

Analysis on the Competition Law with special reference to Abuse of Dominant of Cartel in India

Virendra Dattatray Phapale

LL.M 4th Semester

School of Law, Sandip University, Nashik, Maharashtra, India

phapale.virendra@gmail.com

Abstract: *Competition law is an integral part of policy making in today's times. In line with this, India enacted its Competition law in the form of Competition Act, 2002. There is certain core areas of competition law of India contained in sections 3 to 6 of the Competition Act, 2002. When it comes to competition law enforcement, India is keeping its date with the developed jurisdictions. Before the advent of competition law, there was in operation what one may call as trusts or cartels across the globe. These were sought to be controlled by competition law. In light of the above, the present paper seeks to analyze the importance of cartel control in India in light of the cartel control provisions in the jurisdictions of the US, EU, Germany and Japan. The present paper confines their study to the aforementioned jurisdictions as the Indian law on competition is based on the relevant country's law as stated above. The present paper shall analyze the problem of cartels, detection and prosecution of cartels and suggest ways to improve cartel control measures in light of the Leniency programmed.*

Keywords: Competition, cartel, Dominant position, CCI, Consumer Protection, Competitive Agreements, abuse of dominance, MRTP, Agreement.

I. INTRODUCTION

There is nothing like "Pure" or "perfect" competition as expressed in a theoretical market structure. This is just a benchmark which is used to satisfy the actual working market structures. But in a situation where not the buyer or the seller has a direct implication over the price of the product or services it produces, the demand and supply are influenced by the price. The independent bargaining of buyers and suppliers is the way by which the price is established. None of the parties involved are not that financially big to have the market power to manipulate the price of a homogeneous product. The Competition Act regulates to make a safe and fair environment which in turn prohibits or prevents the "abuse of dominance" by an „enterprise or

Undertaking" for a smooth and healthy competition. The first step to success is competition. When markets stabilize, the economy gains sustainability, earnings, effectiveness, advancement, and long-term advantages. One such law is the Competition Act, 2002, which aims to eliminate anti-competitive behavior by prohibiting anti-competitive agreements and mistreating market domination situations. As long as it is done in a legal manner, competition is regarded as a healthy practice for fostering chances and acting as a motivator in any profession. Perfect competition is characterized by a market outcome in which all firms sell a homogeneous and perfectly divisible product, all producers and consumers accept prices, all firms have a small market share, and buyers and sellers are fully informed about the market, including the product's price and quality, and there are no externalities. It is the cornerstone upon which the market system and the economy are built. Since consumers frequently are unaware of the effects of such actions and fail to comprehend market monopolies, increasing public awareness of competition law is absolutely necessary. Competition law and policy in India have undergone active interpretation over a period of its evolution. The present article discusses The Competition Act, 2002 by simplifying the same for the readers in terms of its traits, purpose, objective, loopholes, present changes, and overall functioning.

II. HISTORICAL BACKGROUND

In India the competition act 2002, was enacted to repeal the MRTP Act. Fundamentally the competition act, 2002 is a law that addresses Anti- Trust issues. The US Act, the Sherman Act, 1890 which prescribes agreements in restraint of trade, appears to be the earliest Anti- Trust Statue in the World. In India also the contract act was enacted which is earlier than the Sherman Act. The contract Act contains a provision declaring agreements I ret stint of trade as void. The expression restraint of trade was explained by the US Supreme Court in Business Electronic Corporation V Sharp Electronics Corporation (1988) to mean not merely a particular list of agreements but also a particular economic consequence that may be produced by different sorts of agreements in varying time and circumstances. Even before the advent of Glasnost and globalization which started in the early 1990's India had enacted an Anti- Trust act that was known as monopolies and restrictive trade practices Act, 1969. The preamble of the said act advocated a socialistic philosophy by declaring that the act was intend to ensure that the operation of the economic system did not result in the concentration of economic power to the common determent. The act was intended to control monopolies and to provide for the prohibition of monopolistic and Restrictive Trade Practices.¹

III. METHODOLOGY

The nature of this research paper is theoretical; hence the data has been collected through secondary source, for example, reference books, internet, journals, etc. have been widely consulted to develop the plan of the research paper. The study employed a simple framework in identifying the contemporary definitional elements of "reasonable apprehension" and the role excluded by the Supreme Courte of India while exercising its criminal jurisdiction in the matters of concerning private defense of the body under the criminal laws of India.

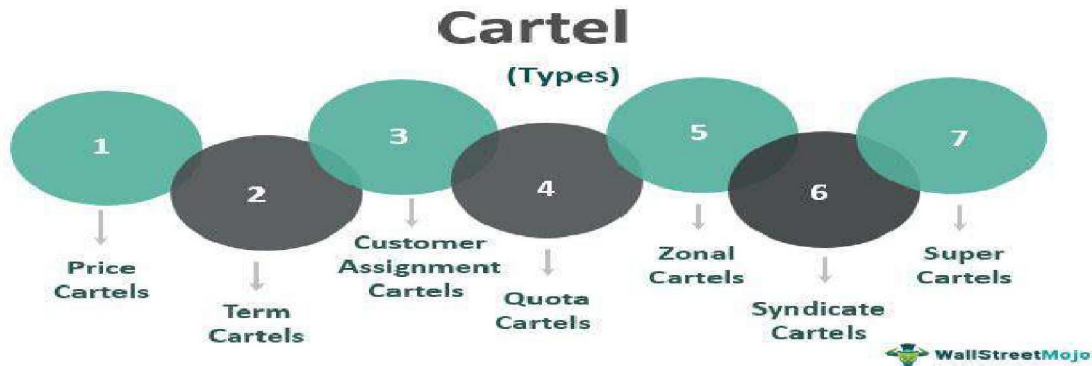
IV. ABUSE OF DOMINANCE OF CARTEL

Cartel is the common concept which refers to anti-competitive agreements and/or concerted practices among competitors including (i) price fixing, (ii) market allocation, (iii) collective refusal to supply/deal (group boycotts), (iv) imposing quotas or (v) collusive bidding in tenders. Such agreements and concerted practices have consistently been deemed to be per se illegal. Cartels are accepted as the most severe competition restriction. They are the result of competitors striving to increase their profits by controlling different market related variables including, especially, price and output. Article 4 of The Law on the Protection of Competition No. 4054 (the "Competition Law") prohibits any form of agreements which has the "potential" to prevent, restrict or distort competition. Lack of effect does not preclude the application of the cartel prohibition. Article 4 does not refer to "appreciable effect" or "substantial part of a market" and thereby excludes any de minimis exception yet. Generally speaking, the rules and principles applicable under the EU competition law on cartel definition would also apply in Turkey. The Turkish Competition Authority treats cartels differently than other practices restricting competition and punishes them in the most severe manner, due to the severe damage cartels do to economy. The Turkish Competition Authority mostly imposes administrative monetary fines on cartelists. Cartel activity may also result in administrative monetary fines on employees/executives with decisive roles in the formation of cartels. Bid rigging cartels may also be subject to criminal sanctions. Last but not least, loaded punitive damages are available for the injured parties under private law. One of the most effective methods competition authorities, including the Turkish Competition Authority, utilize in their fights against cartels is the "leniency programs". The leniency program facilitates the Turkish Competition Authority's work on detecting cartels, which by nature operate in secret. The program provides cartelists the opportunity to be immune from competition law sanctions if they disclose the cartel to the Turkish Competition Authority as the first comer and meet the additional conditions listed in the relevant leniency regulation. For further detail, please see the sections (i) Leniency Program, (ii) Conditions for Full immunity and Reduction of Fines and (iii) Deadlines for Application.²

¹ T. Ramappa, Competition Law In India: Policy, Issues, And Developments (2nd Ed.2009).

² Abuse Of Dominant Position, Legalservicesindia.Com (2002),

Types of Cartels



V. CCI AND COMPETITION ACT 2002

In India the competition act 2002,³ was enacted to repeal the MRTP Act. Fundamentally the competition act, 2002 is a law that addresses Anti- Trust issues. The US Act, the Sherman Act, 1890 which prescribes agreements in restraint of trade, appears to be the earliest Anti- Trust Statue in the World. In India also the contract act was enacted which is earlier than the Sherman Act. The contract Act contains a provision declaring agreements I ret stint of trade as void. The expression restraint of trade was explained by the US Supreme Court in Business Electronic Corporation V Sharp Electronics Corporation (1988) to mean not merely a particular list of agreements but also a particular economic consequence that may be produced by different sorts of agreements in varying time and circumstances. Even before the advent of Glasnost and globalization which started in the early 1990’s India had enacted an Anti- Trust act that was known as monopolies and restrictive trade practices Act, 1969. The preamble of the said act advocated a socialistic philosophy by declaring that the act was intend to ensure that the operation of the economic system did not result in the concentration of economic power to the common determent. The act was intended to control monopolies and to provide for the prohibition of monopolistic and Restrictive Trade Practices. The said MRTP Act was found to be very ineffective due to variety of reasons, one of which was the frequent shift in the industrial policy of the government. Chapter 3rd of the said act conferred power upon the central government to regulate the expansion of and the establishment of new undertaking by any undertaking falling under chapter 3rd of the Act. After the new industrial policy was introduced in 1991, the government removed some important regulatory provisions in the chapter 3rd of the MRTP Act. In other words, the pre- entry restriction on the investment by the corporate sector was removed. With the process of liberalization, India became a party to two important agreements of the world trade organization namely General Agreement on Tariffs and Trade (GATT) and Trade related Aspects of intellectual property Rights (TRIPS). As a result many multinational companies could able to enter in the Indian Market. Therefore, realizing that there was no tooth for the MRTP Commission under the MRTP Act and that a new law was the need of the hour, the central government constituted a high level committee of competition policy and law. The committee undertook an exhaustive study of the government policies, their effect on the industrial structure in India, the deficiencies of the Indian industries to compete with multinational and then submitted its report. The major recommendations made by the Competition Law promote or seeks to maintain market competition by regulating anti-competitive conduct by companies.

³ Avtar Singh & Harpreet Kaur, Competition Law (1st Ed. 2012).

VI. INDIAN COMPETITION ACT

The Competition Act provides in section 4 for the prohibition of abuse of dominant position: Section 4: Abuse of Dominant Position.⁴

(1) No enterprise shall abuse its dominant position.

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,—

(a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and

unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition; or

(b) limits or restricts— (i) production of goods or provision of services or market therefore; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or (c) indulges in practice or practices resulting in denial of market

access; or (d) makes 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 such contracts; or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favor;

(b) “predatory price” means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

VII. CONSTITUTIONAL PROVISIONS

Competition Commission

The Competition Commission of India is established under the Competition Act, 2002.⁵ It is a statutory body that has the power to govern and enforce the Competition Act including penalties. It was established when the need for a healthy competitive environment became necessary following liberalization under the Vajpayee government. The Commission is composed of a chairman and a minimum of 2 board members and a maximum of 6 board members. These members are required to have a minimum of 15 years of experience in their respective fields. Its objectives, duties and powers are enumerated in the Competition Act, 2002. Its main duty and object is to ensure that the Indian markets maintain a healthy and fair competitive environment and is granted the power to ensure such an environment and penalize any acts adversely affecting its duties. Regulation of Combination The term combination has a broad definition under the Act, it includes:

• any acquisition of shares, • voting rights, • control of assets, and • party to merger or amalgamation of enterprises.

Any person/enterprise shall not enter into a combination that is likely to have an adverse effect on the competition and such a combination will be void. If any person/enterprise proposes to enter into a combination he shall intimate the Competition Commission of India within 30 days of:

• Approval of the proposal relating to mergers and amalgamation by the Board of Directors of the enterprises involved in the process.

⁴ Abuse Of Dominant Position In Indian Competition Law: A Brief Guide, The Centre for internet and society (2017).

⁵ [Http://Www.Legalservicesindia.Com/Article/Article/Abuse-O-Dominant-Position-729- Html](http://www.legalservicesindia.com/Article/Article/Abuse-O-Dominant-Position-729- Html).

- Execution of any agreement pertaining to acquiring control. Business Perspective Business operations in India necessitate the knowledge of the various laws and regulations and also the Implementation of the same. Competition in the market is a huge challenge that needs to be dealt with carefully. It is essential for businesses to realize that although competition brings prosperity, thriving and striving shall be a continuous process. The various matters to be kept in mind by the business houses are:
- The markets are susceptible to the formation of cartels which pose a risk of formation of monopolies. The awareness of the fact that such associations are not permitted under the Competition Act, 2002 is essential.
- When discussions are made with competitor's documentation of the same should be done. • Any meetings wherein any matter is being discussed, which shall raise issues under the Competition Law shall be avoided.
- It is advisable to avoid discussions pertaining to price and the actual cost to the company.
- Appointment of an Ombudsman for advice on the Competition Law so as to prevent any legal issues may be done.
- Communication aspects although seem trivial may leave an impact when it comes to abuse of dominant position issues. Any statements made shall be weighed carefully.

VIII. OBSERVATIONS OF RESEARCH

With my research below are my observations

To repeal the MRTP Act and to enact a competition act for the regulation of Anti- Competitive agreements and to prevent the abuse of dominance and combinations including mergers.

To eliminate reservation of products in a phased manner for the small scale industries and the handloom sector and divest the shares and assets of the government in state monopolies and private them, and

To bring all industries in the private as well as public sector within the proposed legislation.

To Imposing unfair or discriminatory terms on the purchase or sale of goods and services, or increasing costs on the purchase or sale of goods and services (particularly aggressive rates), either explicitly or implicitly

To the harm of customers, reducing or controlling the manufacturing of goods or services, or constraining scientific or technological advancement related to goods or services.

To Participating in activities that restrict access to markets in any manner taking advantage of a dominating position in the market to defend or enter another particular market.

IX. CONCLUSION

A perusal of MRTP Act shows that there is neither definition nor even a mention of certain offending trade practices such as abuse of dominance, cartels, collusions and price fixing, bid rigging and predatory pricing. The MRTP Act became obsolete in certain areas in the light of international economic developments relating to competition laws. The competition act while replacing the MRTP Act shifts our focus from curbing monopolies to promoting competition. But the Indian competition Act should be strong enough and also try to match up with the international standards.

The abuse of dominance is some way or the other is intruding with the competition in the changing demands of market place. In easy and clear terms it refers to the behavior of the undertaking which enjoys the dominant position, as per the Act. In actual sense dominant position means the authority or position of strength and superiority which is enjoyed by an undertaking enables it to perform independently of its competing forces which prevail in the relevant market. Such an undertaking or enterprise will be in a stature to ignore the market forces and unilaterally impose trading conditions, fix prices, etc. which is abusive and may result in the preventing any kind of competition, or the elimination of effective competition. Some of the various kinds of abuse are: price fixing, imposing discriminatory pricing, predatory pricing, limiting supply of goods or services, denial of market access, etc Abuse of dominant position is an important part of the constitution of modern competition authorities. For developing country like India, competition authorities who are regulating through the Competition Law rules, it is recommendable to deal with "abuse of dominance" on a priority basis. This question is very relevant in case of India as the Competition Commission of India has not yet started enforceable action yet on such an issue. Abuse of Dominant position cases should be taken up by authorities only if it has strong enforcement in. anti-competitive agreement and mergers.

REFERENCES

- [1]. T. Ramappa, Competition Law In India: Policy, Issues, And Developments (2nd Ed.2009).
- [2]. Avtar Singh & Harpreet Kaur, Competition Law (1st Ed. 2012).
- [3]. Abuse Of Dominant Position, Legalservicesindia.Com (2002),
- [4]. [Http://Www.Legalservicesindia.Com/Article/Article/Abuse-O-Dominant-Position729- Html](http://www.legalservicesindia.com/Article/Article/Abuse-O-Dominant-Position729-HTML),
- [5]. Sneha Singh & Syed Ahmed, Abuse Of Dominant Position Academike (2015),
- [6]. [Http://Www.Lawtopus.Com/Academike/Perfect-Competition-And-Abuse-OfDominant position](http://www.lawtopus.com/academike/perfect-competition-and-abuse-of-dominant-position).
- [7]. Abuse Of Dominant Position In Indian Competition Law: A Brief Guide, The Centre for internet and society (2017).