



Overview of Competition Law in India

Grounds for Competition Laws:

The Competition Act, 2002 ("**Act**") was introduced to transform the landscape of competition law in India. In generality, competition laws are premised upon the principle that while competition is desirable in a free market, economic concentration in hands of few shall be frowned upon¹ and therefore stringent laws to control the anti-competitive practices in the market is highly desired.

The Act replaced the ineffective regime falling under the Monopolies and restrictive trade Practices Act 1969 ("**MRTP Act**"). The MRTP Act primarily focused on curbing monopolies in the market, however with the advancement of competition practices in India, the focus has now been shifted from curbing monopolies to promoting healthy competition. Competition laws are introduced in order to regulate the practices in which businesses are conducted in India, this is to create an even level playing field with effective competition.

The basic intent is to regulate business practices so that they are to compete on the basis of merit and not with aid of anti-competitive agreements and/or conduct. While the Act promulgates an even level playing field for all businesses to thrive, the intent is not to make it easier for weaker business to survive or require dominant/profitable businesses to give up their market share. It is purely for regulatory purposes.

Objectives and basic principles of the Act:

The last decade has witnessed an insurgence in Antitrust appeals before the Supreme Court of India ("**SC**") which has led the SC to lay down essential principles of Competition Law in India. Landmark judgments by the SC have played a pivotal role in matters concerning competitive practices.

The case of *Competition Commission of India v. Steel Authority of India Ltd* was one of the earliest decisions by the apex court which discussed the background object and core principles of the Act. The court reflected on the intentions of competition law to market power and remedy the situations which may arise due to activities of one or more firms leading to a hindrance of the free market system.

Subsequent decisions in the case of *Excel Crop Care v. Competition commission of India*, the SC was of view that the pursuit of fair and effective competition plays an instrumental role in the improvement of economic efficiency, growth, and development of consumer welfare.

In the case of *Competition commission of India v. Fastway Transmission Pvt. Ltd*, the Court duly observed that it is the basic duty of the Competition Commission of India ("**CCI**") to promote and sustain competition to protect the freedom of trade in different markets in India, in addition to protecting consumers.

Practices Governed under Competition Act:

The Act was not formed to prohibit competition in the Market but primarily seeks to regulate the practices that have an Appreciable Adverse Effect on competition ("**AAEC**") in the market(s) in India.

¹ Inspiration drawn from Article 38 and 39 of the Constitution of India, 1950

Additionally, the Act intends to promote and sustain competition in markets, provide protection to consumers and ensure effective freedom of trade in the markets in India.

At the heart of the Act there are various activities that are prohibited as being anti-competitive in nature. The activities comprise of:

- a. Anti-competitive Arrangements.
- b. Abuse of Dominant Position
- c. Mergers and acquisitions having Appreciable adverse effect on competition.

A. Anti-Competitive Arrangements:

- Anti-Competitive agreements are those that have their object as or have an effect in preventing, restricting, or distorting competition in the relevant market in India. Such arrangements not only cover agreements but also decisions made by associations of persons/enterprises as well as conduct of parties acting in collusion.
- Section 3 of the Act prohibits Anti-competitive agreements in India. The ambit of the section is wide as it not only includes express agreements but also entraps implied agreements in its purview. Although the Act does prescribe certain arrangements which will or be likely to be caught by the restriction on anticompetitive practices, it is not exhaustive in nature.
- Section 3(3) deals with Agreements which are between parties who are engaged in identical or similar trade of goods or provision of services and are direct competitors of one another in a relevant market. There is a rebuttable presumption that four kinds of horizontal agreements enumerated under the section cause AAEC in the relevant market. They are as follows:
 - Directly or indirectly determining purchase or sale prices.
 - Limiting or controlling production, supply, markets, technical developments, investments, or provision of services.
 - Arrangements for sharing markets or sources of production or provision of services.
 - Directly or indirectly engaging in bid rigging or collusive bidding.
- **Burden of proof:**

Section 19(3) of the Act enumerates a number of anti-competitive and pro-competitive practices which help the CCI to determine whether an agreement has caused or will likely cause AAEC. However in the case of *Rajasthan Cylinders v. Competition commission of India*, the Supreme court pointed out that since agreements under section 3(3) are already presumed to be anti-competitive in nature, there is no need for a specific analysis done under section 19(3) by the CCI. As it is the presumption of AAEC under section 3(3) is rebuttable in nature. The onus to discharge such burden under the subsection would lie with the parties who have allegedly entered into such agreements by justifying that their conduct or practice does not cause any AAEC in the relevant market.

Section 3(4) deals with Agreements which are between parties who are on different stages or levels of the production chain in different markets, . the vertical agreements are not considered to be per se violative of the provisions under the Act, but they are considered to be in contravention of the Act only if they have an AAEC in the relevant market. The examples of such agreements are as follows:

- Enforcing a condition on the purchaser of certain goods to also purchase some other goods (tie-in arrangements)
- Entering into exclusive distribution or supply arrangements
- Arrangements between persons involving a refusal to deal with a particular manufacturer or customer (refusal to deal)
- Entering into arrangements to sell goods on the condition that the prices to be charged on the resale by the purchaser, shall be the prices stipulated by the seller, unless it is clearly stated that prices lower than those prices may be charged (“resale price maintenance”)
- Exemptions:

The Act provides for certain exemptions under the purview and applicability of Section 3. The section shall not restrict any right of person to restrain any infringement, or impose reasonable conditions, as may be necessary to protect the rights conferred under:

- The Trademarks Act,1999
- The copyrights Act 1957
- The Patents Act 1970
- The trade and merchandise Marks Act, 1958
- The geographical indications of Goods(registration and protection) Act 1999
- The Designs Act,2000

B. Abuse of Dominant Position

- The Act prohibits any conduct which amounts to the abuse of dominant position which may have as its object or effect, an appreciable adverse effect on competition in any market in India². The Act has clearly defined dominant position as a “*position of strength, enjoyed by an enterprise, in the relevant markets in India which enables it to:*”
 - *Operate independently of competitive forces prevailing in the relevant market; or*
 - *Affect its competitors or consumers or the relevant market in its favour”*
- The Act does not define as to what constitutes as conduct amounting to “abuse” of dominant position. However, the Act does prescribe certain forms of conduct as being likely to fall within its general prohibition. They are³:
 - Engaging in predatory pricing or any other form of predatory behavior.
 - Limiting production, markets, or technical development to the prejudice of consumers.
 - Indulging in practices resulting in denial of market access.
 - Making conclusion of contracts subject to acceptance by other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of the contracts
 - Leveraging the dominant position in another market to enter into or protect the relevant market.

It is imperative to note that holding the mere position of a large or dominant player in the market does not constitute to anti-competitive behavior. The Act seeks to target and to dissuade a dominant player from using his dominance to AAEC in a market.

² Section 4, The Competition Act, 2002 .

³ Section 4(2), The Competition Act,2002.

- Denial of Market Access:

Section 4(2) (c) of the Act prohibits explicitly dominant entities from indulging in activities which would lead to a denial of market access in any manner to another entity. The Supreme Court in the *fastway Case*, noted that since the group of dominant multi-system operators holding 85% of the market had prematurely terminated a vertical agreement with a broadcaster which effectively hindered the broadcaster's ability to access and compete in its relevant Market. the landmark decision reaffirmed the fact that dominant entities can often impact and deny market access to parties in upstream or downstream markets through their exclusionary and unilateral conduct.

C. Anti-Competitive Combinations:

- A combination of enterprises i.e. where two or more entities combine together to form a single entity, leading to reduction of number of players in the market, may result in lessening of competition within a relevant market in India.
- Combinations include mergers, amalgamations and acquisition of control, shares, voting rights or assets. And can be classified into:
 - Horizontal Combinations- those that are between competitors who are engaged in identical or similar trade of goods or provision of services and are direct competitors of one another in a relevant market and are most likely to cause appreciable adverse effect on combination.
 - Vertical combinations- those that are between enterprises that are at different stages of the production chain and are less likely to cause appreciable adverse effect on competition.
 - Conglomerate Combinations- those that are between enterprises who are not in the same line of business or in the same relevant market and are least likely to cause appreciable adverse effect on combination.
- The scrutiny of a Combination under the Competition Act,2002 in India usually takes place before it comes into effect with an idea of preventing a possible anti-competitive behavior which may adversely affect the consumers. Combinations likely to have an anti-competitive effect can be permitted after such effects are removed by Modifications.
- The Act is designed to regulate the operation and activities of combinations. Combinations that exceed the threshold limit in terms of assets or turnover, which causes or likely to cause an AAEC within the relevant market in India can attract scrutiny by the Commission.

Thresholds for notification to the Competition commission of India are:

Enterprise level:

India- assets of >2000 INR crore or turnover of > 6000INR crore.

Worldwide with India leg- for assets : > USD 1 BN with at least >1000 INR Crore in India or turnover of >USD 3 BN with at least >3000 INR crore in India

Group Level:

India- Assets of >8000 INR Crore or turnover of >24000 INR Crore.

Worldwide with India leg- Assets >USD 4 BN with at least >1000 INR crore in India or turnover of >USD 12 BN with at least >3000 INR crore in India.

- Regulation of Combinations⁴:

The Act provides for the law relating to regulating Combinations. It prescribes that all transactions qualifying as a Combination should be notified to the Competition Commission of India in Form I (short form application) or Form II (long form application) as applicable. Section 6 further provides that a Combination shall not be given effect to until approved by the Commission or until 210 days have passed from the date of notifying to the Commission whichever is earlier. The CCI may either approve the Combination or may approve subject to modifications in the structure of the Combination or not approve the Combination.

- Green channel route

- The “Green Channel” route provides for automatic approval of certain combinations under the Act and was adopted and implemented via amendment to Combination regulations, 2011 vide gazette notification dated August 13, 2019.
- The parties interested in following the route have to perform a “self-assessment” on the transactions to see if they qualify for the green channel route.
- Eligibility criteria for green channel route: If after considering all plausible market definitions, the transacting parties do not have any:
 - a) Horizontal overlaps (must not be producing similar or identical/ substitutable product or services)
 - b) Vertical overlaps (must not be engaged in activities at different stage/levels of production chain)
 - c) Complementary overlaps (products/services when combined enhance value of combined good/service)

Due Procedure under Competition Act, 2002:

- Procedure for Investigation into Anti-Competitive Agreements and Abuse of Dominance:

- CCI commences prima facie proceedings against market competitors when they receive information related to anti-competitive activities or CCI takes cognizance of any anti-competitive Conduct of its own violation. The prima facie proceedings determine whether the information provided calls for further investigation⁵.
- An order is passed under section 26(1) if there appears to be Prima facie merit in the allegations in the information. The CCI directs the Director General (“DG”), who is the investigative wing of the CCI, to start a formal investigation into the matter.
- If the report submitted by the DG recommends that there is no contravention of the provisions of the Act the CCI shall invite objections/suggestions from the concerned parties . Upon

⁴ Section 6 of the Competition Act 2002

⁵ Section 26 of the Competition Act, 2002

consideration of these objections or suggestions if CCI agrees with the DG, it shall close the matter. If CCI does not agree with the recommendation of the DG, it may order further investigation by DG or may itself conduct further investigation.⁶

- If DG in its report recommends, that there is a contravention of the provisions of the Act and the CCI is of the opinion that a further inquiry is required, it shall investigate into such contravention in accordance with the provisions of the Act.⁷

- Orders by Commission after inquiry into agreements or abuse of dominant position⁸:

When after the inquiry has been conducted under section 26 of the Act, and the Commission finds that an agreement or an action of an enterprise in a dominant position is in contravention of the Act, it shall.

- Direct any enterprise or association of enterprises, person or association of persons involved in such agreement or abuse of dominant position to discontinue or not to re-enter such an agreement or practice such abuse of dominant position.
- Impose penalty, which shall not be more than ten percent of the average of the turnover for the last three preceding financial years, upon each of such parties of the agreements or abuse.
- Direct for modification of the agreement to the extent and in the manner as specified by the Commission.
- Or pass any other order, deemed relevant.
- An order passed by the Commission is appealable before the first appellate Authority, The National Company Law Appellate Tribunal ("NCLAT")

- **Interim Orders:**

Section 33 of the Act bestows the CCI with the power to pass interim orders in the form of ex-parte injunctions during an inquiry if it is satisfied that an act violating Section 3 or Section 4 is continuing. Under Section 33, the CCI may pass an ex-parte injunction restraining the offending party from continuing with such an act for the duration of the inquiry.

- **Procedure for Investigation of Combinations⁹ :**

Inquiry and Investigation into Combination by CCI:

Section 20 of the Act empowers the Commission to inquire into whether a combination has an appreciable adverse effect on competition in the relevant market in India. The commission can initiate inquiry upon its knowledge, on information received or a reference received from the central government, state government or a statutory authority. The law provides for several filters before the Commission can commence an inquiry against a proposed transaction of combination. These are:

- If the result breaches the statutory thresholds.
- Prima facie causation of appreciable adverse effect on competition in the relevant product and geographic market within India. Factors relating to ascertaining appreciable adverse

⁶ Section 26 (5), (7) of the Competition Act, 2002.

⁷ Section 26 (8) of the Competition Act, 2002

⁸ Section 27 of the Competition Act, 2002

⁹ Section 29 of the Competition Act, 2002

effect on competition have been statutorily provided in the law, thereby, minimising arbitrariness.

- Local nexus or “de minimis” thresholds have been provided under the law for overseas transactions having adverse effect in India. Cross-border transactions which do not exceed the statutory “de minimis” thresholds shall be exempted from being inquired into by the Commission.
 - Government-aided enterprises are not exempted from being scrutinised thereby ensuring a level-playing field between private and public sector competing enterprises.
- After the commission has initiated an inquiry into whether a combination has an appreciable adverse effect on competition in the relevant market in India or not. Upon coming to prima facie opinion that the combination is likely to cause or has caused an appreciable adverse effect, the Commission will investigate the matter in accordance with Section 29 of the Act.:
 - The commission shall issue notice to show cause to the parties to combination calling upon them to respond to the notice within thirty days of receipt of notice as to why the investigation in respect of combination should not take place¹⁰.
 - The commission then asks the parties to publish the details related to the combinations for bringing the combination to the knowledge of the public and the person affected or likely to be affected by it. The commission also invites any aggrieved person to file their written objections with them within fifteen days from the date of publishing of the details of Combination¹¹. The commission may also call for any additional or other information as deemed fit from the parties to the combination.¹²
 - Where the commission feels that any combination with AAEC or likely to have an AAEC can be eliminated by suitable modifications, it then proposes appropriate modification to be made to the Combination¹³. If the party fails to carry out such modifications as ascertained by the Commission, then the combination is deemed to have an appreciable adverse effect on competition and shall be dealt in accordance with provisions of the Act¹⁴.
 - Where the commission has directed that certain combination shall not take effect or the combination is deemed to have an AAEC, then without any prejudice to any penalty¹⁵ or prosecution which may be initiated under the Act, order that the i) acquisition ii) the acquiring of control and iii) the merger or amalgamation shall not be given effect and that the commission if it considers appropriate, frame a scheme to implement its order¹⁶.

¹⁰ Section 29 (1) of the Competition Act, 2002

¹¹ Section 29(2) (3) of the Competition Act, 2002

¹² Section 29(4) of the Competition Act, 2002

¹³ Section 31(3) of the Competition Act, 2002.

¹⁴ Section 31(5) of the Competition Act, 2002.

¹⁵ Section 42 (2) of the Competition Act, 2002. Penalty for contravention of orders of commission, is punishable with fine which may extend to Rs 1 lac for each day during such non-compliance occurs, subject to a maximum of Rs 10 crore, as determined by the Commission.

¹⁶ Section 31(10) of the Competition Act, 2002.

- Penalty:
 - Combination without prior approval of the Commission, shall be liable for penalty which may extend to 1% of such total turnover or the assets of such a combination, whichever is higher.
 - - Penalty for contravention of orders of the Commission is fine which may extend to Rs.1 lac for each day for which such non-compliance occurs subject to a maximum of Rs.10 Cr.
 - - Any person being party to a combination ; makes statements in false manner or omits to state any material matter will be liable to a penalty not less than Rs.50 lac but can extend to Rs. 1 Cr. as determined by the Commission.

Conclusion

In conclusion, it is pertinent to note that antitrust jurisprudence in India has not only envisaged enforcement against the antitrust violations that have already taken place but also of potential violations of the Act, anti-competitive agreements and regulations of combinations both have appropriate laws in place where there is a likelihood of an AAEC In India.

The Competition Act is a big step towards India's competition law framework from the previous MRTP regime which was primarily focused on "curbing monopolies" to promote competition in market by prescribing practices that have AAEC. Consistency in CCI's approach will go a long way in planning pro-competitive business strategy within the framework of the Competition Act.

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