COMPETITION LAW -NEW MARKET TRENDS

Soumika Sarkar[1] and Harshit Kumar Mishra[2]

Abstract

India is a developing country. Also, India is the fastest growing economy and e- commerce. With this growth tag it is natural that foreign companies will come and go business in India. With new players new methods of competition are also getting introduced. Therefore, it's the duty of the concerned authority as well as the government to ensure that these new methods doesn't hamper the existing competition in the market. In this paper, we have suggested new ways to ensure that there is a healthy competition among the players in the market.

Keywords – Competition, Market, Dominance, Economy.

[1] *4th Year BBA LLB Student, New Law College, Bharati Vidyapeeth (Deemed to be University).*
[2] *4th Year BBA LLB Student, New Law College, Bharati Vidyapeeth (Deemed to be University).*

Introduction

India is the fastest growing economy in the World. Various foreign companies are coming to invest in India. By one way or the other they are trying to enter the Indian market. With more and more companies entering India, the government needs to see that the economy of the country and laws related to it are effective and enforced properly.

Competition Act, 2002[3] wasenacted to regulate competition and also to check dominance in the market, but with the changing scenario the law needs to be amended so that new aspects of the 21st Century Indian economy.

The main aim of the competition act is to promote good and fair competition in the market. The checksthe following aspects of competition:

1. Anti – Competitive Agreements and Cartels.
2. Combination.
3. Abuse of Dominance.

In Present there are various new aspects coming up every day, new modes of doing business, use of latest technology, tapping into the needs of the consumers, etc. With these new aspects the provisions of the competition law cannot fit into them and hence they go unregulated. Therefore, we need new provisions to make the law more effective and efficient.

History

In Indian market, competition is very old aspect as we can get its idea from Kautilya's Arthashastra which tells about economic policy.[4] Indian Constitution also provide government regulation to control market competition

MRTP ACT

India adopted a planned economic strategy and due to the Directive principal of State policy [5]the MRTP(Monopolies and Restrictive Trade Practice) Act came into existence to regulate economic power and concentration. In India the economic system is not like USA or China,. MRTP Act was made according to the country's economic then condition. The main focus of

[3]Herein referred to as 'the act'
[4]Sunipun, Development of Competition Law in India, ipleaders, (Dec,24,2018), https://blog.ipleaders.in/competition-law-india/.
[5] The Constitution of India, 1949

the act is to check monopoly of the firms in the market, it aims at healthy competition among the firms in the market so that none in the position to dominant the market.

In the year 1991 India adopted new economic policy which famously known as New Economic Policy of 1991 which features are liberalisation, globalisation and privatisation. It is adopted for the economic progress of India with international market. With this adoption the old Act for controlling competition in Indian market needed to be changed. So the government appointed a high level committee under the chairmanship of Mr SVS Raghavan to advise the government to adopt which policy or act which suits best which the current economic system. In the year May 2000 the committee submits its report to the government.

The committee suggested that rivals in the market must get or have equal opportunities to compete with each other the basis of quality output and resource development at the lowest price to meet customers' demand.

On the basis of this recommendation the Parliament passed a new lawnamed Competition Act 2002 which repeal the old MRTP Act.

In this article we will see the various provisions of Competition act and also suggest the changes which ought to be made so that it can cope up with the new economic environment.

RELEVANT MARKET

The definition of relevant market has created a huge stir not only within India but also within USA, UK and many other developed countries. It is very difficult to define "relevant market." Definition of the relevant market as enshrined in Section 2(r)of the act cannot be exhaustive as the term owes its origin to the concept of Economics and thus is bound to be dynamic depending on the unique set of facts for each case. Section 2(r) [6]manifests that the task of determining the "relevant market" is left with the Commission and the terms like 'relevant product market' and the 'relevant geographic market' involves understanding of the legal concepts, concepts of Economics and also involves analysis of volumes of data/statistics before arriving unto a conclusion.

[6] *"relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;*

Relevant market in common parlance refers to the market where competition takes place. A relevant market can further be divided into 'relevant product market' and 'relevant geographic market'

Section 2(t)[7] of the act defines the 'relevant product market' using the following factors:

- Interchangeable products or services or,
- Substitutable by consumer,
- Characteristics of products or services,
- Price and
- Intended use

Object of Defining Relevant Market.

In case of abuse of dominance first relevant market has to be defined. The Supreme Court in Competition Commission v. Coordinated Committee of Artist and Technicians of WB Films and Television [8] held that the main object of defining relevant market was to identify those actual competitors of the undertakings that were capable of constraining those undertakings behaviour and of preventing them from behaving independently of effective competitive pressure.

The concept of relevant market implies that there could be an effective competition between the products which form a part of it and this presupposes that there is a sufficient degree of interchangeability between the products which form part of the same market .

How to define Relevant Market?

Market definition exercises should differ from merger cases to dominance cases.
The relevant legal test in merger cases is whether the merger creates or strengthens a dominant position in the market, taking as a starting point or benchmark the pre-merger situation. Consequently, in merger cases, the market definition exercise focuses on the extent and importance of different competitive constraints at pre-merger prices.
In dominance cases, the focus is not on substitution patterns at current prices. But, instead,

[7] *"relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;*

[8] AIR 2017 SC 1449

the goal is to "identify those products that would represent effective competitive constraints on the products of the allegedly dominant firm."[9]

In the case of *In Re: Fast Track Call Cab And ANI Technologies*[10], it was argued by ANI technologies that a proper relevant market should capture all modes of transport as they pose an effective threat to its business. The Commission rejected this argument on the basis of key features of taxis as point to point pick up, availability, estimated waiting time, GPS/GPRS etc.

In case of *In Re: Meru Travel Solutions Pvt Ltd. And ANI Technologies Pvt Ltd*[11]too CCI went with the case of 6 & 74 of 2015 and said that it finds that all submissions made are similar and also said that all these have been discussed in detail and no reason not to accept it. Therefore, we can see from the above cases that the commission has defined the relevant product market on the basis of features or characteristics of services provided by them.
In the case of *In Re: Meru Travel Solutions Pvt Ltd. And ANI Technologies Pvt Ltd*[12]. the informant alleged abuse of dominance by opposite parties in the city of Kolkata, Mumbai, Chennai and Hyderabad. So the relevant geographical market was decided as the same.
Same was the case with *In Re: Fast Track Call Cab And ANI Technologies,*[13]where the informant alleged abuse of dominance by the opposite party in the city of Bengaluru, the relevant geographical market was decided as market of Bengaluru.
Thus, we can say the commission today is taking a new view of the relevant market where it is not only seeing the interchangeability but also seeing the features provided and various other factors involved.

NEW ASPECT - AFTERMARKET

Markets can also be defined to include groups of complements. Complements are groups of products that are consumed or produced together. They are included in the same market when competition in the supply of one product constrains the price charged for the other. This is most common in secondary markets, also known as after markets. They are also known as Aftermarkets. Secondary products are products which are often purchased after purchase of primary product. Ex – Car and their parts.

[9]Dr. Atilano Jorge Padilla, THE ROLE OF SUPPLY-SIDE SUBSTITUTION IN THE DEFINITION OF THE RELEVANT MARKET IN MERGER CONTROL, Ref Ares (2014) 77077. 15, 15 (2001).
[10] Case no 6 & 74 of 2015.
[11] Case no 25-28 of 2017.
[12]*Ibid.*
[13] Supra note 10.

There are 3 possible aspects of aftermarkets:

- A WHOLE Market – Both primary and secondary market.
- MULTIPLE Market - One primary market but separate markets for secondary products for each brand of primary market.
- DUAL Market – One for primary and one for all brands of secondary products.

A Whole Market is when buyer takes into account the cost of both primary product as well as secondary product while buying a particular thing. Multiple Market is where a buyer buys a primary product but gets locked into a secondary market which is compatible only with primary market.(Car Parts,etc.) Dual Market is where all secondary products are compatible with all primary products.(Paper for printer).

In India when we go to buy cars or electronics goods we take into factor all other aspects like cost of repairing, cost of parts etc. Now this constitutes a Whole Market but now after buying the product the customer has to stick to the components compatible with the product bought. Now this constitutes a Multi-Market. Now the main question arises is:

In determination of relevant market should the secondary market be considered or not? If yes, The should it be combined with the primary market or separate relevant market?

This basically will depend on various cases and will also depend on product to product. The Commission and the Central Government both have to decide on this matter.

ABUSE OF DOMINANCE

The concept of dominance and its abuse is a two-step assessment:

- Whether the enterprise or group is in a dominant position in the relevant market ?
- Whether they have abused this dominant position or not?

ASSESING DOMINANCE

The word dominance has been defined in Explanation Clause of section 4 of the act[14].

Section 4 gives out two factors of dominance:-

- The enterprise can operate independently of its competitors,
- The enterprise affects its competitors and consumers in its favour.

[14] Dominance 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 favour.

Section 19(4) of the act has laid down factors which indicate that enterprise is in dominant position or not. The commission can have due regard to all or any of the factors mention in the section.

In *In Re: Fast Track Call Cab And ANI Technologies*[15], the commission discussed the emphasis of market share in detail. The commission said that market share though a factor for consideration but it is not the only factor. It also said that only placing reliance on market share held by the party should not be a sole criteria. One also should look at the market share held by other players and competitors as well as emphasis should be given to the size and importance of the competitors. In this case the commission said that Ola's next rival Uber is a foreign company and has a market value of 15 to 20 times that of Ola.

Again in the case of *In Re: Meru Travel Solutions Pvt Ltd. And ANI Technologies Pvt Ltd.*[16]the commission said that market share is not a sole factor for dominance. In para 41 [17]the commission had said that "*Though market share is theoretically an important indicator but not an conclusive indicator of dominance. Further, there cannot be any objective criteria for determining market share thresholds. Therefore, the Informants' contention that market share of more than 50% leads to a presumption of dominance may not be accepted, especially when under the Act, no numerical threshold for presumption of dominance has been prescribed*."

The commission also notes that presence of a huge competitor also does not amount to dominance.This has been held in*In Re: All India Online Vendor Association And Flipkart India Pvt Ltd*[18] *and In Re: Mohit Agarwal And M/s Flipkart India Pvt Ltd*[19].

That presence of other competitors t like Paytm Mall, SnapDeal, ShopClues etc. does not amount to dominanceAlso, held that the next big competitor of Flipkart is Amazon which has a brand valuation of $700 billion and hasa global presence too."

In India the business which is able to recognise the needs of the people and backed by the use of technology is naturally able to capture more market share than other doing business the traditional way This has been seen in the cases of taxis (Ola), online shopping (Flipkart) and food delivery (Swiggy). All these examples were the first one to enter the market with the use of latest technology and they also could understand the needs of the people. This is the reason why they were able to hold a significant amount of market share for a considerable period of

[15]Supra note 10.
[16]Supra note 11.
[17]*Ibid.*
[18] Case no: 20 of 2018.
[19] Case no: 80 of 2014.

time. This was also said by the commission in *In Re: Fast Track Call Cab And ANI Technologies*[20] "New technology and the new business model in the form of a platform marketplace has had a transformative effect on how services are provided in the sector. It is also pertinent to note that being the early adopter disruptive technology will be a market leader in future. However, that does not imply that uniformmarket share thresholds canbeappliedinthesamemannertoallbusinesses/sectors. The variance across industries in terms of theirinherent characteristics, such as nature of competition, technologyandinnovation dimensions, calls for a case-by-case assessment.

Once dominance has been established then the commission will investigate the alleged conduct of the enterprise. Section 4 of the act gives us the various types of conduct which are termed as abuse of dominance. It also includes predatory pricing. However, first relevant market has to be decided, dominance has to be established and only then comes the investigation on alleged conduct as abuseof dominance. If dominance is not established then the alleged conduct cannot be termed as abuse. In the case of *In Re: Mohit Manglani And Flipkart India Pvt Ltd*[21], where dominance is not established, commission doesn't consider it necessary to go into the question of abuse. However now with the new business models and use of technology the old and traditional methods are getting outdated hence we must now look at the new aspects of abuse of dominance.

NEW ASPECTS OF ABUSE OF DOMINANCE

MARKET SHARE NOT THE SOLE CRITERIA

Although it has been held in majority of the cases, but to clarify it we can say that high market share can be a presumptionbut it cannot be a sole criteria. The Commission on receiving any information about abuse of dominance where the informant has relied on market share, the commission should also investigate other aspects too. All factors mention in section 19 (4) should be investigated in detail and then decision must be given. Other factors not mention but have arisen because of development of economy should also be considered. This goes with section 19 (4) (m) where commission have been given the freedom to consider other factors relevant for inquiry.

COLLECTIVE/JOINT DOMINANCE

Collective Dominance is the feature absent from the present competition act. dominance has been defined in Explanation Clause of section 4 of the act. It says, " Dominance means a

[20]Supra note 10.
[21] Supra note 19.

position of strength, enjoyed by **an enterprise**, in the relevant market[…….] Before the 2007 amendment even the word 'group' was not added in section 4. Group was specifically introduced in the 2007 amendment. However, the definition of group in section 4 is similar to that of combination given in Explanation (b) of section 5.

Article 102[22]talks about collective dominance. It says "Any abuse by **one or more undertakings** of a dominant position within the internal market [….] ." The words one or more indicate the enterprises may be economically related to each other or independent of each other.[23]

Section 47 (1) of Competition act of Singapore also gives the concept of collective dominance. "Subject to section 48, any conduct on the part of **one or more undertakings** which amounts to the abuse of a dominant position in any market in Singapore is prohibited." However, the recent Competition (Amendment) Bill, 2012 seeks to acknowledge this concept by adding the words "singly or jointly" after the word 'group' in section 4. This shows that the government is aware of the situation existing in the market and hardships face by the Commission in penalising one or two enterprise who dominate the marker together.

Factors to consider while determining collective/joint dominance:

1. Lack of competitive pressure.
2. Independent of each other.
3. Market Structure.
4. Uniform Conduct/ Common Policy
5. Tacit Collusion
6. Any Other factors which the commission deems fit .

EXPANSION BARRIERS

Section 19 (4) of the act recognises entry barriers as a factor for dominance but it doesn't mention expansion barrier as a factor. Merely entry into the market is not sufficient, the entrant should also be able to expand sufficiently so that it can give a good competition to existing undertakings. Entry and expansion barriers are almost the same but to assess whether an undertaking or group is in a dominant position in the relevant market or not one also has to see the condition of its competitors. Let's take the example of e – commerce. Today in the sector of e – commerce we hear only two names i.e. Flipkart and Amazon. We don't know any e – commerce platform which provides a range of product on a single

[22] European Union , Treaty on the Functioning of European Union, 55,C326/1, (2012).
[23] Cases T-68, 77-78/89, Societa Italian Vetro SpA v Commission [1992] ECR II-1403 [357]-[358]

platform. No doubt there is Paytm Mall, etc. but are giving enough competition to the two giants of e – commerce? The answer is No. Let's take automobile industry as a 2nd example. There are many names in this industry – Maruti, Hyundai, etc. Here though Maruti has a larger market share but still there are others who are effectively competing with it. This shows that though in the automobile industry all entry and expansion barriers are the same still they are competing with each other and there are other who have enters the Indian market – Jeep, KIA. Expansion Barrier can also be assumed when the undertaking has indulged in predatory practice. Predatory Price is the price when an undertaking sells good at a price which is lower than the cost price. Undertakings often do it because they don't want to lose their market share to new players. Since new players cannot afford competition with them they either go bankrupt or exit from the market. Therefore, predatory pricing should also be considered as a barrier to entry as well as expansion.The commission should also see that whether these barriers is an the act of the undertakings or is it because of other factors. This reduced competition would also affect the consumers and thus, the activity of the enterprise which affect its competitors or consumers or the relevant market in its favour.

Abuse in Related Markets

One dominant enterprise in one market can use its dominance to affect competition in another market. This is not uncommon. There are various enterprises which have used its market share in one relevant market to enter and expand in another market. Ex – Reliance, Tata etc. Every enterprise has a right to enter into any market to do business because of Article 19 (1) (g)[24]. Just because in one market it is dominant doesn't mean that it will be dominant in other markets too. For example, Aditya Birla is a dominant player in the cement industry but it is facing a lot of competition in retail market as well as in telecom market. Therefore, abuse in related market must be constructed in a different way. Lets take 4 situations and analyse it. There will be an enterprise 'Y' and two markets 'A' and 'B'.

1. Y may be dominant in Market A and use a predatory strategy to eliminate competitors from Market A. The effect of abuse of dominance is only in market 'A'.
2. Y may be dominant in Market A, and it provides the raw material essential to production in Market B, in which itis also a market player. To strengthen its own position in Market B, it may abuse itsdominant position in MarketA, by refusing to supply the raw material in question to its competitors in Market B. Here the abuse of dominance is in market 'A' but the effect is in market 'B'.

[24]Constitution of India, 1949.

3. Y may be dominant in Market A, but not dominant in the related Market B. Y may offer special discounts inMarket B, to buyers who remain loyal to it in Market A, so as to help maintain its dominant position in Market A. Here it is using its dominant position in market 'A' to obtain dominance is market 'B'.
4. Y may be dominant in Market A. It may try to leverage its market power in Market A to Market B, by tying the saleof its products in Market A to the sale of its products in the related Market B. Dominance is in market 'A' but the abuse of dominance in market 'A' affects market 'B'.[25]

Therefore, the Commission should consider that if one enterprise uses its dominant position in one market to influence other market then only it should be treated as abuse of dominance not merely because it was dominant in one market and has entered another market.

The New Issue of Predatory Pricing in India

The government recently released a draft policy which attempts to regulate and control deep discounting and predatory pricing by e – commerce players. While this policy has been criticised by many but on also know that the issue of pricing has harmful impact on consumers and the economy as a whole. We are seeing other industries, such as telecom, bleeding due to predatory pricing and the outcome may not eventually be beneficial for the consumers, too. In the airline industry, for example, we hear voices that question whether very low prices can be sustained, and whether it is healthy for that sector. Therefore, the government must check on the issue of pricing as it will have a huge impact on the economy. [26]

In the case of *Flipkart India Pvt Ltd. Vs Assistant Commissioner of Income Tax* [27]The Income tax Department was investigating the predatory pricing of Flipkart. It was said that this strategy was to incur losses in the short run to gain more market share in the long run. Flipkart also admitted that it has been using this strategy.

Flipkart, Amazon etc. are all online market platforms.They just provide a platform for buyers as well as the sellers to meet and trade. They don't need to maintain inventory, they need not open stores thus they save hugely on costs. But apart from saving costs they also receive funding from various investors, private equity or venture capital funds. Now since Flipkart is taken over by Walmart it has more funding to issue more discounts and thus it will one day create Duopoly or Oligopoly in the market.

[25]CCCS Assessment on The Section 47 Prohibition, 2016.
[26] Rajini Sinha, Price of Unfair Competition: Government needs to be wary of predatory pricing by e – commerce, Financial Express (Dec,24,2018), https://www.financialexpress.com/opinion/price-of-unfair-competition-government-needs-to-be-wary-of-predatory-pricing-by-e-commerce/1305077/.
[27] ITA No. 202/Bang/2018.

Predatory pricing is a global phenomenon. In Singapore Uber – Grab deal [28]which was investigated in detail by the Competition Commission in Singapore it saw that when Uber and Grab were competitors they used to give god amount of incentives to the drivers as well as the riders and also gain market share through predatory pricing. But as soon as Uber sold its entire business to Grab, Grab started to increase the prices, giving low incentives to the drivers etc. to save losses. The Commission said that when these two businesses were in competition they did everything to capture market share, but as soon as Grab became dominant it increased its prices this was done to reap the losses from competition.

In the US, Amazon is often blamed for predatory pricing. But the company escapes antitrust scrutiny by the US regulator as it can argue that it's not in a dominant position in any of the businesses.The difference is that in developed markets the retail industry is already developed and hence is in a better position to take on price competition from e-commerce players, but in India both the organised retail industry and e-commerce are at a nascent stage.

Therefore, we can see that even though a enterprise is not in a dominant position still it is indulging in predatory pricing to capture market share and as soon as it captures markets share by any method it increases the prices of its products or services.

Thus, here we can say that government should either create a policy or in the act through amendment predatory pricing should be restricted irrelevant of dominance of the enterprise. But one also has to take in consideration the rules made by the commission in determination of cost.[29] Though the rules of cost of production can be in line with that of services but the commission should also frame rules of cost of providing services so to avoid any confusion and easy & quick settlement of cases.

ANTI – COMPETITVE AGREEMENTS

Section 3 of the act prohibits agreements entered by any person or enterprise that causes or is likely is cause an appreciable adverse effect in the market. Agreements are broadly classified into two categories – Horizontal Agreement & Vertical Agreement.

- Horizontal Agreements - Close Competitors in same line of business
- Vertical Overlap- Two Businesses in different stages or levels of production chain.

The word agreement here not only covers the Indian Contract Act but also any agreement or understanding between two person or enterprises. It is not essentially to only be a written contract. It is essential that the agreement has to be between two distinct entities. Agreement between two departments wouldn't amount to an agreement. This also has been used in Europe as well as in

[28]Case No. 500/001/18, 2018

[29] The Competition Commission of India (Determination of Cost of Production) Regulations, 2009.

India. An agreement between two enterprises who form a part of the same group cannot be considered as an agreement as subsidiary company will do as the parent company says. This is called Doctrine of Single Economic Entity.

It is interesting to note that agreements are not *per se illegal* but those agreement which causes or is likely to case appreciable adverse effect is illegal. Section 3 (3) gives us those agreements which are presumed to be appreciable adverse effect on the market. Section 3(4) gives us those agreements which will be considered as anti – competitive if it causes appreciable adverse effect on the market. Here it is very interesting to note that in one section those activities will be presumed to be appreciable adverse effect while in one section it will be anti – competitive only if it is causing appreciable adverse effect.

NEW ASPECTS OF ANTI – COMPETITIVE AGREEMENTS

Relevant Factors

Time and again the informant have failed to prove that there exists a cartel or there exists an agreement between the enterprises. In *N. Sanjeev Rao and Mrs. Fatima Tahir Informants And Andhra Pradesh Hire Purchase Association & 162 others*[30] the commission said that the informants have failed to prove that an agreement exists . Same was the case in *Royal Energy Ltd. vs. IOCL*[31] where the commission said that DG didn't find any evidence to suggest an agreement between the companies. Here the commission must consider all those factors as it did in the cement cartelisation case. The Commission did not consider direct evidence but also considered circumstantial evidence. The Commission held that the existence of a cartel can be inferred from the conduct of the parties. More specifically Commission said that pricing conduct of the parties was the main reason for existence of such cartel.

Therefore, not only for cartel but the Commission should also consider this for anti – competitive agreements too. Though the commission has used it in this case but it should use it more frequently.

VERTICAL AGREEMENTS

Except those 5 kinds of agreement mentioned the section doesn't seek to regulate any other kind of agreement. For ex – there are 3 firms – A, B, C. 'A' is dominant in distribution chain, B in production chain. C provides raw material to 'B' for production of bread. 'A' decides to sell bread and buys bread from 'B'. Both A & C using their dominant position forces B to enter into an

[30] Case no 49 of 2012.
[31] MRTP Case no: 1/28 (C-97/2009/DIGR).

informal agreement to control all the aspect of bread – price, supply, distribution etc. One person alleges that there is an agreement between all 3 companies, but there is no agreement given under section 3(4) to make it void. This is the main problem that exists in India where many companies dominant in their sector tend to use their dominance in other markets to create an agreement to control all the aspects of a given product. Therefore, the act should contain all aspects of anti – competitive agreements and not only horizontal or vertical agreement.

CONCLUSION

With the growth of economy and business reforms, there is a change in the market. So the competition in India needs to cope up with the situation. Laws which deals with the economy also needs to change with the changing market. In the present Competition Act, 2002 there are many loopholes which result in excessive litigation and the enterprises going unpunished. In this article we have studied these loopholes with foreign laws and our point of view. We recommend the following changes in Competition Act.

- Sufficient powers should be given to Commission and Director – General for investigation.
- Concept of Joint/Collective Dominance should be introduced.
- Market Share should not be the sole criteria for dominance.
- Predatory Pricing must be taken into consideration in a new way.
- Vertical Agreements should not be restricted to only the mentioned ones.
- Secondary Market should also be considered as a relevant market in certain cases.
- Circumstantial Evidence should be strongly considered while investigation of anti – competitive Agreements or Cartels.