

# ANTITRUST REGIME AND ITS IMPACT ON THE INDIAN E-COMMERCE INDUSTRY

Dr. Anju Jain,

Associate Professor, University of Delhi.

**Abstract:** Indian antitrust law of India i.e. Competition Act, 2002 aims to promote fair competition and regulates business combinations. It has developed precise safeguards against incidents bearing appreciable adverse effect on the competition and has dominating impact especially in the e-commerce industry. The present research is conducted to understand the regulating effect of the antitrust regime over the Indian e-commerce industry.

**Keywords:** Competition Act, 2002, Appreciable adverse effects, Antitrust law regime in India, CCI.

## 1. Introduction

Competition Law or the Anti-Trust Law of India is a *sine qua non* for stabilized competition, healthy business operations and better regulatory governance. It has become an indispensable component for competitive growth of the industry and for regulating the anti-competitive behaviour of the business organisations across the Indian geographical and product markets. Competition law has been used as a tool used for welfare of the society by promoting free and healthy trade practices. The beginning of the Competition Law era can be dated back to the Medieval and the Roman period. The period of 1624 has witnessed the Parliament of England controlling and limiting the monopoly powers prevalent during the period. Plausible negative implications of formation of cartel in the economy are well proved. The Doctrine of Restraint of Trade forms the predecessor to the modern Competition Law. The origin of the modern Competition Law can further be traced back to the enactment of Sherman Antitrust Act of 1890 in the United States.

After attaining independence, India followed a systematic approach of planned economic development. Self-reliance and social welfare were the core objectives before for the policy makers. Such objectives resulted into enforcement of policies restricting imports, plethora of controls for private and corporate trade and huge reservations for the public sector. The then prevailing economic, political and social state of affairs suited the requirement of having a '*Command and Control Policy*' of the Government. Furthermore Article 38 and Article 39 of the Constitution of India strives the responsibility of the State to promote public welfare, reduce irregular distribution of resources and to avoid concentration of wealth which may lead to common detriment.

The time period of 1960's observed a gargantuan concentration of economic powers and heightened disproportionate distribution of the economic assets. Such widespread economic discrimination was evidently leading to rebuttal of the irrefutable rights conferred by the Directive Principles of the State Policy therefore the Mahalanobis Committee was appointed on October 13, 1960 and the Monopolies Inquiry Commission was constituted on April 16, 1964 to inquire the extent and effect of prevalence of

monopolistic and restrictive practices and envisaged setting up of a permanent commission for regulating the matters related to trade and commerce.

Consequently the Monopolistic and Restrictive Trade Practices Act, 1969 (MRTP Act) was enforced in the year 1970. The provisions of MRTP Act broadly dealt with Monopolistic Trade Practices (MTP), Unfair Trade Practices (UTP) and Restrictive Trade Practices (RTP). It did not have suitable provisions for appropriately handling modern businesses practices such as predatory pricing, cartelization etc. With the progress of time, growing demands of the Industry, complexities arising in the business transactions, the 1991 reforms of liberalization, privatisation, globalisation and international best practices, strict restrictions of MRTP Act were attracting scathing disapproval and criticism. Therefore, a high level committee was constituted for examining the MRTP Act under the Chairmanship of SVS Raghavan. Such recommendations formed the genesis of the new competition law enforced as the Competition Act, 2002. The present study has been modelled on the framework of highlighting the imperative need of the introduction of a holistic Anti – Trust Law in India. Further this study analyses the future of the combination regulating law considering the jurisprudential progress.

## **2. Research objectives**

The present research has been conducted with the twin objective of firstly understanding the provisions of the Competition Act, 2002, its historical significance and how it has been affecting the Indian industry. Secondly, to understand the impact of the antitrust regime over the e-commerce industry in India.

## **3. Research methodology**

The present research is a fundamental research which seeks to evaluate different provisions of Competition Act, 2002. It was conducted by first understanding the concept of antitrust law. Thereafter history of Indian antitrust law was studied following which a holistic perspective could be formed. This step was followed by an analysis of the competition laws applicable in foreign jurisdictions combined with their juxtaposed analysis with the Indian regulatory framework.

## **4. Research analysis**

The Competition Act, 2002 (the Act or the New Act) has been modelled with IX Chapters and 66 Sections. It applies to the whole of India except the State of Jammu and Kashmir. The New Act repealed the MRTP Act with a broader regulatory outlook and encapsulates areas such as Competition Advocacy, Prohibition of Anti-Competitive Agreements, Abuse of Dominant Position of Enterprise and Regulation of Business Combinations. It provides for the establishment of Competition Commission of India (CCI). The commission is a quasi-judicial body which gives opinion to statutory authorities and deals with multiple types of other cases. It aims to eliminate the practices having adverse effect on competition and gives its opinion on different matters related to competition law. CCI focuses on consumer's welfare and ensures for healthy competition in economic activities and implements competition policies. CCI ensures interaction and cooperation with other regulating authorities in the economy. This will ensure that the sectoral regulating laws are agreeable with the competition laws.

## Anti-Competitive Agreements and Business Combinations

CCI works anti-trust watchdog for smaller organisations that are unable to defend themselves against malpractices pursued by large corporations. In this regard, Section 3(1) and 3(2) of the Act provides that any 'Agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an **Appreciable Adverse Effect on Competition (AAEC)** within India shall be *void*. Section 3(3) and Section 3(4) categorizes the agreements into horizontal agreements (agreements between the competing firms) and vertical agreements (agreements between firms at different manufacturing / production levels) respectively. Thus the Competition Act, 2002 has prohibited every 'Agreement' which causes or is likely to cause an AAEC within India. It is therefore imperative to understand when does an arrangement / contract becomes an agreement and when it is called to have AAEC in India.

The term Agreement has been defined under Section 2(b) of New Act, which covers every arrangement, understanding or action is formal or in writing, whether enforceable or not within the ambit of 'Agreement'. While analysing the AAEC component, we perceive that no express definition has been provided in the Act in this regard. An extrapolation can be drawn from the provisions of Section 19(3) of the Act, which provides that the Commission shall duly consider the factors such as 'creation of barriers to new entrants', 'driving existing competitors out of the market' to while determining the substance of AAEC.

Section 3(4) provides illustrative definitions of the agreements which may involve AAEC in a vertical arrangement. Section 3(4) covers within its ambit tie-in arrangement, exclusive supply agreement, exclusive distribution agreement, resale price maintenance and refusal to deal agreements. In quintessence these arrangements are classified as anti-competitive only if such agreements cause or are likely to cause an AAEC in India. Meaning thereby while Section 3(3) empowers CCI to 'presume' the presence of AAEC elements, arrangements falling under Section 3(4) have to be interpreted following the Rule of Reason analysis. The Competition Act 2002 has further recognized, protected and provided exemption to intellectual property rights (such as Copyrights, Patents, Trade Marks which are essential for protection from infringement) and agreements related to export of goods from its purview of having an AAEC. Importance of Section 3 can be inferred from a number of rulings that CCI has been able to order in determining the contraventions of the above stated provision. Section 4 of the Act, has prohibited the abuse of dominance by an enterprise. Therefore it is imperative to understand the meaning of the term 'dominance'. It refers to the ability to disrupt the business competition or the ability to monopolise the industry. Therefore the Act has not prohibited an enterprise to emerge as a dominant leader however it has prohibited any abuse of such position by the enterprise. Section 19(4) has further prescribed certain parameters to be used by the CCI to determine the abusive use of dominance for a case to case basis, thereby providing much needed flexibility to CCI in this regard. Such parameters include market share of the enterprise, size and resources of the enterprise etc.

Since the constitution of the Raghavan Committee, the regulation of the M&A activity, Competition Act compliances and its disclosures has been a much talked issue. Section 5 and Section 6 of the Act

provides for regulation of 'combinations' and prohibits and 'combination' that causes or is likely to cause AAEC in India. The term 'combination' can be understood widely to include all kinds of M&A activity and business restructurings. Any combination can be considered to have an AAEC element if it exceeds the monetary thresholds prescribed by CCI. Considering the dynamics of business and industry, CCI has been adjusting the monetary limits accordingly. Further relaxation to M&A activity has been provided by CCI by providing a *De Minimis Exemption* subject to certain prescribed conditions. The Competition Act 2002 has prescribed timelines to be strictly adhered so as to not delay the applications in achieving their targeted business objectives. The Act has provided an outer limit of 210 days for finalising a combination case and if it is not approved by then it shall be deemed to have been approved.

### Competition law in Indian E-Commerce Industry

CCI has been actively undertaking investigations against the alleged anti-competitive practices of technology and internet based companies, majorly working in the e-commerce industry. For instance, CCI investigated the online travel agencies MakeMyTrip, Oyo for alleged imposition of vertical restrictions and abuse of dominance.

The Indian E-Commerce industry has been dominated by few players and hence they possess the potential to disrupt business practices of small and medium businesses. Any kind of agreement between these players or cartelization can wipe out entire competition from the industry. CCI ensures that the E-Commerce Industry has parity clauses wherein all suppliers and buyers have equal accessibility to the E-Commerce platform. Secondly, it evaluates how aggressively is the aggregator itself involved in the business transactions. Thirdly, it evaluates the international antitrust regime with reference to the E-Commerce industry and its applicability in the Indian industrial sector. Herein certain agreements such as the exclusive agreements, deep discounting policy and platform neutrality are duly evaluated.

### **5. Conclusion**

The Competition Law has a rich and vast history in the Indian scenario. While affixing the irregularities in the archaic MRTP Act and for bringing the Indian laws at a juncture at which they are at par with the international standards the Government of India introduced the Competition Act, 2002 protecting and promoting consumer interests and to promote competition advocacy. In the last few years, CCI has been actively monitoring the business activities and has taken up numerous measures to promote fair trade in the industry. By notifying the 'Group Exemption', 'Target Based Exemption' and by increasing the monetary threshold limits for filing of combinations with the CCI, much respite has been provided to the business and the industry.

The Indian E-Commerce industry has tremendous growth opportunities and thus needs to be appropriately regulated. CCI has been striving to ensure that the E-Commerce sector remains a fair market place having equal accessibility for all the players.

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