

How to play fair in an unfair World?



COMPETITION LAW

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INTRODUCTION

This article summarizes the journey of Competition Law from its evolution to the present operational Act in India, later proceeds with highlights on anti-competitive agreement, IPR, Cartels, Bid Rigging, abuse of dominance under Competition Law and current jurisprudential trends. For better understanding relevant case laws are also mentioned. It concludes by focusing on its contribution to the Indian Society with respect to its impact on future.

“Government seeks to fill 2 Competition Commission member post”,ⁱ dated June 26th 2014, “Implementation of competition law face challenges, says CCI chairman Ashok Chawla”,ⁱⁱ dated June 13th 2014, “Competition Commission of India closes case against Hyundai Motor Company”ⁱⁱⁱ dated May 29th 2014, “Competition Commission of India slaps Rupees 1 Crore on Google for failing to co-operate in an ongoing investigation”,^{iv} dated March 28th 2014. Reason behind the existence of Competition Law in India or any Country for that matter is crystal clear by above mentioned

news headlines i.e. to promote competition as an appliance for increasing the growth of Indian market via different economic tools with the objective of providing better quality products at lower prices.

Having a competitive market is always beneficial for desirable participants as it provides consumers with multiple options at affordable rates. Notion of not benefiting the sellers does not exist anymore. Competitive market act as a motivating factor for the sellers as accelerating competition in market is accompanied with innovation and productivity enhancing technology, which ultimately results in cost saving for the consumers.



EVOLUTION

Competition Law has been given different names in different countries. Like in USA, it is called antitrust law. In China and Russia, it is called antimonopoly law, In Australia and the United Kingdom; it is referred to as trade practice law.

History of a nation doesn't depend on how many rulers ruled the nation or how old the history is? History of nation reaches the epitome of glory

by the economic policies of a dynasty. Britain could rule the World only because they encouraged open market system hence become the mode for entering international market.

The idea of restraining anti-competitive agreements is truly old and might be followed back to the Indian and Roman civilizations.

While talking about Indian civilization, one cannot skip **Kautilya's Arthashastra** which dealt with statecraft and monetary strategy. It doesn't recognize the difference between the abundance of the sovereign and that of his subjects. It likewise outlines how hoarders were seriously rebuffed.

Under the Roman Empire, the practices of business sector merchants, organizations and governments have dependably been liable to investigation, and once in a while confronted extreme approvals. Another traceable occasion of beginning of the competition law could be viewed in the book of "**Wealth of Nations**" by Adam Smith where the famous metaphor of the "invisible hands" was used.

Foundational step towards the development of competition policy in India was laid down as a consequence of WTOs Singapore Ministerial declaration in 1996.

A group of professionals were appointed by the Union Ministry of Commerce in Oct, 1997 to analyse matters relating to the interaction which included anti-competitive

agreements and the impact of company mergers and amalgamation on rivalry aspect of Indian Market.

Report submitted by the group suggested in January, 1999 that the enactment of competition law and harmonization of competition principles is the need of the hour.

The Finance Minister of India then in his budget speech on 27th Feb, 1999 declared MRTP Act archaic in the era of international economic reformation and stated that we need to focus on promoting competition and not on curbing monopolies.

With the objective of promoting fair competition in the Indian market, prohibiting anti-competitive practices and most importantly protecting the interest of consumers, competition law was passed in 2003 and competition commission was established for its implementation.

The following act has been amended twice by Competition Act, 2007 and Completion Act, 2009.



ANTI-COMPETITIVE AGREEMENT

Section 3 of the Act deals with Anti-Competitive Agreements. Whenever any organization attempts to confine competition by developing agreements such as collusive agreements in order to fix prices and outputs they need to be prohibited through legal strategies

mentioned under Competition law, 2002, which can be further divided as follows:

Horizontal Agreements

- a) To limit production and/or supply
- b) To allocate markets
- c) To fix price
- d) Bid rigging

Vertical Agreements

- a) Tie-in arrangement
- b) Exclusive supply/ distribution arrangement.
- c) Resale price maintenance
- d) Refusal to deal^v



Following are the conditions favorable for the formation of cartels:

- a) High concentration
- b) High entry and exit barriers
- c) Homogeneity
- d) Dependence of the consumers on a product.



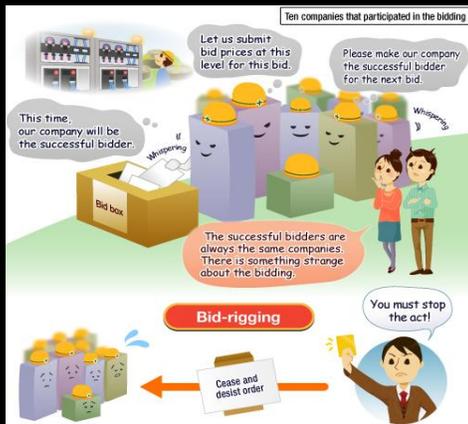
CARTEL

Cartels are those kind of agreements which are between enterprises, persons, a government department and association of persons to avoid battlefield when it comes to pricing, product, services or customers. Most destructive of all is the one which results in higher prices, poor quality and limited choice for goods or services. There is an International Cartel which can be subdivided into Import Cartel and Export Cartel.



BID RIGGING

Bid-rigging is defined as any agreement between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.



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Different forms of bid-rigging are **Bid suppression**- refrain from bidding, **Complementary or Cover bidding**- submit bids too high or with unacceptable terms, **Bid Rotation**- competitors agree to take turns being the lowest bidder, **Sub-Contracting**- colluding Competitors receive sub-contracts from successful bidder. It usually takes place when bidders agree among themselves to eliminate competition in the procurement process leading to higher prices and denial of fair price. Other instances of Bid-rigging are when a competitor agrees to submit a non-competitive bid that is too high to be accepted or contains terms that are unacceptable to the buyer, when a competitor agrees not to bid or to withdraw a bid from consideration and when a competitor agrees to submit bids only in certain geographic areas or only to certain public organizations. Likewise there are many other ways by which it can occur. ^{vii}



ABUSE OF DOMINANCE

Section 4 of the Act deals with Abuse of Dominance. What is dominance? In simple terms it means a position of power which enables an organization to function independently of competitive forces by letting its competitors or consumers or the market to operate in its favour. Abuse of dominant position destroys the scope of having fair competition between different firms, exploits consumers in two ways first with respect to relevant product and second with respect to geographic market.

It includes conditions like imposing unfair conditions or price, predatory pricing, limiting production/market or technical development, creating barriers to entry, applying dissimilar conditions to similar transactions, denying market access, and using dominant position in one market to gain advantages in another market.



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INTELLECTUAL PROPERTY RIGHTS

Under the Competition Act, 2002, Intellectual Property deals with the following:

- a) Copyright and Related Rights
- b) Trade Marks
- c) Geographical Indications
- d) Industrial Designs
- e) Patents
- f) Layout-designs of the Integrated Circuits



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IPRs provide special privileges to the holders in terms of performing a any commercial activity. However does not include the right to exert restrictive or monopoly power in a

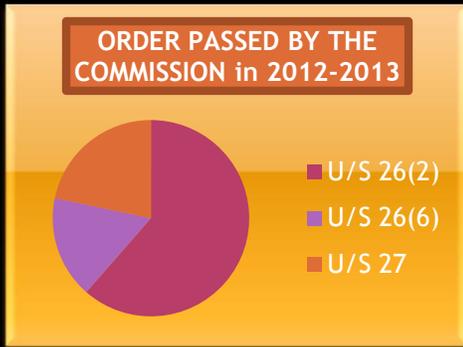
market. It helps in generating market power.

There is a difference between existence of a right and in its exercise. In other words, during the exercise of a right, if a prohibited trade practice is visible to the detriment of public interest or consumer interest, it ought to be assailed under the competition law.^x



JURISPRUDENTIAL TRENDS

CCI has received a total of **271** cases under section 19 (1)1 of the Competition Act till February, 2013. In FY 2009-10, 32 complaints U/S 19 were taken by CCI. CCI got **50** pending cases of MRTPA Act under the provisions of S/66. In 2010-11, CCI received **77** complaints which increased to 93 in FY 2011-2012. CCI has passed final orders in **79** cases. It indicates that awareness about the Act is increasing among corporations. It was found that in FY 2009-10 to February 2013, almost equal number of anti-competitive agreements and abuse of dominance cases were filed. In the orders passed by CCI around 63 cases were section 4 cases relating to the abuse of dominance, whereas 58 cases were section 3 cases relating to cartels and other anti-competitive agreements. In 40 other cases informants have raised issues under both Sections 3 and 4 of the Competition Act.^{xi}



Landmark judgments given by CCI

Coal India Limited (CIL) & Suppliers of Explosives- As an informant, CIL had alleged that the explosive manufacturer had formed a cartel and violated section three of the Act. CCI awarded penalty at the rate of 3% on the average of three years turnover on the 10 opposite parties. ^{xii}

Shri Surinder Singh Barmi & Board for Control of Cricket in India (BCCI) - CCI found BCCI in contravention of Section 4(2)(c) of the Act and directed it to 'cease & desist' from any practice denying market access to potential competitors. ^{xiii}



Corruption in this sector is widely known and accepted. It has the tendency of

affecting larger sectors of a nation. Factors responsible for this disease are as follows:

Public procurement- Procurement means acquisition of goods or services from an external source. This entire process involves large orders which increase the inducement factor of public officials.

Government contracts- Usually what happens here is that Govt. contracts act as a long term business opportunities for bidders and their suppliers. Not only local enterprises compete for the same but are accompanied by international firms. Due to increase in economic activity on a global level, public procurement becomes susceptible to bribery. Sector like energy, defense and Telecom are usually the first to be affected as stakes are very high here because of the magnitude, complexity, money and the international character of the deals.



COMPARATIVE STUDY

In Australia, there is Australian Competition & Consumer Commission for implementing Trade Practices Act 1974, it controls mergers and prohibits abuse of market power. Whereas in China, the anti-monopoly enforcement agency is yet to establish, hence PRC Anti-Monopoly Law is active since 2008. Like India, Singapore has

Competition Commission which operates on the guidelines of Competition Act, 1994 & various industrial codes.

Interestingly Malaysia has extreme level of open market system with no authority as there is no regulatory law. As mentioned earlier, US have antitrust law and UK has European Union Competition law.



CONCLUSION

Fair competition in a healthy business environment is the sole objective of Competition Law. The question which remains unanswered is, "Is it possible?"

However it has been proved that mechanism for monitoring it is effectively functioning in this era of globalization cum privatization. Due to direct correlation between the Competition and GDP, it helps in generating employment and hence increases per capita income of a nation. Competitive pressures have helped suppress inflation, raise living standards, and pushed manufacturing productivity up by 4% a year concluded by William Lewis, in 'The Power of Productivity' and economist Paul London in 'The Competition Solution.' One off the best example illustrating the following is Pro-competition policy in New Zealand and the UK added around 2.5% to

their employment rate over 1978-1998. Australian Productivity Commission study estimates that average Australian household annual income was a \$7,000 higher on account of Competition Policy. Australian GDP increased by 5.5% or \$23 billion a year and average employment rose by 30,000. ^{xiv}

As far as India is considered, Competition Law in the past couple of years has been operating effectively and has helped in promoting fair competition via participating in various workshops organized by international bodies like Training on competition law and state-owned enterprises which was held on 21st may 2012 and Training on handling in-depth merger investigation, held on 23rd May 2012. Collaboration with foreign regulatory bodies is other outstanding initiative of the Commission.



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Chairman CCI signing India-US MOU on Anti-trust cooperation with US agencies



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Round Table on Corporate Compliance on good corporate governance in Jan 2013

For generating awareness among younger generation, the commission has started giving internships to students coming from different streams like Law, Economics and management studies.

Answer to the above raised question i.e. "Is it possible?" is YES. It is possible by implementing Competition Law, 2002 effectively which CCI has been doing.

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