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PREVENTING MONOPOLIES VIS-À-VIS ANTITRUST LAWS IN INDIA

ABSTRACT

A market is considered competitive when buyers have an equal opportunity to utilise any company's product without experiencing unbalanced costs. In a market like this, different businesses and entrepreneurs produce a specific product, but none of them takes the lead and creates a monopoly. However, a market in which one business outcompetes everyone else and denies them a fair opportunity to expand could also have an impact on the national economy. The consumer will be forced to use the goods produced by just one business. A market like this is referred to as monopolistic. In a monopolistic market, there are variations in price because there isn't the equilibrium that is established between the seller and the buyer or consumer as there is in a competitive market. Because of this, the market needed to be regulated in order to prevent companies from becoming monopolies. Antitrust laws were passed with that goal in mind. The act governing anti-competitive practices and monopolistic markets in India is the Competition Act, 2002.

In this paper, the development and current scenarios of antitrust laws in India will be discussed.

INTRODUCTION

The laws that control the market and its operations are known as antitrust laws. The goals of these laws are to stop monopolies and lessen unfair trade practices. With the passage of the Sherman Act in 1890, the idea of antitrust laws was first introduced in the United States. The MRTP Act addressed similar issues in India, but as industrialization and urbanisation grew, the Parliament felt the need to create a new Act to address the growing incidence of unfair trade practices and regulate businesses. As a result, in 2002, the Competition Act was passed and the Competition Commission of India was set up to check the enforcement of the Act. In 2007, it underwent additional amendments, and NCLT was created to expedite the resolution of cases. The main objective of this Act is to promote economic efficiency, keep checks on monopolies

and unfair trade practices in the market and look after the interests of consumers. The Act is discussed below in detail along with relevant provisions of it on antitrust activities and case laws.

WHAT IS A MARKET MONOPOLY?

A market monopoly occurs when one company, or a group of companies, controls and dominates a sizable portion of a specific market or industry. A monopoly occurs when a single supplier or manufacturer offers a particular good or service, and customers are not able to find reasonably priced alternatives. As a result, the monopolistic entity gains significant market power that it can use to control the supply of goods and services, set prices, and affect market conditions. These practices are called anti-competitive practices and the companies by hiking prices and controlling market supply and demand abuse their dominant position in the market.

FEATURES OF A MARKET MONOPOLY

- A monopoly occurs when a single organisation controls the whole market. This business is the only one offering a specific good or service.
- When substantial obstacles prohibit new competitors from joining the market, monopolies frequently develop. High startup costs, initial access on resources, restrictions from the government, or fervent brand loyalty are a few examples of obstacles.
- Customers usually have no alternative options for the product that is offered by the monopolistic company.
- A monopoly has a significant amount of market power which permits it to control prices without any fear of competition. This leads to higher prices for customers.
- The monopoly has a control over the supply of the product which gives them the power to determine its quantity and control its supply.
- There is no competition in a monopolistic market for their specific product.

NEED FOR ANTITRUST LAWS

It is important that consumers have a choice in any given product, when it comes to businesses. In a monopoly, consumers are restricted to only one product with a very high price and no other option. They don’t have any power to negotiate in such a situation, leaving them with no choice. To avoid such cases, it is important to have laws regarding antitrust and competition to regulate

monopolies and conduct fair trade practices. These laws are important to protect the interests of consumers.

The laws implemented to regulate such practices and to provide a free and open market are knows as antitrust laws. These laws set forth guidelines for the right way for businesses to operate in the market without engaging in unethical behaviour. They aid in preventing the formation of numerous businesses with the goal of deceiving customers and manipulating prices to keep the market under control. The Competition Act of 2002 is the current law that fulfils the function of antitrust laws in India.

LAWS GOVERNING ANTITRUST IN INDIA

DEVELOPMENT OF ANTITRUST LAWS

The development of antitrust laws happened in two phases- pre-liberalization and post liberalization.

1. Pre-liberalization- During this time, India was still gaining independence and was having difficulty setting up systems of governance and other controls over the behaviour of its government agencies. The Planning Commission was established at the time by the government to examine the expansion and stability of every industry in the nation. In its First Five Year Plan, the Commission prioritised the rehabilitation of the suffering refugees left behind by the division. Up until the Second Five Year Plan, the Indian market's stability and economy received no attention. The Mahalanobis Plan is another name for the Second Five Year Plan. The adoption of the Mahalanobis Model aimed to quicken the industrialization process. The plan's objective was to create an increasing number of industries in order to boost the manufacturing process and broaden the market, ultimately leading to the establishment of a socialistic society. The government created the Monopolies Inquiry Commission in 1965 to report on the terms of a specific company's monopoly in the market and recommend measures in response to the emergence of industries and businesses in the market. This move was motivated by the government's perception of the need to control monopolistic practices. Parliament passed The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) based on a recommendation from the Commission to prevent monopolies and guarantee equitable resource distribution to all industries. However, the act was vague

and could not prevent practices like cartelisation, predatory pricing, abuse of dominant position and mergers and acquisitions.

2. Post-liberalization- In the past, the government neglected the benefits of competition in favour of keeping monopolies out of the market. Because state-controlled industries lacked competition, they had little faith in the advancement of goods and services. Following liberalisation, the economy shifted from being governed by the state to being governed and powered by the market. Foreign businesses and investors also made investments in Indian industries and markets during this time. To encourage foreign investment, the government chose to simplify the process. However, the MRTP Act was unable to achieve the goal; consequently, the Raghavan Committee was established to address it. The Committee suggested drafting new laws and repealing the Act. Adopting laws that promote market competition and provide consumers with options was one of the committee's other recommendations. The Competition Act of 2002 was passed as a result of this. The Act allowed for fair trade and business in the Indian market, safeguarded consumer interests, and encouraged competition. It gave companies the chance to defend against anti-competitive practices if they had a good reason to do so, but it did not entirely outlaw all monopolistic practices or make mergers and acquisitions illegal. All businessmen and industrialists were granted the freedom to engage in free trade, subject to reasonable limitations. This Act, which continues to be known nationwide as the Antitrust Law, serves all the purposes.

COMPETITION ACT, 2002

The Raghavan committee suggested regulating unfavourable acts that have an impact on competition. This led to the passage of the Competition Act 2002 by the parliament. The MRTP act was gradually phased out starting in 2010, at which point the act took effect. The act's preamble recognises the connection between the nation's economic expansion and the requirement for a competition policy.

The act gives jurisdiction to the Competition Commission of India (CCI) on every anti-competitive agreement, abuse of position by a company having a dominant position in the market or such combinations outside the country or have an Appreciable Adverse Effect on the Competition (AAEC). It provides that all such agreements are not permitted and, hence, will

be void. It also talks about horizontal and vertical agreements. Let us discuss the Act concerning antitrust in detail.

1. Anti-competitive agreements- Section 3 of the Act deals with anti-competitive agreements that are signed by the parties. The Act mentions two types of anti-competitive agreements. These are:

    - Anti-competitive horizontal agreements (Section 3(3))- Horizontal agreements are those that are entered into by parties on the same level of a supply chain. Such agreements include:
        - Agreement for fixing a price,
        - An agreement limiting the production or supply,
        - The agreement that allocates the market,
        - Agreement of colluding biddings.
    - Anti-competitive vertical agreements (Section 3(4)) – These are made by the parties during production, distribution, supply etc. who are different levels of a supply chain. However, some conditions are necessary in order to protect the intellectual property rights and are not seen as a violation of the Act as per Section 3(5). The following are such agreements:
        - Tie-in arrangements,
        - Arrangement of exclusive supply,
        - Refusal to deal,
        - Maintenance of resale price.

2. Abuse of dominant position- Given under Section 4 of the Act, it states that if a company uses its position in the market to gain control of the market in its entirety and then abuses such position, it is said to be abuse of dominant position. Acquiring a dominant position on the market is not a crime but abusing such position is against the Act. The following acts committed can be said to be abuse of dominant position-

    - If the company imposes unfair prices on consumers including predatory pricing. For example- Amazon has been accused of predatory pricing; keeping prices of

products below cost as to attract customers and drive competitors out of the market.

- If the position is used to limit production or development
- Blocking of free entries in the market and being a barrier

In the case of Pankaj Aggarwal v. DLF Gurgaon Home Developer Private Ltd[1]., it was held by CCI that "the terms and conditions only in the favour of the enterprise will be considered as one sided in the buyer's agreement as well as abusive. Such conditions shall be treated as exploitative on the part of the purchaser."

In another leading case law of Google v. Competition Commission of India[2], it was held that Google had abused its dominant position in the online market, which had denied other companies access to the market, thus creating a barrier on free entry.

3. Cartel agreements- Some agreements cause appreciable adverse effect on competition (AAEC) in the market, which are an offence under the act. Such agreements are called cartel agreements and are a type of horizontal agreements.

4. Mergers and Acquisitions- Any combination such as merger or acquisition must comply to the provisions of Section 5 and 6 of the Act. Such combinations need to get prior approval from CCI. The de minimis test (the threshold below which the exempted input tax is considered insignificant) and filing of such mergers and combinations are the two prerequisites. Additionally, the Act grants the CCI jurisdiction over all combinations, including those that are made outside of the nation. In the event of a merger or amalgamation, notice must be given within 30 days of the board of directors' approval, or, if an acquisition, within 30 days of the agreement's execution indicating the intention to purchase a business. The failure to adhere to the guidelines will lead to an investigation by the CCI.

PUNISHMENTS UNDER THE ACT

[1] Pankaj Aggarwal v. DLF Gurgaon Home Developers Private Ltd., (2015)
[2] Google v. Competition Commission of India, (2023) SC 88

The Act authorises CCI to impose the following penalties in case of contravention to the provisions of the Act. Anti-competitive agreements may result in fines of up to 10% of the average turnover over the previous three fiscal years. The penalty for cartel agreements is three years' worth of profits made during that time. It may also request a change to the agreements or an order to desist. In addition, Section 42 of the Act imposes penalties for breaking the Commission's order, and Section 44 of the Act imposes penalties for providing false information. The Act also gives CCI the authority to apply lenient penalties in accordance with Section 46.

IMPACT OF THE COMPETITION ACT ON OTHER ORGANISATIONS

1. Organisations run by the State- These comprise of several kinds of state-controlled organisations and public sector projects. They had a monopoly in the market prior to liberalisation, but as a result of the private sector's boom, they lost their monopoly. These organisations typically struggle because they cannot compete with the private sector because of their higher production costs. They are not, however, free from the Act's jurisdiction, and no clause affects the independent operations of these organisations, if any.

2. Medium and small-scale industries- India's medium-sized and small-sized industries are still relatively unknown. They sometimes find it difficult to compete with large private industries and combine to create a combination. They also engage in bid rigging, which the Act defines as an anti-competitive practice. As a result, the Act governs them, and any behaviour that the Act declares unlawful will be penalised.

3. E-Commerce- The growth of online retailers such as Amazon, Flipkart, Zomato, and others has presented a new challenge: safeguarding small-town merchants. This kind of online commerce frequently establishes a connection between the buyer and the seller and even sets fees. Additionally, they charge less for their goods, which clearly disadvantages local vendors who are not affiliated with these businesses and causes them to suffer greatly. Thus, the Act is amended in such a way so as to protect their interests.

COMPETITION COMMISSION OF INDIA (CCI)

CCI is a statutory organisation under the Ministry of Corporate Affairs that was established in 2009 with the goals of policing market competition and guaranteeing honest and open trade. The Act gives it the authority to stop actions that could harm competition and to look into complaints of this kind that are made to it. The Competition Appellate Tribunal (CAT) and the Competition Commission of India were established by the Competition (Amendment) Act, 2007. The National Company Law Appellate Tribunal (NCLAT) took the place of CAT in 2017, but the Competition Commission of India continues to function and handles cases pertaining to Act violations. CCI ensures that consumer interest is protected, promotes healthy competition and handles cases of unfair trade practices, abuse of dominant position and other anti-competitive agreements.

CASES ON THE FUNCTIONS OF CCI

In the case of Competition Commission of India v. Steel Authority of India (SAIL)[3], the Supreme Court upheld the CCI's order to investigate SAIL for anti-competitive practices in supplying rails to Indian Railways. The Court also said that the CCI was a necessary or proper party in any appeal before the COMPAT.

A recent report in 2022 had shown that CCI had approved the acquisition of a telecom player by Google and Airtel. After deciding to invest and purchase telecom players' shares, both parties drew up an agreement for the transaction. However, it was noted that any transaction exceeding the predetermined threshold necessitates regulatory approval. The CCI serves as the regulatory body and this is done to stop unfair trade practices. [4]

Another recent development about the CCI's operations and functioning reveals that it has approved Air India's acquisition of Air Asia, subject to the requirement that it not have any unfavourable effects or detrimental effects on market competition.[5]

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[3]

[4] January 28, 2022.

[5] March 28, 2024.

CCI penalised seven entities that were found guilty of bid-rigging in Indian Railways tenders, with fines amounting to Rs. 30 lacs. One of them applied to the Commission under Section 46 of the Competition Act, 2002, for a reduced penalty, and the application was granted. Additionally, it was decided that if an application for a reduced penalty is submitted to CCI, it must contain a true and authentic disclosure of the specific activity or allegation.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL

Initially, the Competition Appellate Tribunal was responsible for hearing appeals against CCI's decisions. However, in 2017, the Competition Appellate Tribunal was replaced with the National Company Law Appellate Tribunal, which currently handles appeals regarding competition matters.

INTERNATIONAL INITIATIVES GOVERNING ANTITRUST

OECD COMPETITION COMMITTEE

The OECD (Organisation for Economic Cooperation and Development) addresses unfair trade practices through various steps such as the OECD Competition Committee, which encourages communication and collaboration on matters pertaining to competition among member nations.

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

The goal of UNCTAD is to advance global development and trade. Through its Intergovernmental Group of Experts on Competition Law and Policy, it offers advice on competition law and policy and assists nations in putting into place efficient frameworks for competition. It also addresses curb regulations that hinder competition and policies to protect consumers from abuse.

INTERNATIONAL COMPETITION NETWORK (ICN)

ICN is the global network of competition authorities. In order to address the challenges of global competition, it makes member jurisdictions' communication and cooperation easier. The ICN offers a forum for exchanging best practices and creating guidelines pertaining to different areas of competition law.

WORLD TRADE ORGANISATION (WTO)

Through its Working Group on the Interaction between Trade and Competition Policy, the WTO addresses competition policy even though its primary focus is on trade-related matters. The goal is to guarantee that trade barriers are not unnecessarily imposed by competition policies.

CONCLUSION

Even though the current Competition Act provides a robust framework for curbing anti-competitive practices, there is always a need to constantly review and make these laws better so that they are capable of facing emerging challenges. The Act has been effective in keeping market monopolies at bay, but it now faces some additional difficulties. The emergence of the digital economy and e-commerce has given rise to a number of new issues, including network problems, payment delays, privacy concerns, and the protection of data stored online, among others. The likelihood of monopolies in the market has increased even more because businesses with access to e-commerce and the digital economy will draw in more customers. In addition, the number of fraud and cheating cases has skyrocketed. The Act must take care of all of this, so the government must figure out how to handle these issues.