COMPETITION ACT - IMPACT ON RETAIL INDUSTRY AND ITS OVERVIEW

By Ritik Sharma & Arpit Sharma
From Symbiosis Law School, Noida

ABSTRACT:

This paper provides detailed information about the Impact of competition Law on Retail Industry. It explores the role of the Government of India in the industries growth and the need for further reforms. In India the vast middle class and its almost untapped retail industry are the key attractive forces for global retail giants wanting to enter into newer markets, which in turn will help the India Retail Industry to grow faster.

INTRODUCTION:

Competition benefits everyone: businesses, consumers and the economy as a whole. It encourages businesses to compete for customers. Buyers of goods and services, from individual consumers to businesses, benefit by paying less and having more choice and better quality. Competition results in open, dynamic markets, featuring increased productivity, innovation and better value. Retail Industry plays a vital role in any Country, and especially in India. As retail industry considers as the key pillars in Indian economy, as it contribute around 10% in India’s Gross Domestic Product (GDP).¹

OBJECTIVES OF ACT

To promote healthy competition in the market.
To prevent those practices which are having adverse effect on competition.
To protect the interests of concerns in a suitable manner.
To ensure freedom of trade in Indian markets.
To prevent abuses of dominant position in the market actively.
Regulating the operation and activities of combinations (acquisitions, mergers and amalgamation).
Creating awareness and imparting training about the competition Act.

IMPACT:

Competition laws all over the world are primarily concerned with the acquisition and/or exercise of market power and abuse. Market power is variously known in competition jurisdictions as dominant

¹ Indian Brand Equity Foundation, Retail Industry in India, and its overview, Last Updated: October, 2018
position, monopoly power and substantial market power. The Competition Act, 2002 and amended in 2007 follows the philosophy of modern competition laws and aims at fostering competition, protecting Indian markets against anti-competitive practices by enterprises who always want market leadership to maximize benefits from the market for their progress. The Act prohibits anti-competitive agreements and abuse of dominant position by enterprises and regulates combinations which include mergers, amalgamations and acquisitions thus laying down certain practices from which enterprises shall have to keep away. Enterprises not following the law on competition will have to face penalty which will thwart activities and operation in the market.²

The Act prohibits anti-competitive agreements including cartels, abuse of dominant position, regulates combinations which includes mergers, amalgamations and acquisitions. An anti-competitive agreement is an agreement having appreciable adverse effect on competition. Anti-competitive agreements may include, but not limited to: (i) Horizontal Agreements to: (i) fix prices; (ii) limit production and/or supply; (iii) allocate markets; and (iv) bid rigging or collusive bidding. (ii) Vertical Agreements including: (i) conditional purchase/sale (tie-up arrangement); (ii) exclusive supply arrangement; (iii) exclusive distribution arrangement; (iv) refusal to deal; and (v) re-sale price maintenance.

² Ibid;

Now when we talk about Competition Commission act, there are some criticism also attach to it, like excess control of central government, Competition Commission bound to follow the direction issued by the central government, and central government can exempt any number enterprise from the CCI. And when central or state government is involved, then there are a chance of biasness comes into play.

Retail Industry is the only industry, where in the government of India permitted 100% foreign direct investment. Having Competition commission act in India has helped the small retailers from the international competitor from all over the world.

The Act intends to curb any activity that could harm consumer welfare or freedom of any individual (or individuals) to freely and fairly compete in the market. Therefore, the three broad areas for the Competition Act to look at are: (a) cartelizing behavior of the firms, (b) abuse of dominant position, and (c) mergers and acquisition.³

When Indian Government, allow 100% Foreign Direct Investment in Retail sector, the pressure on Indian retail industries arises from multifold. As competition from internal as well as external competitors tends to rise with this step of government, thus there is an emergence need of competition act, from preserving the retail industry from malpractices adopted by some countries. Entering of Wal-Mart in India, tends to raise a competition to a very different level, thus protection of Indian retailer is necessary.

³ Competition Act undoubtedly promotes efficiency and accountability of the players ample choices for the consumer and
ultimately leading to welfare of customer and enterprise both. Retail business are now cannot charge different price from different customer, the prices need to be well settled and equal for all. Various retailers were not happy with this competition act, as earlier they were indulge in entering exclusive dealing agreement.

In the case of **Ahuja vs. Snap Deal**⁴, Ashish Ahuja used to sell various products through Snapdeal, in the process of which he used to purchase SanDisk products from open market and sell them through Snapdeal. Snapdeal eventually refused to sell these products and took them off its website. Mr Ashish Ahuja was informed that SanDisk had given a list of authorized channel partners and only such partners could sell SanDisk products through Snapdeal.

Snap Deal forcing him to sell only particular product, and refusal from Ahuja side, will going to stopping the supply of sand disk product.

Snap Deal was charged by CCI, for using his Dominant position in market for mode of the sale, thus preventing Ahuja from offering competitive prices for same product.

The famous Wal-Mart effect on retail sector, when Wal-Mart enters in India, Small retailers threatened with this entry in market due to stiff competition and chances of survival were less. Now we have to understand this thing that Retail also include E-Commerce, but not all of it, at least 10% of E-Commerce is retail⁵. In case of **Mohit Manglani v. Flipkart**⁶ India Private Limited & Ors, (Case No. 80/2014) the five major e-commerce portals in India namely; Flipkart, Snapdeal, Amazon, Jabong and Myntra were alleged to have contravened the provisions of the Competition Act, 2002. Here the informant alleged that the e-commerce portals entered into exclusive agreements in order to sell selected products exclusively through their portal and excluded other e-commerce portals and physical channels. He further averred that these e-portals decide upon the terms of resale, sale price, quality or service conditions, terms of payment and delivery. Moreover, all these stipulations were non-negotiable in nature for the prospective consumers. Further the informant claimed that each of these e-commerce portals were dominant as they had 100 percent market for the product they chose to exclusively deal in. It was contended here that the relevant market constitutes the market in context of that particular product and dominance is also perceived accordingly.

E-Commerce is channel of distribution to the relevant market of retail.

**LIMITATION PERIOD**

In **Nitin Radheshyam Agarwal vs. Competition Commission of India**⁷, it was argued that in the absence of prescription of
any period of limitation under the act, the
commission cannot refuse to order an
investigation into allegation of anti-
competitive agreement, but that does not

5 E-Commerce is 10% Retail, Author: Steve
Denis, Forbes, Last Updated: April 9, 2018

6 Competition Commission of India, Case
No.80 of 2014

7 Appeal No.108/2015, order dated 14-12-
2015 (CAT)

mean that the claim would be made even
after unreasonable delay., what is reasonable
time depend upon case to case.

**DETECTION OF BID RIGGING OR
COLLUSIVE BIDDING**

The main problem in checking the practices
or arrangement of bid rigging or collusive
bidding is how to detect the secret
understanding between the parties in the
absence of evidence. The problem becomes
more acute; when the parties do not quote or
bid the same rates but vary slightly with the
intention that it should appear to other as if
there has been no collusion. However,
suspicion may be unusual bidding or
something a bidder says or does certain
patterns of bidding would be seen to be odds
with a competitive market and suggest the
possibility of collusion.8

Any agreement (in Collusion) not to respond
to an initiation to tender until after
discussion with other person invited to
tender, is also a bid rigging offence.9

Certain patterns in bids can give rise to
suspicion of collusion. The competition
Commission of India has identified some
situation of suspicious behavior to include
the following:

- The bid offered by different bidders
contains same or similar errors and
irregularities (spelling, grammatical and
calculation). This may indicate the
designated bid winner has prepared all other
bids (of losers).10

- Bid Documents contain the same
corrections and alteration indicating last
minute changes. A bidder submits his/her bid and also the competitor’s bid.

- A party multiple bids to a bid opening and
submits a bid after coming to know who
else is bidding.

- A bidder makes a statement indicating
advance knowledge of the offers of the
competitor. A bidder makes a statement
that a bid is a ‘Complementary’ or ‘Cover’
bid.

- A bidder makes a statement that the
bidders have discussed prices and reached
an understanding.

8 Bid Rigging under the Competition Act,
2002.

9 Ibid;

10 Competition Act, 2002( Principles and
Practices), by: Prof. Dr.V.K. Agarwal, 2nd
Edition 2019

**TYPES OF BIDS**

- **Identical Bids**

Some time parties agree to put in identical
bids for every job, each bidder receive fair share.

*Cover Bids*

Bidders makes an arrangement as who shall submits the lowest bid and rest shall submit ‘cover’ bids, so that designated bid will be accepted, these are known as complementary bidding.

*Bid Suppression*

The competitor agree not to bid against each other, one or more bidder agree to refrain from bidding, or one who has agree to withdraw the submitted bid.

*Bid Rotation*

Competitors agree to designate the bid winner in advance on a rotational basis or on a geographical or customer allocation basis.

*Protection bid*

Sometime association determines which supplier it to receive the contract. The others then directed either not to bid at all, but it gives them protection that certain firm out of several quoting price for a particular customer obtains the contract.

**CASE LAW:**

- **Quoting Identical Price- may not be cartel**
  
  Excel corp. limited v/s Competition Commission of India

  Supreme Court held companies liable for quoting identical prices, which has adverse effect on the market. Allegations of cartelization and bid rigging were also raised in this case where the issue before the Supreme Court of India was whether the four manufacturers of Aluminium Phosphide Tablets had formed a cartel by entering into anti-competitive agreements amongst themselves since these manufacturers quoted identical rates for their products. The UNCTAD Competition Glossary defines bid rigging as “bid rigging or collusive tendering is a manner in which conspiring competitors may effectively raise prices where business contracts are awarded by means of soliciting competitive bids”.

  Union of India vs. Hindustan Devlopment Corporation

  The Supreme Court considered the questions whether quoting identical price or near-identical price by the seller/suppliers of the product cannot itself construed as an act of cartelization/bid- rigging etc. In this case the tender committee formed an opinion that 3 big manufacturer formed a cartel by quoting the identical price.
Court held that this was only a suspicion because merely quoting the same price does not mean formation of cartel/bid-rigging, quoting same price and lower price does not mean the same, thus these suspicions are not enough to conclude that they have form the cartel.

rail Coach Factory Kapurthala vs. Faively transport India Limited

In that case tribunal rejected the argument the allegation of formation of cartel by the respondent by observing the mere identity of price did not furnish the valid ground for holding the respondent liable.

We may asst that in an oligopolistic market like the one in question, the identity of price quoted by the bidder is not an unusual feature. The player in the limited market are aware of the price quoted by each other, it is ordinary course of quoting the same price in response to next tender. Thus merely suspicion of quoting the same price and formation of cartel did not render it void.

❖ MERITS:

- Although competition forces lessen your market share, it can also force you to become a better business.
- Advantage for customer It’s good to have choices. The number competitors, the better the offer for customer.
- Promotes Economic Efficiency or best use of resources.

Demerits:

- Competition decreases your market share

Act protect enterprises, but from creation of monopoly in the market, with no price fixation in the market which is a very positive step in achieving a good competitive environment.

- Protection of small and medium enterprises, from getting dissuaded from the multinationals.
- Customer is benefitted due to Competition Policy.

Lower prices for all, the simplest way for a company to gain a high market share is to offer a better price. In a competitive market, prices are pushed down. Not only is this good for consumers - when more people can afford to buy products, it encourages businesses to produce and boosts the economy in general.

- Better quality Competition also encourages businesses to improve the quality of goods and services they sell – to attract more customers and expand market share. Quality can mean various things: products that last longer or work better, better after-sales or technical support or friendlier and better services.

- More choice in a competitive market, businesses will try to make their products different from the rest. This results in greater choice – so consumers can select the product that offers the right balance between price and quality.

- Innovation to deliver this choice, and produce better products, businesses need to be innovative – in their product concepts, design, production techniques, services etc.

- Better competitors in global markets

Competition within the EU helps make European companies stronger outside the EU too – and able to hold their own against global competitors.

❖ DEMRITS:

- Competition decreases your market share

15 Appeal No.10/2016, order dated 17-02-2016 (CAT)

www.supremoamicus.org
and shrinks your customer base, especially if demand for your products or services is limited from the start.\textsuperscript{16} 

Competition can be hard on businesses; it may harm companies you regularly support.\textsuperscript{17} 

There are no clear rules or international standards on what constitute “fair” or “unfair” trade practices. Many jurisdictions assume that collusive agreements are per se bad and hence illegal; some subject these to the rule of reason.\textsuperscript{18} 

An apparent overkill: Because of the diversity of factual circumstances in a market, the impact of business practices on competition cannot usually be pre-judged.\textsuperscript{19} 

Even though dominance of the market by established players tends to make it more difficult for newcomers to compete, it is not the Government’s objective to specifically favour newcomers. Creates uncertainty in the competitive world. 

No emphasis given without intention parallel pricing, as it sometime coincidence that multiple enterprises quoted the same pricing, without having any ill intention on their part, but due to which they have to face burden of the act, which protect parallel pricing.

\textbf{DIFFERENCE BETWEEN MRTP ACT AND COMPETITON ACT}\textsuperscript{20}

<table>
<thead>
<tr>
<th>BASIS</th>
<th>MRTP ACT</th>
<th>COMPETITION ACT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Meaning</strong></td>
<td>MRTP Act, is the first competition law made in India, which covers rules and regulations relating to unfair trade practices</td>
<td>Competition Act, is implemented to promote and keep up competition in the economy and ensure freedom of business.</td>
</tr>
<tr>
<td><strong>Nature</strong></td>
<td>Reformatory</td>
<td>Punitive</td>
</tr>
<tr>
<td><strong>Dominance</strong></td>
<td>Determined by firm's size.</td>
<td>Determined by firm's structure</td>
</tr>
<tr>
<td><strong>Focuses on</strong></td>
<td>Consumer interest at large</td>
<td>Public at large</td>
</tr>
<tr>
<td><strong>Offenses against principle of</strong></td>
<td>14 offenses</td>
<td>4 offenses</td>
</tr>
</tbody>
</table>

\textsuperscript{16} Ibid;\textsuperscript{17} Ibid;\textsuperscript{18} Government Response, ‘Competition Policy’- The key to economic success
In short, the two acts are different in a number of contexts. MRTP Act has a number of loopholes and the Competition Act, covers all the areas which the MRTP Act lags. The MRTP Commission plays only advisory role. On the other side, Commission has a number of powers which promotes suo moto and levies punishment to those firms which affects the market in a negative way.

**CONCLUSION**

Competition Act purpose is regulate market fairly, without any fraudulent practices on the part of enterprises, it seeks to maintain market competition by regulating anti-competitive conduct by companies. Talking about retail industry, government and other institutions does not lay emphasis on this industry, while this industry contributes 10% to total Gross Domestic Product (GDP).

The specific anti-competitive practices of the retail Industry covered under Section 3 of the Act are exclusive supply agreements, exclusive distribution agreements, refusal to deal and resale price maintenance. The prohibition of cartel agreements (price fixing, output restricting, market sharing or bid rigging) between enterprises or persons is the strongest provision in the Act however the act shall not apply in case such an agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods and provision of services. Having said this it must be noted that cartels may increase efficiency but alongside may also increase prices that may be detrimental to the consumers.

India has liberalized 100% Foreign Direct Investment (FDI) in its single and multiple brand retail industry, which results into higher level of competition in the market, thus chances of sucking the throats of small and medium retailers, thus need for such policy is very urgent to protect the same from dying from the market. Although this has proved very beneficial to customers.

It can now be concluded that the competition Act, 2002 is landmark legislation. The main aim of this Act is to promote competition and curb all anti-competitive agreements. This Act restricts the abuses of dominant enterprises. It can also regulate any kind of combinations beyond a particular size. Thus this Act does not curb monopolies rather it curbs abuses of monopolies.

Thus, the competition Act is expected to play a responsible role in changing the control mechanism related to monopoly and restrictive trade practices and is also
expected to protect the interest of the small and medium industries in the country besides giving consumers more powers to redress their grievances.

21 Competition Law in Retail Sector, PVX Law partners, Last Updated 20 June, 2018

*****