

Competition Commission of India: Towards a more competitive & fair market



The Act covers those anticompetitive practices that have an appreciable adverse effect (AAE) in India. Specifically, the Act covers Anti-Competitive agreements, e.g., Cartel and Abuse of dominant position. The Act provides that the issues of Anti-competitive agreements and abuse of dominant position should be determined in “relevant market” in which core issues may cause or are likely to cause AAE on competition. Further, the Act requires regulator to determine dominance not solely on basis of market share but to look into number of factors including market share and for this purpose the Regulator is vested with substantial powers including power to declare agreements void, levy stringent fines and penalties and to block mergers.

Competition Act, 2002 (Act) in India, marks a landmark shift in approach towards regulating business in India. The Act brings India at par with UK, USA and EU in regulating free market.

Competition Commission of India (CCI/Commission) was established on 14th October, 2003 and started accepting cases under the Act after September 1, 2009. The Commission is vested with both regulatory and quasi-judicial powers to:

- Eliminate practices having AAE on competition.
- Promote and sustain Competition.
- Protect interests of consumers.
- Facilitate competition advocacy and spread awareness.

CCI has suo moto power to enquire whether anti-competitive agreement or abuse of dominant position causes or is likely to cause AAE on competition but this power must be exercised within one year from date the combination takes effect. CCI may direct any enterprise or person or their associations to discontinue anti-competitive practices. The CCI may on prima facie merit handover cases to Director General (Investigation) for a detailed investigation and based on its findings come out with its verdict.

Determination of Abuse of Dominant Position is not based solely on market share held by entity in particular market, but on various factors including market share. It would make the process somewhat unpredictable and complex and could open the Commission to charges of subjectivity. Clause (l) introduced in Section 19 and Clause (m) in section 20, of the Act are two examples of a confused legislation. Clause (l) has been inserted to ascertain dominance of an enterprise in market but appears to provide the Commission a mitigating factor where a dominant enterprise may be making a contribution to economic development. An identical Clause (m) has been inserted in Section 20 of the Act. Erroneous determination of Dominance will discourage firms from pursuing anti-competitive conducts, whereas erroneous non determination of dominance will allow them to continue with exploitative conducts.

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Two significant features of the Act are that like the EU model, Indian law also adopts “effects doctrine” in preference to “conduct doctrine”, and creates an extra territorial jurisdiction empowering the Commission to inquire into an agreement which is entered between foreign entities outside India. The “effect doctrine” is based on principle that any jurisdiction where the effects of any acts are felt should have concurrent jurisdiction over that conduct. However, applicability of the doctrine causes multiplicity of jurisdictions over the conduct which may cause conflict of jurisdictions among countries.

At the same time sector specific legislations already established sector specific regulators like Telecom Regulatory Authority of India (TRAI) for telecom, etc. The absence of clearly carved out legal space for statutory and sector regulator under various legislations and the Act creates an overlap between the domain of sector regulators and the Commission. One view is that such overlaps are unavoidable and the Commission would have to clearly demarcate jurisdictions in order to discourage forum shopping. Further, sector regulator may have to deal with different parameters/criterion to safeguard same issues which the Commission is empowered to regulate.

Thus, India has a law to tackle the challenges posed by growth of business by non-organic mode, and balancing of free market tenets. Question arising here is how Commission will intervene in deserving cases to regulate the anti-competitive conduct of market participants. The Commission will soon have the opportunity to reveal its anti-trust agenda and its approach to interpretation and application of the new concepts embodied in the Act. More importantly, its approach to investigation of complaints or information received from affected market players will determine its deterrent impact on the big fish who may be tempted to impose unfair or unreasonable conditions on their smaller competitors.

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