

Consumer Protection under Competition Law, 2002

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Abstract: *There is an old Soviet era joke about the party leader asking a peasant to give him the watermelon, which he is carrying under his arm. The peasant says 'OK, choose', to which the Communist leader replies 'What to choose, it's only one!', and the peasant says 'You are also the only candidate, but we still elect you!'. The time when people had no right of choice for their lives in politics is hopefully gone. But the ability to choose the best option among many is a fundamental right. It is the engine of the economy and of people's welfare. Competition is crucial for the functioning and wealth of the markets – both in terms of competition between companies and the right of choice for consumers. That is why competition and consumer protection are two sides of the same coin. In this paper, the author makes an attempt to explain how consumer protection is dealt with by the Competition Act, 2002 with reference to the Consumer Protection Act, 1986.*

Keywords: Competition, Consumer Policy, Consumerism, Anti Competitive Agreements, Cartels, Abuse of Dominant Position, Combination, Competition Advocacy

1. Introduction

Competition is increasingly being recognized as a core consumer issue. Competition policy and consumer interest should, and indeed must be seen as inextricably linked and interdependent.¹ Although Consumer interests in themselves cannot be precisely defined, being in the nature of diffused interests which cannot be described with relation to specific group of persons², they are inherent to every persons who acquires good or services for private consumption; in general sense one can define consumer interests in the market as related to the four market characteristics of price, service quality and choice.

The diffuse character of consumer interests makes it difficult to cope adequately with these interests through competition policy alone because while consumers obviously want to enjoy as much competition as possible on the market in order to have optimal free choice, an excess of competition may lead to deception and inefficiency.³ But in tandem, Competition Law and Consumer Law can guarantee adequate protection for consumer. While Competition policy aims primarily at safeguarding the consumers' right of economic self-determination or guarantees the private autonomy and its exercise, unhampered by exploitation of market power, and guarantees the efficiency of the market on a microeconomic level, consumer law through specific protective measures aims at raising the quality of life and redressing situations where economic self-determination fails due to incomplete or misleading information through laws dealing with advertising and promotion techniques, unfair contract terms, product safety and product liability, labeling, distance selling, door step selling and the like, which correct market failures.

Thus, the synergies between competition and consumer policy are clear: both share the goals of healthy

¹ J Vickers, *Healthy Competition and its Consumer Wins*, (2002) 12 CPR 142

² N Reich, *Competition Law and the Consumer*, Kluwer London 1997.

³ J Stuyck, *European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or beyond the internal Market?*, (2000) 37 CML Rev367.

competition and consumer welfare. Both policies cover the entire internal market and relate to all sector policies. But competition and consumer protection

2. Consumerism - An Essential Aspect

The term "consumerism" is used to refer to the consumerists movement, consumer protection or consumer activism, which seeks to protect and inform consumers by requiring such practices as honest packaging and advertising, product guarantees, and improved safety standards. It is evident from the definition of 'Consumerism' that interest of consumer remains at centre stage. The genesis of consumer protection in India is Constitution of India. It guarantees consumer protection through various articles mentioned under Directive principles of state policies. The Constitution of India provides for the Directive Principles of State Policy and Articles 38 and 39 of the Constitution mandate upon States to secure a social order for the promotion and welfare of the people. This provision recognized the need to eliminate and minimize the inequalities in income, which applied not only to the individuals but also to the groups in different areas. Article 39(c) of the Constitution provides that the States shall strive to secure that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. ⁴ Thus, based on these constitutional provisions both Competition Law and Consumer protection Act, 1986 strives for consumer interest and their welfare. In *Ashoka Smokeless Coal Ind. P. Ltd. v. Union of India*⁵, the Hon'ble Supreme Court reflecting on consumers' interest observed:

In a market governed by free economy where competition is the buzzword, producers may fix their own price. It is, however, difficult to give effect to the constitutional obligations of a State and the principles leading to a free economy at the same time. A level playing field is the key factor for invoking the new economy. Such a level playing field can be achieved when there are a number of suppliers and when there are competitors in the market

⁴ *Keshwananda Bharti v. Union of India*, AIR 1973 SC 1461

⁵ (2007) 2 SCC 640

enabling the consumer to exercise choices for the purpose of procurement of goods. If the policy of the open market as to be achieved the benefit of the consumer must be kept uppermost in mind by the State.

Competition law aims to protect competition in the market as a means of enhancing consumer welfare and ensuring the efficient allocation of resources. While to a large extent, it is therefore a 'consumer-focused competition policy.' Moreover, the Hon'ble Supreme Court of India in the case of Competition Commission of India v. Steel Authority of India Ltd.⁶ observed:

The principle objects of the Act, in terms of its preamble and Statement of Objects and Reasons, are to eliminate practices having adverse effects on the competition to promote and sustain competition in the market, to protect the interests of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments of the country.

In other words the Act requires not only protection of trade but also protection of consumer interest.

3. Definition of Consumer

The word consumer has not been defined under Competition Act, 2002 but it has been defined exclusively under Consumer Protection Act, 1986. It defines Consumer⁷ as:

- (i) "One who buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) One who hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment.

Thus, it can be said that 'Consumer' under Consumer Protection Act, 1986 includes only those who uses goods or services for individual purpose. But the term 'consumer' under Competition Act, 2002 has wider scope. Under the competition law a trader who buys goods for commercial purposes is also considered as a consumer but the same person will not be treated as a consumer under the Consumer Protection Act. Thus the scope with respect to definition of consumer of competition law is larger than the Consumer Protection Act. The Competition Act

enables a person who buys goods for resale to challenge anti-competitive practices as a consumer.

Consumer protection from competition law aspect:

Competition law of India advocates consumerism mainly through four important aspects:

- a) Protecting consumers from anti- competitive agreements by market controllers.
- b) Protecting consumers form any abuse of dominance by market players.
- c) Protecting consumers from any type of combinations i.e. from mergers, acquisitions, amalgamations etc. having adverse effect on competition in the market.
- d) By promoting Competition Advocacy to consumers.

A) Anti-Competitive Agreements And Consumer Protection:

Section 3 of Competition Act, 2002 describes exclusively agreements which are anti- competitive in nature. It prohibits any enterprise or association of enterprises or person or association of persons to enter into any type of agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or likely to cause any appreciable adverse effect on competition.⁸ Thus, it protects consumers from being harassed by those anti- competitive agreements.

Section 3(3) and Section 3(4) of the act exclusively provides for cartels and vertical restraints of trade as anti-competitive in nature.

Cartels: In simple terms a cartel is an association of manufacturers or suppliers that maintain prices at a high level and restrict competition.

A hard-core cartel as defined in the OECD Recommendation is: ...an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.⁹

Fighting cartels is one of the most important areas of activity of any competition authority and a clear priority of the Commission. Cartels are cancers on the open market economy, which forms the very basis of our Community. By destroying competition they cause serious harm to our economies and consumers. Cartels, therefore, by their very nature eliminate or restrict competition.

Vertical Restraints: Another way in which competition in the supply of a product or a service may be reduced is through practices that control or remove the freedom of

⁸ Competition Act, 2002, Section 3(1).

⁹ Hard Core Cartels: Third report on the implementation of the 1998 Council Recommendation, OECD Journal of Competition Law and Policy, Vol. 8, No-1, June 2006, OECD Publishing.

⁶ Civil Appeal No. 7779 of 2010

⁷ Consumer Protection Act, 1986, Section 2(d).

one of the parties in concluding an agreement in the way in which it would be enough to meet its usual needs that the transaction is intended to procure. Inevitably, the imposing of this unwanted burden will be by the economically stronger of the parties. Where the parties are in different stages or levels of the production chain, this practice is called a vertical restraint. If it causes appreciable adverse effect on competition then it is anti-competitive in nature and harmful to consumer interests.

Section 19 (3) of the Competition Act, 2002 provides power to Competition Commission of India to deal with issues related to anti Competitive Agreements such as cartels and vertical restraints in the form of tie in agreements and if they conclude that the cartels or vertical restraints or anti Competitive agreements have appreciable adverse effect on competition in the relevant market; those cartels or anti- competitive agreements may be quashed and penalty may be imposed on those entities which may be up to ten percent of profits earned by those entities in previous three years.¹⁰

B) Abuse Of Dominant Position And Consumer Protection:

The extent of domination can be defined as the position of strength enjoyed by an undertaking that enables it to operate independently of the competitive pressures in the relevant market and also to affect relevant market, competitors and consumers by its actions.¹¹ The Competition Law does not prohibit dominance but abuse of Dominant Position.¹²

The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the presence of the undertaking in question, the degree is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of the competition.¹³

Section 4(1) of the Competition Act, 2002, specifically states that no enterprise shall abuse its dominant position and Section 4(2) of the Competition Act specifies the practices by dominant enterprises or group of enterprises as abuses such as directly or indirectly imposing unfair or discriminatory conditions or price in purchase or sale of goods and services, limits and restricts production of goods or provision of services or technical and scientific development related to goods etc.

¹⁰ Competition Act, 2002; Section 27

¹¹ Abir Roy, Jayant Kumar, *Competition Law in India on the Anvil*, Vol. 42 May (I) Corporate Law Advisor, pp 8-23.

¹² *Sri Neeraj Malhotra v. North Delhi Power Limited, BSES Rajdhani Power Limited and BSES Yamuna Power Limited*, MANU CO/0026/2011

¹³ *Hoffman La Roche & Co. Ag, Basle v. Commission of the European Communities in Brusels*, Case 85/76.

4. Predatory Pricing and Consumer

The “predatory pricing” under the Act 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 goods or provision of services, with a view to reduce competition or eliminate the competitors”.¹⁴ The predatory firm after driving other competitors from the market raises their price above the competitive levels to earn supra-competitive profits and recoup the losses incurred during the predatory period. This anti-competitive practice undermines the competition in the market and is not in the interest of the consumers.¹⁵

The US Supreme Court in *Utah Pie v. Continental Banking Co.*¹⁶ considered the price below the full cost as predatory:

Predatory Pricing is Anti-Competitive in nature and aims at eliminating competition in the market. Both of these initially benefit the consumers by offering goods and services at lower prices and when the players using such anti-competitive measures are able to eliminate competition i.e. the smaller players in the market, they start exploiting the consumers. As they have succeeded in eliminating competition and they attain dominant position in the market, they begin to abuse it. They do this by hiking the prices and deteriorating the quality of the goods, thus, all in all affecting the consumers in the long run.

Regulation Of Abuse Of Dominance By Competition Commission of India:

Section 19 (1) of the Act provides that the Commission may either on its own motion or on receipt of a complaint, from any person whether consumer himself or any trade association or by government or any other authority, inquire into any alleged contravention of the provisions contained in Section 4(1) of the Act. Commission may pass any order under Section 27 in order to root out abuse of dominance by any person. Under these order Commission may a) direct the parties to discontinue and not to re-enter such agreement; b) direct modification of the agreement; c) impose a penalty which shall not be more than 10 per cent of the average of the turnover for the last preceding three financial year; and d) award compensation to the parties in accordance with provision of Section 34 of the Act.

C) Effect Of Combination On Consumers:

Section 5 of the Act refers to the acquisition of enterprises, by one or more persons or merger or amalgamation, in the manner set out therein, which would

¹⁴ Competition Act, 2002, *Explanation (b) of Section 4*

¹⁵ Einer Elhauge and Damien Geradin, *Competition Law and economics*, Hart Publishing, pp314

¹⁶ 386, US 685 (1967)

be a combination.¹⁷ Under Section 2(1) the term 'person' would include an individual, a company and certain other entities. Combination of two firms can have an adverse effect on the market. If two major market players combine, they can start controlling the prices and eliminate the small industries easily. Ultimately it will be the consumers who will be affected. Thus it becomes the duty of the Competition Commission to look into matters relating to mergers and combinations and assure that there is no combination which hampers the competition in the market which has a negative effect on the consumers and gives way to anti-competitive practices. Section 6 of the Competition Act, 2002 provides power to Competition Commission to regulate all those mergers and combinations which have appreciable adverse effect on competition. This provision makes it obligatory for all entities going under merger or acquisition or any form of combination to inform the Commission about the same and thereby Commission, provide them with specific instruction if they violate any provision of the Competition Act, 2002 and thereby causing harm to consumers. Provisions relating to regulation of combinations and enquiry procedures for the same have been mentioned under Section 20, Section 29 and Section 30 of the Competition Act, 2002.

D) Competition advocacy:

Competition law plays a big role in protecting the interests of consumers and their welfare by providing specific provision in the Competition Act, 2002 which specifically deals with Competition advocacy.¹⁸ The aim behind this provision is not only to enhance the role of Competition Commission to guide Central and State governments in framing policies in relation to effective competition in the market but also to make public aware about the importance of effective competition in the market. Competition Commission of India keeping in view this provision does various activities which helps in generating awareness to public about competition and those includes:

- Creating awareness among various levels of Government Officers to harmful effects of anti-competitive measures adopted by suppliers, manufacturers etc.
- Helping identifying areas where bid-rigging, cartelization or abuse of dominance may be taking place more often.
- Helping in protection of small enterprises, self-employed and micro-retailers against abuse of dominance by bigger enterprises.
- Creating positive effect on wages, working conditions and workers' welfare as a result of increase in allocative efficiencies arising in labour market.
- Familiarizing with the legal remedies available in competition law.

¹⁷ T. Ramappa, *Competition Law in India- Policy issues and Developments*, Oxford University Press, New Delhi, 2006.

¹⁸ Competition Act, 2002, Section 49- Competition Advocacy.

- Providing competition advice in framing policies which are competition compliant.

Thus, in this manner Competition Act, 2002 plays a great role in generating consumer awareness and thereby helping in consumer advocacy.

5. Concluding Remarks and Future

Competition promotes efficiency and productivity. In an industry where there is intense competition, often, there is a tendency, that the industry would become better and efficient. This happens because competition eliminates the poor performing products or services and leaves only good and outstanding products for the general masses to consume. As there exist competition in the market, the market players try their best to provide consumers what they need. Consumers need good quality products at lower prices. Now if there is Competition in the market, the market players in order to survive will be compelled to bow down to the demands of the consumer, i.e. quality products at lower prices.

Charles Darwin had given the theory of the survival of the fittest. According to Darwin in nature, only the fittest will survive and the weaker will be eliminated by natural forces like enemies, weather etc. Thus every offspring will have to compete with its fellow off springs for food, water, shelter. Off-springs who are weaker than others will be eliminated by nature. Applying the same theory by Darwin to the market competition the situation seems similar. In the market as well the players have to fight with each other for survival and those who are weak are eliminated by nature i.e. the market forces. The competition process provides the greatest incentives for merchants to offer consumers the best quality goods and services at the lowest possible prices. The competitive process generates the greatest possible level of public surplus. By protecting the competitive process therefore, competition protection provisions indirectly promote consumer welfare. Competition leads to reduced prices and to more choices, which benefits the consumer.

Evidence has shown that with competition, prices go down while without competition, prices go up. Equally, there may be other benefits in terms of improvements not only in prices but also in services offered and choices available to consumers. Competition is therefore perceived as a driving force of choice. Competition among producers tends to lower prices, provide consumers with choice, generate more information for consumer decisions and open new markets for competitive firms. Competition is therefore seen as a necessary element for consumer welfare though not in itself a sufficient one. Though consumer welfare is not direct aim of Competition law but through its various provisions in the Act it plays a dominant role in deciding the interests of consumers and thereby leading to their welfare. Thus, we can say that Competition law play significant role in India towards consumerism.

The Act came into force in phases: the provisions relating to anticompetitive agreements and abuse of dominance

becoming operational as of May 20, 2009 and the provisions relating to merger control being notified on June 1, 2011. The competition law regime in India has only been in force for less than four years. Despite the relatively nascent merger control regime, the Competition Commission of India ("CCI") has quickly established its credibility as a regulator, having undertaken several suo motu investigations and examined complaints relating to various sectors (such as cement, tires, steel, coal, aviation, sugar, etc.). They have also passed several orders pertaining to issues such as burden of proof and the establishment of an agreement in the case of cartels and bid-rigging as well as the delineation of the relevant market in abuse of dominance cases.¹⁹ Nevertheless, there remain several unresolved issues, including the lack of guidelines or rationale for the imposition of penalties by the CCI in its orders thus far, the inconsistencies in the approach of the CCI towards the standard of proof to establish a cartel, etc. These hurdles need to be dealt with to make the Law more effective.

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¹⁹ <https://www.competitionpolicyinternational.com/the-future-of-competition-law-in-india-reading-the-portents/>