



PRATISPARDHA KANOON: THE COMPETITION WATCHDOG

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Introduction

“Competition in market-based economies refers to a situation in which firms or sellers independently strive for buyers' patronage in order to achieve a particular business objective, for example, profits, sales, or market share. Competition in this context is often equated with rivalry. Competitive rivalry may take place in terms of price, quantity, service, or combinations of these and other factors that customers may value.”¹ No better combination of words nor any quote can describe the state and definition of competition in the economy. Competition Law has legacy of many years. “Relevant Market” and “Power over the Market” are noticeable features of competition. Competition law has been adopted by a lot of countries and most of them include provisions regarding relevant market and power over the market. The question which this paper seeks to answer is, whether relevant market is the only determining factor in the matters involving Competition Law? “Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish framework within which the competition policy is applied by the commission. The main purpose of market definition is to identify a systematic way the competitive constraints that the undertakings

involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure.

Therefore, the purpose of defining the “relevant market” is to assess with identifying in a systematic way the competitive constraints the undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned. In essence, it is the notion of “power over the market” which is key to analyze many competitive issues.”²

The severity and magnitude of the relevant market in Competition Law serves to be more salient when such words happen to be a part of the judgment delivered by the Hon'ble Supreme Court of India. The global development of relevant markets is one of the evident feature of this era. Relevant market has impact on firms and is increasingly recognized in International Combinations as well. Therefore if dealt properly and

¹ The World Bank, *A Framework For The Design and Implementation Of Competition Law And Policy*-available at: <http://documents.worldbank.org/curated/en/977331468759588195/pdf/multi-page.pdf>

² *CCI v. Bharti Airtel Ltd. and Ors*, 2019 2 SCC 521, decided on December 5, 2018.



skillfully relevant market could be a factor which could change the course of any competition related issue.

Relevant Market: When is Market Power Determined?

The market wherein one or more goods compete is known as the relevant market under competition law. Consequently, whether two or more products can be construed as substitute goods and whether a particular and separate market for analysis of competition is constituted by those goods, is defined under Relevant Market. Relevant Market constitutes both the product market as well as the geographic market. In order to determine the relevant product market, all those products and services which are considered as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use, need to be analyzed. Furthermore, proper care is needed to see if the area in which the firms concerned are involved in the supply of products or services, and whether the conditions of competition are sufficiently homogeneous or not. Relevant Market is an important component of most of the systems of competition law.

Law or Social Change: What Dash Ahead?

Law has been both dependent as well as independent variable i.e. a cause as well as an effect in society and has inter-reliance with other social systems. The advantages of law as an instrument of social change are attributed to the fact that law in society is seen as legitimate, more or less rational, authoritative, institutionalized, generally not disruptive, and backed by mechanisms of enforcement. While the term is usually

applied to changes that are beneficial to society, it may result in negative side-effects or consequences that undermine or eliminate existing ways of life that are considered positive.³

The old MRTP Act metamorphosed into the Competition Act with the emerging regulations of competition in India. Growth of state-owned enterprises between 1960 and 1990 along with Economic Liberalization in India in 1991 addressed the issue of competitiveness among enterprises in the markets of India. In 1995 when India decided to sign the World Trade Organization (WTO) global treaty this issue became grave. It was during these years from Economic Liberalization to signing of the WTO global treaty, when the debate as to whether or not the MRTP Act, 1969 and the MRTP Commission should continue to regulate the monopolies and restrictive trade practices in India. This resulted in the constitution of a high-powered committee (Raghavan Committee), headed by Mr S V S Raghavan, in the year 1999 in order to gauge some of the necessary changes which may be required to combat the trade related anti-competitive practices of Indian enterprises after economic liberalization. Coupled with the recommendations of the Raghavan Committee and the Constitutional Mandate, the Parliament enacted the Competition Act, 2002 in December 2002 which obtained the Presidential assent on 13 January 2003. The Competition Act is, thus, a legislation that imposes reasonable restrictions upon citizens

³ *Social change*, NEW WORLD ENCYCLOPAEDIA available at:

http://www.newworldencyclopedia.org/entry/Social_change



and enterprises to the freedom of trade and commerce while operating in India.⁴

Competition Law, indisputably, has led to a positive social change preventing practices having adverse effect on competition, in order to promote and sustain competition in markets; protect the interests of consumers and ensure freedom of trade. In Monopoly form of market, the total profit is greater than that of the combined profit of all firms in a market of competitive nature. Furthermore, consumer welfare also suffers under monopoly as compared to a competitive scenario. Competition Law covers this part in almost every aspect of itself, and ensures the well-being of competition in the market as well as consumer welfare. The Competition Act, 2002 aims to curb any activity which is or which may harm the freedom of an individual to freely compete in the market or which may go against consumer welfare.

It is hence, pretty lucid that, the law has played a positive role in fabricating the social status of Competition Law from removal of monopoly to growth of competition. The latest competition legislation of India is a civil legislation and mandated the Commission to abide by the principles of natural justice.⁵

BHARTI AIRTEL Verdict- Concept of Relevant Market and the Competition Act.

The recommendations of the Raghavan Committee and the Constitutional Mandate led to the legal recognition of Competition Act, 2002 in India. The concept of “relevant market” was well explained by the Competition Commission of India through its

verdict in *Competition Commission of India v. Bharti Airtel Ltd. And Ors.*⁶

The case in Bharti Airtel Ltd. was about the grievances of the telecom operators who alleged collusion, anti-competitive agreements between the telecom operators and denial of point of interconnection (POIs) [i.e. points that allow voice call originating from the work of one operator to terminate on the network by other operator]. RJIL, a new entrant into the telecom market had filed an information before the Competition Commission of India alleging anti-competitive agreement having being formed by three major telecom operators. Further allegations against the respondents, that is, Incumbent Dominant Operators were that they had, through an anti-competitive agreement/ cartel, limited the provision of services by delaying or denying POIs to RJIL, with a view to block its entry into the market. The Competition Commission of India, while inquiring into the alleged contravention and determining whether any agreement has an appreciable adverse effect on competition or not, mentioned that it is relevant to take into consideration the provisions stated in sub-section (3) of Section 19. These constitute creation of barriers to new entrants in the market, driving existing competitors out of the market foreclosure of competition by hindering entry into the market. All these activities have connections with the ‘market’.

A. Relevant Market

The word “market” has reference to “relevant market”. As per sub-section (5) of Section 19, such relevant market can be relevant

⁴ Manas Kumar Chaudhuri, *Competition Law in India: Perspectives* available at: https://www.researchgate.net/publication/304184152_Competition_Law_in_India_Perspectives

⁵ Sections 36(1) and 36(2) of the Competition Act, 2002.

⁶ *Bharti Airtel Ltd. and Ors.*, Supra Note 2.



geographic market or relevant product market. In the present case, we are concerned with the relevant product market viz. telecommunication market. Sub-section (7) of Section 19 enumerates the factors which are to be kept in mind while determining the relevant product market. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which the competition policy is applied by the commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic and productive dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure. Therefore, the purpose of defining the "relevant market" is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specified use of such product is concerned. In essence, it is the notion of "power over the market" which is key to analyse many competitive issues.⁷

B. The Objective Behind the Competition Act

The Act prohibits anti-competitive agreements and has a laudable purpose behind it. The main purpose of this act is to ensure healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. Enhancement of consumer well-being is the ultimate goal of the Competition policy/ Consumer policy. These policies ensure that the market functions effectively. Ensuring "Level playing field" for all market players is another purpose in curbing anti-competitive agreements, as a result of which market remains competitive. It sets "rules of the game" that protect the competition process itself, instead of competitors in the market. Consequently, economic growth, development and economic efficiency improve.

In *Excel Corp Care Ltd. v. CCI*⁸, the objective behind the act as well as the rationale in curbing anti-competitive practices was taken note of. Effectual use and allocation of the resources of the economy is included in efficiency of the Economy. Competition inclines to bring about enhanced efficiency in not only static but also dynamic sense. The same is done by disciplining firms to produce at lowest possible cost and pass these cost savings on to consumers, and also motivating firms to undertake research and development to meet consumer needs. Economic Growth and economic development are interrelated. An increase in the value of goods and services produced by an economy is a key indicator of economic development. Economy's well-being constituting, employment growth, literacy, mortality rates and other measures of quality of life, is a part of the broader definition of

⁷ *Bharti Airtel Ltd and Ors.*, Supra Note 2

⁸ *Excel Corp Care Ltd. v. CCI*, (2017) 8 SCC 47



economic development. Through improvements in economic efficiency and reduction of waste in the production of goods and services, competition may bring about greater economic growth and development. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over-time sustained economic growth tends to lead an enhanced quality of life and greater economic development. Economic growth to the ultimate benefit to the consumers through Competition policy is reflected in terms of better choice (new products), better quality and lower prices. For the purpose of redressing a perceived imbalance between the market power of consumers and producers a consumer welfare protection may be required. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction cost. Competition policy may serve as a complement to consumer protection policies to address such market failures. Due to worldwide deregulation, privatization and liberalization of markets, developing countries need a competition policy, in order to control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.

International Relations

A. Anti-Trust Law of U.S.

U.S. Law was the first jurisdiction to introduce a coherent competition system⁹ to

⁹ Barry J. Rodger & Angus MacCulloch, Competition Law and Policy in the EC and UK 13 (3rd edn. , 2004)

¹⁰ Merger Regulation for the Global Prosperity: A Comparative Study of Matured Competition

influence entire global competition regime. The core of anti-trust regulation is formed by Sherman Act and Clayton Act. Prohibition of concentration of wealth and economic power in the hands of a few was aimed by the Sherman Act. The courts made the enactment more meaningful by interpreting the vague terms. Clayton Act was an attempt to strengthen anti-trust enforcement. Another law, Federal Trade Commission Act was enacted in the year 1914. It declared the unfair methods of competition and unfair and deceptive acts, practices affecting trade and commerce to be illegal. In relation to the new law, the test of “Market”¹⁰ evolved as relevant for application of Anti-Trust law. It was based on geographical nexus and included a range of close substitutes. Consequently a finer test of “Relevant Geographical Market” and “Relevant Product Market” evolved for analyzing mergers and acquisitions and affirmed the relevance of consumer views and available substitutes in the market place in the analysis of monopoly.

B. International Competition Network-Economic growth and productivity

With the help of Competition productivity increases through various means which include, pressure on firms to control costs, easy market entry and exit, encouraging innovation, pressure to improve infrastructure and benchmarking. In an environment of competition, it is important for firms to constantly strive in order to lower their production costs so that they can charge competitive prices. Furthermore, in order to correspond to consumer demands, they must

Jurisdictions, (2018) 5 GNLU L. Rev. 121, available at-

file:///G:/paper/Competition%20Law/J_2018_5_GNLU_L_Rev_121_anandshambhavi2_gmailcom_20191219_152947.pdf



also improve their goods and services. Resources are reallocated from less to more efficient firms through entry and exit of firms. When an entrant is more efficient than the average incumbent then the overall productivity increases and when an existing firm is less efficient than the average incumbent. Entry as well as threat of entry serves as an incentive for firms to continuously improve in order not to lose market share to be forced out of the market by the new entrant. Innovation acts as a strong driver of economic growth with the help of introduction of new or substantially improved products or services and development of new and improved processes that lower the cost of production and in turn increase the efficiency. Incentives to innovate depend upon the degree and type of competition in the market. By means of competition, communities are pressurized to keep local procedures competitive by improving roads, bridges, docks, airports and communications, as well as improving educational opportunities.

Competition also can contribute to increased productivity by creating the possibility of benchmarking. The productivity of a monopolist cannot be measured against rivals in the same geographic market, but a dose of competition quickly will expose inferior performance. A monopolist may be content with mediocre productivity but a firm battling in a competitive market cannot afford to fall behind, especially if the investment community is benchmarking it against its rivals¹¹.

With the help of applying pressure on firms through competition, productivity of the firms is increased. The reason for the same being the efforts of the producers to charge

competitive prices and at the same time they strive to lower down their production costs. For the purpose of corresponding to the demands of the consumers' the same leads to improvement in the quality of their goods and services. The enforcement of Competition Law deals with anti-competitive practices arising out of acquisition or from the exercise of undue market power by firms that result in harming the consumer in the form of higher prices, lower quality, limited choices and lack of innovation. Through the remedies provided by the enforcement of Competition Law, situations that will lead to decreased competition in the markets are avoided. Furthermore, not only anti-competitive conduct is sanctioned with the help of Competition law but any future anti-competitive practice is also deterred. Competition has a number of benefits and at the same time it can be seen that cartels or anti-competitive agreements cause harm to consumers by fixing prices, limiting outputs or allocating markets. An active and effective enforcement against such cartels or anti-competitive agreements has a direct and visible effect in terms of reduced prices in the market and the same is also supported by various empirical studies.

Keeping in view the aforesaid objectives that needs to be achieved, Indian Parliament enacted the Competition Act, 2002. Need to have such a law became all the more important in the wake of liberalization and privatization as it was found that the law prevailing at that time, namely, Monopolies and Restrictive Trade Practices Act, 1969 was not equipped adequately enough to tackle the Competition aspects of the Indian Economy. The law enforcement agencies, which include CCI and COMPAT, have to

¹¹ *Bharti Airtel Ltd. and Ors.*, Supra Note 2.



ensure that these objectives are fulfilled by curbing anti-competitive agreements¹².

Elimination of Evils affecting the economic landscape of the country

Section 18 Of the Competition Act, 2002 casts an obligation on the Competition Commission of India for the ‘elimination’ of the anti-competitive practices and for the promotion of competition, interests of the consumers and free trade. Mr Neeraj Kishan Kaul, the learned Additional Solicitor General rightly pointed out that the act clearly aims to address the evils affecting the economic landscape of the country in which the interest of the society and consumers at large is directly involved. The court clearly laid emphasis on the same in *CCI v. SAIL*¹³. “As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of achieving the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the

competition in market within India and for this purpose establishment of a quasi-judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body, namely, “the Competition Commission of India” (for short “the commission”) which has the power to perform different kinds of functions, including passing of interim orders and even awarding compensation and imposing penalty. The Director General appointed under Section 16(1) of the Act is a specialized investigating wing of the Commission. In short, the establishment of the Commission and enactment of the Act was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigation, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Section 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 64, the Commission has framed regulations called the Competition Commission of India (General) Regulations, 2009 (for short “the Regulations”).

The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to

¹² *Bharti Airtel Ltd. and Ors.* , Supra Note 2.

¹³ *CCI v. SAIL*, (2010) 10 SCC 744



*contravention of the Act, expeditiously and even in a time-bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultant, country's economy cannot be ruled out."*¹⁴

Concluding from the above, the Competition Commission of India is entrusted with the duties, powers and functions to deal with the anti-competitive practices and activities mentioned above. The main purpose is the elimination of practices having adverse effect on the competition for the purpose of promoting and sustaining competition. In addition to this, protection of the interests of the consumers and ensuring freedom of trade, carried on by the other participants, in India is a vital constituent. The Competition Commission of India is empowered to call any person for rendering assistance or production of the records in order to arrive at even the prima facie opinion, to conduct an enquiry. As a result of the provisions the Competition Commission of India is also empowered to hold conferences with the parties concerned including the advocates of the parties and other authorized persons.

Need for Regulatory Mechanism

Regulatory Mechanism is the order of the day and is also known as regulatory economics. Starting from laissez faire to mixed economy to the present era of liberal economy with regulatory regime, the journey of the

economic policy of this country has served to be a long one in the last 60-70 years. With the materialization of the mixed economy some of the key industries like aviation, insurance, railways, electricity/power, telecommunication, etc. were monopolized by the State, along with the mushrooming of various public sector enterprises.

Conclusion

The Competition Act, 2002 has proved to be a landmark legislation. The act aims at promoting competition and curbing all the ant-competitive agreements. Through this act various restrictions are imposed on the dominant enterprises to curb them from misusing their position. Furthermore, any kind of combination beyond a particular size is also regulated by the act. Therefore, this act does not curb monopolies rather it curbs the abuse of the monopolies.

The Competition act is, in the present as well as in the future, expected to play a responsible role in the process of changing the control mechanism related to monopoly and restrictive trade practices. Furthermore, apart from giving the consumers more powers to redress their grievances, the interest of the small and medium industries in the country are also expected to be protected. There can be no better way, than with the quote from two English barristers, Flynn and Stratford,¹⁵ apt to conclude this article which is as follows-

“It is also helpful to bear in mind the distinction between a restriction on competition (an economic concept) and a restriction on conduct (a concept which

¹⁴ *CCI v. SAIL*, Supra Note 13.

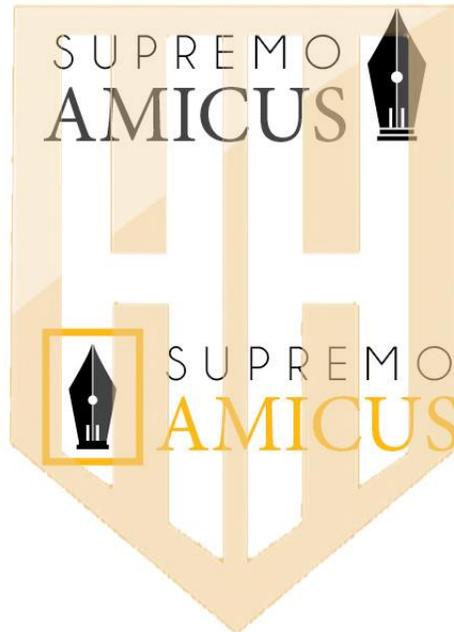
¹⁵ Government of India. (2000, April 27). Report of the high level committee on Competition Policy and Law

(File No.1/9/99.CL-V). New Delhi: Ministry of Law Justice and Company Affairs, Department of Company Affairs



lawyers find easier to understand), especially since such restrictions can be discerned from contractual terms without deeper consideration of the underlying circumstances¹⁶”.

To sum up, the concept of relevant market is like man power in the handloom industry and if the above stated factors are kept as a base and then the relevant market is decided skillfully, the same would drive the course of any competition law related issue. Therefore this concept proves to be the cardiovascular system of the watchdog.



¹⁶ Extracted from Mr Sudhir Mulji’s dissent note in the Raghavan Committee Report