refused the orders of a downstream distributor which attempted to import glass pipes from overseas. Japanese competition

authority proposed the remedy which required the upstream distributor to abandon the refusal to supply to restore the same terms and conditions that are offered to other consumers.

5. Resale price maintenance

Any agreement which has a condition about keeping a fixed price agreed with the purchaser, on the resale of such goods, by a such trader is called resale price maintenance. It is found as a form of vertical agreement by the manufacturers among different levels of diffusing the product. The manufacturers agree with an unchanged retail price of a particular product. If they do not adhere to the given condition, sanctions would be imposed against the trader reducing the price, or such practice can be conducted by an individual brand which is somehow found to be ineffective as retailers can look for alternative sources of supplies. This is to be avoided as it can attract legal action under Competition Act.

It was seen in **M/s Fx Enterprise Solutions India Pvt. Ltd v M/s Hyundai Motor India Limited**[10], CCI concluded that, that the company's restriction on the maximum permissible discount amounts to resale price maintenance violates the Act. It monitored the level of discounts through a 'Discount Control Mechanism'. Hence, a penalty of INR 87 crores was imposed. It was later stayed by an appeal to NCLAT which stated that Hyundai was denied the opportunity to respond, which had done an injustice to Hyundai's right of having an equitable effect and fails to comply with the basic principle of common justice.

6. Bid rigging or collusive bidding

An agreement in which a group of firms or people, having the same background business, come together to agree to a condition, of excluding competition for a particular bid is called bid rigging. There are two types called bid suppression and Phantom bidding in which the former includes parties opting out of a bidding process so a particular party can win the bid, whereas the latter includes bidders solicited to make large and higher bids than they ordinarily would. It is called an act of market manipulation. Bid rigging is against the principle of consumer

[10] *Fx Enterprise Solutions India Pvt Ltd v Hyundai Motor India Ltd* 2014 NCLAT Competition Appeal

welfare as people are likely to pay more if firms get indulged under such contracts. It could be seen in business contracts awarded through competitive bidding.

Western Coal Fields Ltd v SSV Coal Carriers Pvt Ltd[11] the Commission found that there was repeated quoting of identical prices for different bides, which was highly susceptible. The coal transporters had formed a cartel in which they admitted that the prices were already benchmarked against earlier prices, they also had business dealings with each other and had committed the offence of collusive bidding, mentioned under the Act.

HORIZONTAL AND VERTICAL ANTI-COMPETITIVE AGREEMENTS

Horizontal agreements are referred to as agreements among competitors. They include various aspects such as the quantity, market sharing, or price, involved in such an agreement. Companies dealing at the same level in the manufacturing process come together to agree to these conditions of the agreement. It is formed as a cartel which leads to unreasonable restrictions on competition and can be a disadvantage to the competition prevailing in the market. It can also be seen as fixing a market area for every firm, to enjoy dominance in this particular division of the market.

Vertical agreements are agreements between undertakings not in actual competition with each other but unlikely related to each other. They are entered by firms working at diverse levels of the production cycle and in different trade sectors. An example of this would be, a manufacturer who produces cotton clothes agreeing with the retailer to promote the products, and an advantage to the retailer is getting clothes at a highly discounted price.

ABUSE OF DOMINANT POSITION AND IDENTIFICATION OF ABUSIVE USE OF DOMINANT POSITION

There shall also be '**abuse of dominance** by an enterprise that is at a '**position of strength** in the market which enables it to

[11] *Western Coal Fields Ltd v SSV Coal Carriers Pvt Ltd* 2017 CCI 0795

- Operate independently of competitive forces prevailing in the market.
- Affect the competitors or consumers of the relevant market in its favour.

Sec 4 of the Competition Act 2002,[12] explains abuse of a dominant position which shall not be conducted by a business holding such a dominant position in the market. It is strictly prohibited under the law. An enterprise or group is said to have abused its dominant position if

1. **It imposes unfair conditions or price**

The exploitation of competition in the market by charging exorbitant costs or putting such a condition before consumers cause deterioration and justice of consumer welfare as well as prohibits competition in the market. In **Pankaj Agarwal v DLF case[13]**, there was a situation relating to the distribution of apartments, in which only DLF had drafted an agreement that gave discretionary power to the company for deciding on various aspects of the case such as deciding no. of apartments or designation of the super area, relinquishment of booking sums, etc. CCI held that the whole agreement was exploitative against purchasers and it was abusive and thereby held DLF liable for the same.

2. **Gets involved in predatory pricing**

If an enterprise charge, a very cheap price for a product, in comparison to the prices charged by the substitutes available in the market, of such product, then the company is said to have indulged in predatory pricing, which is anti-competitive. It becomes a threat to the competition prevailing in the market as the enterprise that is using predatory pricing has dominance in the such market area and hence it can easily vanish the remaining competition of its substitutes, and therefore regarded as an anti-competitive practice not to be used by an enterprise having such kind of dominance in the market.

3. **Denies market access**

[12] Competition Act 2002, s 4
[13] *Pankaj Agarwal v DLF* 2010 CCI 55

If an enterprise enjoying dominance actively starts restricting the entry of competition, then it is said to have indulged in the abuse of dominance An example case of this is **Shri Shamsher Kataria v Siel Honda** [14]where the company had a dominant position and tried to have an agreement with an overseas supplier to only supply unique vehicle parts to its company and nobody else was considered as limiting passage to new firms entering in the same market and is considered as anti-competitive.

- When a firm uses its dominant position, acquired in a significant market to penetrate another relevant market is also considered an abuse of dominance.
- If a company having a dominant position, directly or indirectly, forces, or prohibits the manufacturing of a product or any service, by another company or its competitor or actively limits the creation or specialization of a product or service acquired by a firm through technical or scientific development, then it is considered as abuse of its dominant power which is a said offence under this Act.

COMBINATIONS

Sec 5 of the Competition Act explains combination as the direct or indirect acquisition of the shares, voting rights, or assets or the control over management or control over assets of one or more enterprises by one or more persons or merger or amalgamation between enterprises and when such combining such factors exceed the threshold set under Sec 5, it is called as a combination[15]. It can only be identified as a combination if it is surpassing the mentioned threshold under the Act. The combination may cause an appreciable adverse effect on competition which is regulated under the provision of Sec 5.
The threshold for combination is as follows -

Parties to combination jointly have or enterprise after merger or amalgamation has - In India, assets over Rs.2000 Cr or turnover of more than Rs.6000 Cr. In India with outside

[14] *Shri Shamsher Kataria v Siel Honda* 2014 CCI
[15] Competition Act 2002, s 5

India(worldwide), assets over USD 1000 million with at least Rs.1000 Cr in India or Turnover above USD 3000 million including at least Rs.3000 Cr in India.[16]

Acquiring group and target jointly have or group enterprise created after merger or amalgamation have - In India, assets over Rs.8000 Cr or Turnover above 24000 Cr. In India with outside India, assets over USD 4 billion with at least Rs.1000 Cr in India or turnover more than USD 12 billion including at least Rs.3000 Cr. in India[17] For this provision, the term group means two or more enterprises, which, directly or indirectly are in a position to exercise 26% or more of the voting rights in the other enterprise, or, they control the management or affairs of the other enterprise. Control includes controlling the affairs of management by

One or more enterprises, either jointly or singly, over another enterprise or group. One or more groups, either jointly or singly, over another group or enterprise. Therefore, any person or enterprise who proposes to enter into a combination shall give notice to the Competition Commission in the prescribed form by following the provisions of Sec 6. However, provisions of this section are not applicable where shares are subscribed by FI, FII, Banks, or Venture Capital Funds as per any loan or investment agreement, and details of such investment are filed with Commission within 7 days. The recent status of the Competition Act in India is hereby focused on the changes which are suggested under Competition (Amendment) Bill 2022.[18]

ANALYSIS OF COMPETITION (AMENDMENT) BILL 2022

The Amendment Bill has for now been referred to the Standing Committee of Finance for review and will be discussed during the winter session in the Parliament which includes a wide framework concerning anti-competitive practices and mergers and acquisitions. The main aim of CCI is to tighten the scrutiny over anti-competitive practices by e-commerce firms. The decision to introduce this bill is a result of a huge shift in the way businesses have started

[16] *Ibid*
[17] Competition Act 2002, s 5
[18] Competition (Amendment) Bill 2022

operating and significant growth in Indian markets. Reports have suggested a huge expansion of the e-commerce market, which needs new norms for mergers and acquisitions.

Competition Amendment Bill has a significant add-on, which is about to change section 5, dealing with combinations and mergers, and acquisitions of companies. This is suggested to change as the e-commerce platform is showing continuous growth, and therefore the Act loses out on such provisions which can regulate and monitor **digital mergers and acquisitions**, it was found that transactions with fewer values were often not reported to the CCI. The government has decided to keep the transaction limit up to Rs. 2000 Crore. The bill also seeks to inculcate, "to provide that if the value of any transaction in connection with the acquisition of any control, shares, voting rights, etc., exceeds Rs 2,000 crore, it would require filing a notice of combination before the Commission and to empower the central government to exempt certain transactions from the requirement to file combination notice under the Act."

TIGHTENING ROPE ON ANTI-COMPETITIVE ACTIVITIES

The next significant amendment is to be brought for Section 48 of the Competition Act [19]concerning the penalty provision for enterprises practising cartelization. According to Section 48 (A),[20] and Section 48 (B),[21] any enterprise against whom any inquiry is initiated may submit a written application to the CCI for the payment of a fee against the alleged contraventions. It also seeks to change Section 41 of the act,[22] which deals with the power of the Director General to monitor and investigate cases of contravention. The bill proposes the contravention to be liable for a penalty. The penalty shall not be more than 10 percent of the average income or the last three preceding financial years and with certain other provisions. Moreover, companies would be penalized for contravention, if, "Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production,

[19] Competition Act 2002, s 48
[20] Competition Act 2002, s 48(A)
[21] Competition Act 2002, s 48(B)
[22] Competition Act 2002, s 41

supply, distribution, storage, sale or price of, or trade in goods or provision of services, causes or is likely to cause an appreciable adverse effect on competition in India."

SPEED UP CLEARANCE OF COMBINATION

The new amendment is about to accelerate the period within which a combination gets approved which is suggested to be reduced to 150 days with a conservatory period of 30 days and increase the importance of pre-filing consultations with the commission.

AMENDMENTS RELATED TO GUN JUMPING

It happens when two or more combining parties close a notified transaction before approval from the Commission. The penalty related to such an offence was a total of 1% of the asset or turnover which is proposed in the amendment to be 1% of the deal value. All these amendments thereby make the Act as well as the Commission more effective to manage the new market and make the operation and monitoring more powerful.

CONCLUSION

It could easily be seen from the various terms discussed above; how would a business be affected if it does not comply with the arrangements and provisions set under the Competition Act. An enterprise needs to thoroughly comply with the standards, provisions, and norms set by the Competition Act if a business wants to expand and grow as a monopoly but also adheres to the limitation and conditions mentioned in the Act. Competition Act does not see the Dominance or Monopoly of a business as conclusively bad or threatening but only if it creates abuse of its position or radically eradicates overall competition prevailing in the market, because, as earlier seen, having no competition, ultimately affects consumers and also the economy as a whole. Also considering the amendments getting into effect will lead India to have a specialized and effective Competition law which is the real need for a successful economy.