COMPETITION LAW IN INDIA: ANTI-COMPETITIVE AGREEMENTS AND UNDERSTANDING THE INADEQUACY OF THE PER SE RULE

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ABSTRACT

In India after the economic reforms of 1990, the country saw a shift in its economic scenario wherein there arose a need for change in the existing competition laws, where the main objective, was to curb monopolies rather than promoting competition. It was in this view, i.e., to promote competition that a new legislation governing the competition practices came into force. Competition Act, 2002, which is a nascent legislation, governs competition Law in India and therefore competition law is in a developmental stage in India. Competition Act deals with prevention of any practices that cause any appreciable adverse effect on competition in a relevant market, under heads of anti-competitive agreements, abuse of dominant position, combinations and regulation of combinations. Furthermore this paper would provide with an in depth analysis of anti-competitive agreements and abuse of dominant position in competition law in India. In addition to the aforementioned objective, this paper will also attempt to illustrate the need for the shift of application of the per se rule to the reasonable test rule in matters adjudging AAEC.

INTRODUCTION

When in 2002 the Competition Act came about, one of its principal aims mentioned in the preamble was to prevent practices having an adverse effect on competition. Even though a perfectly competitive market could be though to take care of the welfare and wellbeing of consumers, yet the attaining of such a situation remains an utopian concept. Markets are vulnerable to the manipulations and actions of sellers, aimed at profiting to the detriment of the consumer. To void the prevention, distortion, restriction and suppression of competition, the Competition Act, 2002, in Section 3 prohibits Anti-Competitive Agreements.

Anti-competitive agreements are those that have as their question, or really impact in counteracting, limiting or misshaping rivalry in any market in India. Such courses of action cover agreements, as well as choices made by relationship of people/undertakings, and in addition the direct of gatherings acting in conspiracy. The ambit of Section 3 of the Act is very wide, in as much as, it gets the express assertions, as well as ensnares suggested understandings in its domain (for example, a respectable men's understanding by method for a handshake on a green would likewise be caught).

In spite of the fact that the Act prescribes certain game plans which will/liable to be gotten by the limitation on anti-competitive courses of action endorsed thereunder, it ought to be remembered that these are just cases of anti-competitive game plans, and game plans that are not particularly recommended under the Act may at present be included inside the general restriction.

SUMMARY OF SECTION 3, COMPETITION ACT 2002

Section 3 of the Competition Act, 2002 defines anti-competitive agreements as any agreements in respect to production, supply, distribution, storage, acquisition and control of goods or provision of services that causes an appreciable adverse effect on competition in India. Adverse effect on competition refers not to a particular list of agreements, but to particular economic consequences which may be produced by quite different sorts of agreements in varying time and circumstances. It generally refers to any action which operates to the prejudice of the public interests by unduly restricting competition or unduly obstructing due course of trade.

These classifications under Section 3 of the Act comprehensively incorporate the following agreements, between two entities, engaged in trade of similar or identical goods or services:

1. That straightforwardly or by implication prompts assurance of procurement or deal costs;
2. That points of confinement or controls generation, supply, markets, specialized improvement, speculation or arrangement of administrations;
3. That offers the market or wellspring of generation or arrangement of administrations by method for allotment of geological territory of market, or sort of merchandise or administrations, or number of clients in the market or some other comparable way;
4. That specifically or by implication brings about a considerable antagonistic impact on rivalry. Regardless of whether an understanding has an anti-competitive impact on the opposition in India is to be chosen by the Competition Commission of India. As indicated by Section 19 of the Act, the parameters for judging or deciding if the understanding can have calculable unfavorable effect on the opposition or appreciable adverse effect on competition (AAEC) incorporate the accompanying:

- Production of obstructions to new participants in the market;
- Driving existing contenders out of the market;
- Abandonment of rivalry by thwarting passage into the market;
- Accumulation of advantages to purchasers;
- Changes underway or dispersion of products or arrangement of administrations;
- Advancement of specialized, logical and monetary improvement using creation or conveyance of merchandise or arrangement of administrations.

HORIZONTAL AGREEMENTS

Horizontal agreements are plans between ventures at a similar phase of the creation chain and that is by and large between two opponents at either settling costs or for restricting generation or for sharing markets. In every such understanding, there is an assumption in the Act that such agreements cause AAEC. Cartel is likewise a Horizontal agreement. This is generally between makers of products or suppliers of administrations for price-fixing or sharing of market, and is for the most part viewed as the most noxious type of anti-competitive understanding.

Section 3(3) provides that an understanding would have AAEC if there is a preparation that has gone ahead, or a choice that has been taken, between any of the gatherings said above, including cartels, occupied with indistinguishable or comparable exchange of merchandise or arrangement of administrations, that can either –

- Straightforwardly or in a roundabout way decide the buy or deal costs;
- Cutoff points or controls creation, supply, markets, specialized improvement, investment or service provisions;
- Offers the market or source of production or arrangement of services by method for allotment of geological area of market, or sort of merchandise or administrations, or number of clients in the market or in some other comparable way;
- Specifically or in a roundabout way brings about bid rigging or collusive bidding (impact of wiping out or decreasing rivalry for offers or unfavorably influencing or controlling the procedure for offering).

In analyzing whether an agreement has an appreciable adverse effect on competition, both the harmful and beneficial effects as envisaged in Section 10 (3) of the Competition Act, **2002** is to be considered.

The segment gives an exemption to the joint endeavors entered into by the parties that they increase the proficiency underway, supply, appropriation, stockpiling, procurement or control of products or service provisions. Section 3(1) of the Act can't be summoned freely and is essentially to be utilized alongside Section 3(3) identified with even understanding or Section 3(4) identified with vertical agreements. Notwithstanding, it ought to be cleared up that Section 3(1) isn't only a suggestive arrangement yet is basically the "family" of the Act. It ought to likewise be conjured autonomously to serve the interest of purchasers and furthermore cover different sorts of understandings which may not fall under the aegis of Section 3(3) or 3(4).

VERTICAL AGREEMENTS

Vertical agreements are between endeavors at various phases of the generation chain, similar to a course of action between the producer and a merchant. The hypothetical rule does not matter to vertical agreements. The inquiry whether the vertical agreement is causing AAEC is

controlled by the rule of reason. At the point when run of reason is utilized; both positive and negative effect of rivalry is investigated. So as to decide if any agreements are in repudiation of Section 3(4) read with Section 3(1) of the Act, the accompanying five basic elements of Section 3(4) must be fulfilled:

1. There must be an agreement amongst corporations or people;
2. The parties to such agreement must be at various stages or levels of creation chain, in regard of generation, supply, dispersion, stockpiling, deal or cost of, or exchange merchandise or provision of services;
3. The concurring gatherings must be in various markets;
4. The agreements should cause or ought to probably cause AAEC;
5. The agreements ought to be of one of the accompanying nature as showed in Section 3(4) of the Act:

- Tie-in arrangement (incorporates any agreements requiring a buyer of products, as a state of such buy, to buy some different merchandise);
- Exclusive supply agreements (incorporates any agreement which confines in any issue the buyer over the span of his exchange from procuring or generally managing in any products other than those of the vender or some other individual);
- Select appropriation agreements (incorporates any agreement where consent to constrain, confine or withhold the yield or supply of any merchandise or assign any region or market for the transfer or offer of the products);
- Refusal to deal (incorporates any agreement which limits, or is probably going to confine, by any technique the people or classes of people to whom products are sold or from whom merchandise are purchased);
- Resale price maintenance (incorporates any agreement where consent to pitch products on condition that the prices to be changed on the resale by the buyer will be the prices stipulated by the vendor except if it is plainly expressed that prices lower than those prices might be changed).

The entire concept of appreciable adverse effect on competition is made subjective as it may vary from case to case. The agreements enumerated in Section 3(3) are popularly known as horizontal agreements and they shall be presumed to have appreciable adverse effect on

competition while this presumption shill1 not apply in regard to the vertical agreement, the legislative intent is to view horizontal agreements more seriously.

ENQUIRY BY THE CCI

Section 19(1) of the Act gives the CCI to suo moto take cognizance and enquire into any contravention or supposed contravention of Section 3 of the Act. But the CCI must proceed with the enquiry only if a prima facie case exists and the Director General undertakes the investigation in the matter.

Any person, consumer, consumer association or trade association can file information relating to anti-competitive agreements and/or abuse of dominant position.

The CCI upon receipt of reference or its own knowledge or information received under Section 19 with regard to anti-competitive agreement has to come to a prima facie opinion that a case exists and once it comes to such conclusion, it shall direct the Director General (DG) to make an investigation into the matter. If the CCI does not find a prima facie case, it will close the case, pass an appropriate Order and forward the Order to the concerned persons.

The DG is required to submit a report on his findings to the CCI within the time as may be specified by the Order of the commission such that:

- If the DG recommends that no case of anti-competitive agreement exists and/or there is no contravention of the provisions of the Act, the CCI shall invite objections/suggestions from the concerned parties.87 Upon 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.
- 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 inquire into such contravention in accordance with the provisions of the Act.

In situations where after enquiry CCI finds that the understanding is anti-competitive and have AAEC, it might pass all or any of the accompanying requests, aside from any break arranges that it can go under Section 33 of the Act:

1. Guide the gatherings to stop and not to reappear such understanding (cut it out);
2. Force such punishment as it might esteem fit which will not be over 10% of the normal of the turnover for the last three going before budgetary endless supply of the gathering;
3. If there should be an occurrence of a cartel, every maker, dealer, wholesaler, merchant or specialist co-op incorporated into that cartel can be forced a punishment up to three times of its benefit for every time of the duration of such understanding or 10% of its turnover for each such year, whichever is higher;
4. Direct to change the understanding and in the way as might be determined in the request of the CCI;
5. Pass any such request or issue such headings as it might esteem fit.

ISSUE ANALYSIS

The Inadequacy of the Per Se Rule while assessing AAEC

Once the Competition Commission of India receives information, about possible anti competitive malafide practices occurring in the market, as per protocol, if a prima facie case exists then the Director General initiates an investigation to assess the AAEC. As the AAEC is nowhere defined in the Competition Act, 2002, the DG is forced to place reliance on either the presumptive rule or the rule of reason with each case and then arrive at a conclusion. The same leads to much discrepancy, arbitrariness and inconsistency in the regulation of competition law in the country[1].

What makes it even more difficult is that people who come together to keep up prices do not shout from the house tops. They keep it quiet. They make their own arrangements in the cellar, where no one can see. They will not put anything into writing not even into words. A nod or

[1] Report of the High Level Committee on Competition Policy and Law, (Chairman S.V.S. Raghavan) 2000

wink will do. The Parliament as well is aware of this. So it is actually not only an agreement so call it any "arrangement" however informal[2].

Any agreement that restrains persons or place or prices would not be *perceived* bad. The question is whether the restraint is such as to regulate and to promote competition or suppress competition. It will be bad, if it destroys competition. These acts are defined as a) acts peculiar to the business (b) condition before and after restraint and (c) probable effects of restraint, has to be considered. The rules laid down by the Supreme Court arc popularly known as the rule of reason[3].

To identify an agreement and then reproving it as an anticompetitive agreement has always been a grey area in anti-trust cases[4]. Due to which the courts have devised apparatus of investigation in order to expeditiously come to a rational conclusion. Of the numerous legal principles that have become the cornerstone of anti-trust common law none have attracted more attention then the rules of "per se" and the "rule of reason". These two rules have been helpful in ascertaining that whether or not a particular agreement is anti-competitive.

The presumption raised under Section 3(3) is that of "AAEC". If there is sufficient proof to establish that the opposite parties are engaged in any of the restricted activities laid down in the sub-section then the commission shall presume that there is "AAEC". Two possible scenarios appear once "AAEC" is presumed. The first being that opposite parties may rebut the presumption by showing that their actions don't fall tainted with any of the clauses [(a) to (d)] of the sub-section. The other being when the parties rebut the presumption by availing the grounds laid in section 19(3) of the act.

The first scenario appears to be reasonable and to a certain extent echoes the spirit of the "per se" rule. The opposite party, if this scenario were to prevail, will not be allowed to show the pro-competitiveness of their actions[5]. Thus the only grounds available for rebuttal are those

[2] Union of India v. Hindustan Development Corporation, (1993) 3 SCC 499
[3] Tata-Engineering(Telco) v. Registrat of Restrictive Trade Agreement, (1977) 2 SCC 55
[4] White Motor Co. v. United States, 372 US 253 (1963)

[5] Federal Trade Commission v. Superior Court Trial Lawyers Association, 493 US 411 (1990)

laid down in clauses (a) to (d) of section 3(3). However such a situation will not arise because of the language of the sub-section. The sub-section raises a presumption of "AAEC" and therefore rationally the grounds for determining "AAEC" should also be the ground for rebutting "AAEC".

In the second scenario if the opposing parties are permitted to buttress their defence by seeking aid of 19(3) then the whole process will be reduced to a "rule of reason" analysis and not a "per se" rule[6]. The "rule of reason" evidently mandates an elaborate analysis in to the reasonableness of an agreement and sub-section (3) of section 19 enables the opposite parties to do the same but the language of the Act inadvertently negates the true spirit of the "per se" rule.

The use of the words "shall be presumed" gives rise to a "presumption" against the opposing parties. The principle of 'shall presume', used in section 3(3) has been explained by courts in India in numerous cases such as in *Sodhi Transport Co.* v. *State of Uttar Pradesh*[7] and *R.S. Nayak* v. *A.R. Antulay*[8]. In *Sodhi Transport Co.,* the court observed that:

'The words "shall presume" have been used in the Indian judicial lore for over a century to convey that they lay down a rebuttable presumption in respect of matters with reference to which they are used…and not lying down a rule of conclusive proof.'

The court also observed that *'A presumption is not itself evidence but only makes a prima facie case for the party in whose favour it exists. It indicates the person on whom the burden of proof lies. But when the presumption is conclusive, it obviates the production of any other evidence. But when it is rebuttable, it only points it the party on which lies the duty of going forward on the evidence on the fact presumed, and when that party has produced evidence fairly and*

[6] Copperzueld Corporation v. Intieptlhicirce TubeCorp., 467 US 752 (1984)

[7] AIR 1980 SC 1099

[8] AIR 1986 SC 2045

reasonably tending to show that the real fact is not as presumed, the purpose of presumption is over'[9]

It is perceptible that the language used in section 3(3) imposes a limitation on the competition authorities to apply the per se rule in its true spirit. Indian Competition law vide Section 3 does not provide for a case-by-case application of the per se rule. If the "per se" rule has to be applied in its true spirit then the legislature has to rephrase the language of the section. The words, "shall be presumed" creates considerable doubt in the minds of legal practitioners. There is an absolute need to have a 'per se' rule in India especially while dealing with serious offences like bid rigging. However policy makers must also conceive of a "per se" rule that suits Indian conditions.

Dumping goods on distributors and pressurizing them to little more than the minimum quantity stipulated in the distribution agreement, and ill effect of distorting competition and trade practice of linkage of discriminatory discounts with off take has to be tested by rule of reason[10].

In *UPSE v. National Stock Exchange Limited*[11] When various fee waivers and the low level of deposit requirements only with respect to the CD segment of NSE were considered completely at a variance with its conduct in other segments and were aimed at eliminating competition and discouraging potential entrants, it was found to be violative of the Competition Act 2002.

When Volkswagen India. Honda India and Fiat India entered into agreements with authorized dealers, which imposed unfair process on the sale of auto spare parts and restricted the free availability of genuine auto spare parts in the market, the CCI held that this amounted to a contravention of the anti competitive policies and penalized the companies[12].

[9] Sodhi Transport Co. v. State of Uttar Pradesh, AIR 1980 SC 1099

[10] Re. Tata Iron & Steel Limited and Indian Tube Company Limited, RTP Enquiry No. 39/1984, order 23/9/1987

[11] 2013 Comp LR 404 (CCI)

[12] Shamsher Kataria v Honda Siel Cars and Ors., 2015 CompLR 753 (CCI)

Very recently, in *Competition Commission of India vs. Co-ordination Committee of Artists and Technicians of W. B. Film and Television and Ors*[13], the Supreme Court held that while conducting an analysis of anti-competitive agreements, the first and foremost aspect that needs to be determined is the *relevant market.* This term as such does not appear in section 3; therefore, until this judgment was pronounced once an agreement fell under any of the four categories of section 3(3) [14]it was presumed to cause appreciable adverse effect on competition without requirement of any further proof.

This proved to be an important step as the rule of reason is required to be exercised in these matters, because the per se rule might not be adequate.

CONCLUSION

The Courts in India have adopted a balanced "common law" approach towards economic policy decisions taken by the Government, which is characterised by:

1. Deference to policy making powers as expert-decisions which Governments and the Parliamentary accountability mechanism are best suited to evolve[15]. The Courts treat policy decisions as involving choices between various options, which require exercise of discretion[16], and in this context recognize that the concerned authority must be seen to have flexibility.
2. Where policy issues are delegated to expert bodies, Courts exercise judicial restraint in interfering with the decisions of such bodies unless the same are found to:

- Fall foul of Wednesbury's reasonableness and proportionality (as adopted and evolved in Indian Courts in context of the constitutional "reasonability" doctrine enshrined as a fundamental right under Article 14 thereof)[17];

[13] AIR 2017 SC 1449

[14] Competition Act, 2002

[15] Leelabai Gajanan Pausare v. Oriental Insurance Co. Ltd., (2008) 9 SCC 720

[16] State of Goa v. Western Builders, (2006) 6 SCC 239

[17] BALCO Employees' Union v. Union of India, (2002) 2 SCC 333

- Violate or unreasonably restrict any fundamental or constitutional right[18]; and/or
- Ultra vires the present statute[19].

One of the avowed objectives of the Act is to promote consumers' welfare by preventing market distortions caused by such actions and agreements of the enterprises which militate against the competition and consumers' interest. The competition law by its very nature envisages that there are situations where the Commission has a role and has to control behaviour of the enterprises in the market place in order to achieve consumer welfare. If an enterprise wants the Commission to believe that the agreement covered under section 3(3) did not have adverse effect on the competition in the markets, the onus would lie on such enterprise to rebut the presumption created by law under this section[20]. The Act aims to prevent practices by parties that have AAEC in India. This can ensure freedom of trade and would protect the interest of all the parties, including consumers. But such an aim would not be achieved unless the parties doing business follow the principles laid down in the Act. It is important for the parties while doing business in India to keep a check on retaining any anti-competitive element in the agreements between them. The test for what should be termed anti competitive, can thus after much analysis be summed up as any restraint is of essence, until it merely regulates and promotes competition. To determine this question, the Court must ordinarily consider the facts peculiar to the business to which restraint is applied, its condition before and after the restrain was imposed, the nature of restrain and its actual or probable effect[21].

[18] Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617
[19] Cellular Operators Association of India v. Union of India, (2003) 3 SCC 186
[20] Ramakant Kini Informant v. Dr. L.H. Hiranandini Hospital, 2014 Comp LR 263 (CCI)

[21] Board of Trade of City of Chicago v. US, (1918) 246 US 231

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