

JURISDICTIONAL OVERLAP OF COMPETITION LAW IN THE REGULATION OF PROFESSIONAL SPORTS IN INDIA

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ABSTRACT

The Competition Commission of India, (“CCI”) is responsible for promoting competition and preventing anti-competitive activities and monopolies in the market which encompasses multiple industries like telecom, steel, electronics, automobile, cement, real estate, e-commerce sector as well as the sports sector. All these industries further have their own sectoral regulatory bodies which are instrumental in effective and speedy redressal of grievances. However, issue arises when this jurisdictional overlap between the CCI and sectoral regulators acts as a hinderance to the successful regulation of the said sector. Owing to the fact that the Sports Industry also has various sectoral regulatory / governing bodies like the Indian Olympic Association, Board of Control for Cricket in India, Athletics Federation of India, Hockey Federation of India, All India Chess Federation, Indian Volleyball Federation, etc., specific to each sport, there is a sharp jurisdictional interface between the CCI and various statutory sports bodies. In recent times, the sports’ governing bodies are found to indulge in anti-competitive practices and are coming under the radar of the CCI for abusing their dominant positions. However, due to the presence of overlapping authorities, the sports sector remains in turmoil over the applicability and validity of orders passed by the CCI to another statutory body like sports’ governing bodies. This paper attempts to arrive at a feasible solution for the proper and effective regulation of professional sports in India, which can be done in a manner which does not result in anti-competitive practices, while keeping in mind the peculiarities of sports governing bodies.

INTRODUCTION

The question of “Sports law” or “Sports and the Law,” is an extensively debated topic. This is largely due to the sports field incorporating within its sphere various legal regimes like labour laws, contract laws, criminal laws, administrative laws, competition law, intellectual property rights, law of tort, and media laws, among others. Since sports issues cross paths with other substantial legal areas, it was not considered to be an independent legal field and was traditionally viewed as a form of entertainment or as a leisure activity rather than as a business activity, and such a myopic interpretation necessitated no market regulation. Today, with the commercialisation of sports, it has emerged as a dominant market with scope for legal disputes. Accordingly, even though sports bodies are free from political interference, sports as a “market”, necessitates regulation of some sort. Under the current national legal system, the Competition Act, 2002 is responsible for governing all sectors and markets across the nation, and accordingly, the inevitable regulatory interface between sports and competition law begins. The **First Part (I)** of the paper seeks to analyse whether the Competition Commission of India (“CCI”) should be allowed to regulate sports related matters. The **Second Part (II)** discusses the quintessential nature of Sports Governing Bodies (SGBs) in India and analyses whether their “pyramidal structure” mandates self-regulation or if it leads to monopolisation and briefly discusses the scope for improvement of sports regulation in India. The **last part** summarises the views put forth by the author throughout this paper and concludes.

JURISDICTION OF THE CCI IN SPORTS RELATED MATTERS

Whether the Competition Commission of India should have Jurisdiction to Regulate the Sports Market?

The Competition Act, 2002, (“**Competition Act**”) is applicable to all sectors and industries within the country. The primary objective of the Competition Act is to “prevent activities and practices that may adversely affect competition in the country.”ⁱ The Competition Regulator of the country, the CCI also undertakes a positive duty to promote and protect competition in the various markets. In furtherance of this objective, the Act prohibits “anti-competitive

agreements”ⁱⁱ and states that “No enterprise or association of enterprises or person or association of persons shall enter into 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 within India.”ⁱⁱⁱ In order to understand if the Indian Sports Governing Bodies and Federations have indulged in such anti-competitive behaviour, it is first pertinent to understand if the above provision applies to them. SFs And SGBs qualify as an enterprise by virtue of:

(i) Being A “Person”

An *enterprise*^{iv} as defined under the Act, includes “a person or Governmental Department that is engaged in the provision of services of any kind.”^v Therefore, Sports Federations and Governing Bodies can also be viewed as “a person”^{vi} for the purposes of Section 3, because a person includes “an association of persons or a body of individuals, whether incorporated or not, in India or outside India.”^{vii} Although Sports Federations and Bodies are free from state and political interference, certain bodies like The Ministry of Youth And Sports Affairs (MYAS) can be considered as a Department of the Government as well.

(ii) Nature of the activity carried on by them

A Sports Federation can be considered as an enterprise under The Competition Act, if it engages in an economic activity for the purpose of generating revenue or income.^{viii} Activities like levying of entrance fees,^{ix} and organising sports events which involve sale of tickets and granting media rights^x qualify as revenue generating economic activities. In view of the decisions passed by the CCI, it can be deduced that the guiding factor to determine whether a sports federation is an enterprise or not, is the “**Nature of Activity**” carried on by that particular Body. Accordingly, Sports Federations are considered commercial enterprises to the extent to which they carry out such economic activities and therefore such activities fall well within the regulatory and jurisdictional boundaries of the CCI.

THE IDIOSYNCRATIC STRUCTURE OF SPORTS GOVERNING BODIES

A. Pyramid Structure of Sports Governing Bodies

One of the elements that is idiosyncratic to sporting bodies not only in India but globally, is its structure of governance. This peculiar structure is popularly known as the “Pyramid Structure,” and refers to a system that has a globally recognised organisation at the head and single member organisations from various countries under it. These member organisations then get the status of being the apex sport’s governing body in their respective countries. In India, it is the Indian Olympic Association (“IOA”) that has primacy. In India, Sports is a State subject wherein the word “entertainment” finds mention in the Constitution under List II, Entry 38. The various State Olympic Associations (“SOAs”) and National Federations (“NFs”), whose main objective is to promote sports and organise sporting events in the nation, come under the IOA. The Government of India also has quite the role and the Ministry of Youth Affairs and Sports (“MYAS”) is responsible for providing financial and infrastructural assistance to the SOAs and NFs. The above mentioned Olympic Associations are for sports that are played in the Olympics, whereas, non-Olympic sports have their own respective federations like Board of Control for Cricket in India (“BCCI”), All India Chess Federation (“AICF”), etc and they are directly under their respective International Federations similar to IOA. This structural hierarchy that exists within Sporting bodies is more commonly referred to as the Pyramid Structure as already mentioned above. The EU Commission^{xi} adopted the Helinski Report on Sports which was responsible for advocating the preservation of this “pyramidal structure” in sports and said that the existing singular or somewhat monopolistic structure is essential to maintaining the uniformity of sports, and keeping it free from political encumbrances.^{xii} It is also responsible for furthering the integrity and standard of sports in the country. In view of this “pyramid structure,” many Indian sports’ governing bodies claim that they should be given autonomy of governance and that they be given certain exemptions in the eyes of law. In view of the above contention, they also claim exclusion from being analysed as a market under the Competition Law Regime and reasons that it is necessary due to the “Specificity of Sports Bodies.” The above contention raised by Indian SGBs must be analysed in light of the existing

international principles on the same, as both sports law and competition law are still at a very nascent stage in India.

B. Are Absolute Sports Monopolies Really Beneficial?

(i) Conditional Autonomy of SGBs & Distinction Between Their Functions

The doctrine of restraint of trade was applied to the sports context as early as the 1970s, by the English Courts.^{xiii} Earlier, even the European Commission was of the opinion that sports should be completely excluded from the purview of competition law however, a lot has changed since then, and there was demand in the European Community that a distinction be drawn between “purely sporting functions” and “administrative functions incidental thereto” and other functions of the sports governing bodies that have a “substantial economic impact.”^{xiv} Consequentially, the EC advocated that “instead of an outright exception of pure sporting rules as was advocated previously, there should be segregation.”^{xv} Many other jurisdictions are of the opinion that “*It is not the power to regulate a given sporting activity as such which might constitute an abuse but rather the way in which a given sporting organisation exercises such power,*”^{xvi} therefore, sports governing bodies enjoy a certain amount of autonomy in the sphere of “setting rules and regulations of the game.”^{xvii} This conditional autonomy is beneficial to the sports governing bodies because they are free to function without political hinderance while it is beneficial to sports as an industry because the autonomy i.e., “conditional autonomy.” This theory of conditional autonomy of sports bodies states that pure sports functions will not come under the radar of competition law whereas the economic aspect would not be excluded from the purview of competition regulation.^{xviii} The EU courts have held that excluding the former from competition regulation will enhance the integrity of sports and therefore must be allowed in larger public interest.^{xix} Due to the above changes in European Law, there was a recommended that there be two categories of functions undertaken by sports governing bodies: (i) Rules and activities essential for governance; (ii) Activities with economic repercussions. Both these categories must be in proportion to the objectives of sporting exemptions.

(ii) Proportionality Test

In India, Sports Governing Bodies and Federations are registered as societies,^{xx} and the CCI in the recently held in the *Hockey India case* that such societies would qualify as “a person” under Sec. 2 of the Competition Act and can therefore be prosecuted by the CCI if they are found indulging in any anti-competitive practices.^{xxi} In this case, Hockey India (“HI”) had allegedly denied market access to the sponsors, organisers, and players belonging to the Indian Hockey Federation and also further imposed restrictive conditions of agreement on the players belonging to rival leagues which constitutes an anti-competitive agreement in contravention to Sec. 3 of the Competition Act. The CCI in the above instance held that HI enjoyed a dominant position by virtue of being the sole hockey regulator in India, however, it ruled that there was no “abuse of such dominance” when viewed in proportion to the objectives of HI and with the policy of the Olympic Charter which recognizes only one single federation from any nation for a particular sport.

(iii) Government Policy

In *SAIL v. Jindal*,^{xxii} the CCI held that SAIL and Indian Railways were not in contravention of Sec. 3 and 4 of the Competition Act even though there was a monopoly, because the lack of competition in the railway services market is due to “government policy.” Similarly, in the *Hockey India case*,^{xxiii} the CCI pointed that HI was the sole regulator on Hockey in India because of the pyramid structure and existing government policy which protects such a structure. However, CCI held that HI cannot abuse its regulatory power while carrying out any function incidental to its commercial activity. In the *BCCI case*,^{xxiv} the CCI held that the monopoly of sports federation is a natural outcome of the Pyramid structure. However, the CCI held that since the BCCI extended its monopoly to its commercial activities and BCCI itself became a beneficiary of the commercial activity, it could not claim exemption for being a monopoly due to the pyramid structure.

C. Accountability & Transparency: The Way Forward

With the paradigm shift in opinion that sports are not merely a leisure activity but is also a business activity capable of having substantial economic impact on the market,^{xxv} and with increase in commercialisation of sports, it is but necessary that issues with regard to the role

and liability of the sports governing bodies coming to the fore.^{xxvi} In view of this, the paper recommends that there should be a National Sports Policy which advocates *accountability and transparency*. These ideals if strictly followed will ensure that there is utmost efficiency and zero anti-anti-competitiveness and corruption in the sports field. In order to hold sports governing bodies accountable for their actions, an independent sports regulator can be introduced in the country. This regulator should possess jurisdictional authority with regard to all sports related matters to ensure that a conflict between competition law and sports law is avoided to the maximum extent possible. Such an independent sports regulatory authority can function on the lines of Telecom Regulatory Authority of India (TRAI). This independent regulator should be responsible for the regulation of sports governing bodies in order to ensure that there is fair play and a level playing field. This change can be introduced through the passing of legislation that is similar to the Australian Sports Commission Act, 1989 which was responsible for the establishment of the Australian Sports Commission (“ASC”) as a statutory sport regulatory in Australia. Further, there is a proposal for the creation of an “Appellate Sports Tribunal”^{xxvii} in order to settle all disputes arising from sports issues so that there is a system of transparency which upholds checks and balances in the otherwise autonomous sports governance structure.

CONCLUSION

The commercialization of sports has led to the need for a regulatory framework for sports as a market. The current market regulator (for all markets) in India is the CCI set up under the Competition Act. The CCI can also exercise its regulatory functions over sports governing bodies by virtue of them qualifying as “a person” as they are established as Societies under the Societies Registration Act. However, the contention of the SGBs who claim complete exemption from the purview of competition law is that the pyramid structure which is essential to the functioning of these sports governing bodies, may be affected if the CCI is allowed to regulate it. However, in line with global standards, the CCI has passed various judgements that has now established that sports governing bodies can be exempt from competition regulation only when they are carrying out “purely sporting functions” and will be regulated by the CCI in case of any “commercial activity having economic impact.” Taking cue from the Australian

model, which is touted to be one of the best sports governance models in the world, it is suggested that an independent body or tribunal, in line with TRAI can be set up to regulate sports and related disputes. This can be a feasible solution to SGBs that feel that CCI's interference is a threat to their political and structural independency. However, until an independent regulator for sports, is established, CCI should have jurisdiction over the commercial activities undertaken by SGBs.

ENDNOTES

- ⁱ Preamble to The Competition Act, 2002, (as amended in 2007).
ⁱⁱ Section 3, The Competition Act, 2002, (as amended in 2007).
ⁱⁱⁱ *Id* at 3.
^{iv} Section 2(h), The Competition Act, 2002, (as amended in 2007).
^v *Id* at 4.
^{vi} Section 2(l), The Competition Act, 2002, (as amended in 2007).
^{vii} Section 2(l) (v), The Competition Act, 2002, (as amended in 2007).
^{viii} D. Pillay v. M/S Hockey India, Competition Commission of India, Case No. 73/2011, (2011).
^{ix} Hemant Sharma v. Union of India and Ors, W.P. (C) 5770 of 2011.
^x *Id.* at 8.
^{xi} EU Commission Report *IP/99/918*, adopted in Brussels, Dec., 1, 1999.
^{xii} EU Commission *Helsinki Report on Sports*, 1999.
^{xiii} Greig v. Insole, 1 W.L.R. 302, (1978).
^{xiv} David Meca-Medina v. Commission of the European Communities, ECR I-6991, (2006).
^{xv} White Paper on Sports, European Commission, 2007.
^{xvi} *Commission Debates Applications of Competition Rules to Sport*, European Commission Press Release, Feb. 24, 1999, IP/99/133.
^{xvii} Weatherhill S., *Is the Pyramid Compatible with EC Law?* 4 ISLJ, 3, 3-7. (2005).
^{xviii} *Id.* at 14.
^{xix} *Id.* at 14.
^{xx} The Societies Registration Act, 1860.
^{xxi} *Id.* at 8.
^{xxii} SAIL v. Jindal, Competition Commission of India, Case No. 11/2009, (2009).
^{xxiii} *Id* at 3.
^{xxiv} S. Barmi v. BCCI, Competition Commission of India, Case No. 61/2010, (2010).
^{xxv} Martijn van de Hel, *Competition Law and Unfair Competition in Sports*, MAVERICK 25-05-2018 (May 25, 2018, 11:28 PM), <https://www.maverick-law.com/en/blogs/competition-law-and-unfair-competition-in-sports.html>
^{xxvi} 2 AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS 167-172 (1997).
^{xxvii} Draft National Sports Development Bill, 2013, Working Group under the chairmanship of Justice (Retd.,) Mukul Mudgal.