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Comparative Analysis of The Objectives of Competition Policy in India and EU in a Neo-Liberal Era (Market Economy)

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ABSTRACT

Today competition law plays a significant role in a country's economic growth. The progress of an economy, attracting investments, FDI is closely linked to the competition law goals and objectives that are pursued by the respective country. The origin of competition law could be traced to Sherman act 1890, around this time there was no specific policy pursuit as competition law was in a nascent stage. It was Robert Bork in 1970s, who highlighted that the goal of antitrust laws should be consumer welfare. Today India and EU pursue a multiple number of goals that include consumer welfare, protection of small players, innovation and efficiency. Both of them belong to Harvard School and have more or less similar objective with minute differences which will be highlighted in this paper. In a neo-liberal world there is role back of state with minimum or no state intervention has given to the impression that there is shift in government policies from consumer centric to pro-business centric. With this context in background, this paper tries to identify the core goals of competition law and its importance. In this light it tries to do a comparative study of goals of India and EU in a neo-liberal world. Further with the help of latest developments the author tries to identify whether there is shift in policy approach towards pro-business.

Keywords: *Goals of Competition Policy, India and EU, consumer Welfare, Harvard School.*

I. INTRODUCTION

In 2016, the entrance of JIO by reliance industries into telecom industry has seriously disrupted the market beyond imagination. A company with almost nil or zero presence in telecom industry at that time has today become the largest number of telecom subscribers in a short period of 3-4 years. The result of this disruption is that Vodafone-idea which was the 2nd largest in the market has been almost eliminated and turned into a bankrupt company when the central government has to intervene to pull out from losses and further most of the telecom companies have incurred serious losses for the past 5 years which continue for even today. Even though intense competition among the players lead to steep price cuts by these companies to retain their

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consumer base thereby benefitting the consumers, the policies adopted by JIO in order to become the market leader like predatory pricing is seriously questionable in light of competition law. However the issue for this article is that the competition commission of India in June 2017 has passed a verdict dismissing the petition by Airtel stating that the Section 4 that deals with abuse of the dominant position was not applicable as it is not a dominant player in the market at that time. This signals a serious shift in the policy deviation from a more consumer welfare and efficiency oriented to pro-business oriented as today there are only two major players left i.e. jio and Airtel and they have already started increasing the plan prices due to duopoly. On the other side of the spectrum the fight of EU Commission with the GAFAM (Google Apple Facebook Amazon Microsoft) to protect the interest of the consumer by imposing huge penalties in billions of dollars as recently as 2020 shows the strong policy orientation towards consumer welfare and efficiency being top priorities for EU even today.²

Even though the competition policy has started in 1880's and 90's the competition policy has since then has taken a prominent position for overall development of a country's economy, consumer welfare, promoting investment and innovation etc. Chapter I of this article is going to discuss about the significance of having a competition policy in a country in the light of economic development, efficiency, innovation and most importantly consumer welfare.

India started its journey in 1947 as a mixed economy with socialistic tendencies and at the same time EU was formed in 1950s and both them have similar policy objectives when it comes to competition policy, efficiency, protection of competition etc. Chapter 2 is going to discuss about similarities and dissimilarities in the objective of competition policy of India and Europe with a critical perspective.

Today we are living in a neo-liberal world where the domination of market forces over several government policies is significant. The government is also under pressure to facilitate market economy, more private participation etc. In light of these changes there are certain policy decisions taken by CCI and the recent amendment to competition commission act poses a question whether there is shift in competition policy towards pro-business centric in chapter 3 analyses whether that shift is beneficial in the overall interests of the economy by comparing with EU policy.

II. SIGNIFICANCE OF COMPETITION POLICY OBJECTIVES/GOALS IN AN ECONOMY

Any human act will always have an objective to be achieved and a rational man does not do

² Vikas kathuria, "Conflict between Regulation and Competition Law in the Indian Telecom Sector" 53 EPW 234, 234-239 (2018).

things in an arbitrary and haphazard manner. Any law being a byproduct of human act will always have an objective to be achieved. For instance the objective of Indian constitution is provided in the preamble which is to establish a democratic state based on equality, liberty and justice. In the same way every country will follow certain goals to be pursued by competition law of the country based on the socio-economic, historical conditions evolved over a period of time.³

The first codified law for competition was the Sherman Act 1890, before it the European countries in 19th century have followed the ideas of Adam Smith based on laissez faire without any state intervention. During this period individual or firms can do any sort of unfair trade practice without any state intervention or penalty. But the Sherman Act was the first legislation in the world with an objective to promote free competition in the world due to the unfair trade practices of standard oil company. Around this time many independent regulatory bodies are setup in America like Interstate Commerce Commission (1887) with the objective of regulating the particular sector and protecting consumer welfare.⁴

The objective of the earliest Acts of America and Europe was to promote free competition and to prevent unfair trade practices. There is no serious pursuit of the goal of consumer welfare until Robert Bork in 1970s popularized the objective of competition law should be consumer law.

Over the period of more than 100 years the competition law across the world has evolved over various phases and now it pursues multiplicity of goals instead of any single goal. These include consumer welfare, efficiency, small business protection, innovation, fair competitive market, promotion of market integration. But it has be noted that there is a means end relationship in these goals, whereas consumer welfare is the end goal which could be achieved by various means like efficiency, fair competition and innovation etc.

III. IMPORTANCE OF HAVING COMPETITION LAW GOALS

Objective/goals of competition law are like the heart of the competition law with other parts being the institutional mechanisms to achieve the goals without the objectives institutions like CCI, government will be directionless leading to arbitrariness, haphazardness and nepotism in decision makings. Having objective help the institutions to set a goal and pursue the goal, being consistent in their approach. For instance during the time of MRTP several controversial decisions by MRTP commission without any consistency was criticized for their arbitrariness

³ Martin, Stephen, "*The Goals of Antitrust and Competition Policy*", 50 *Antitrust Law Journal* 345, 345-354 (2018).

⁴ Id.

and lack of any policy goal.⁵

Any human act requires a direction and Goals are important to achieve that direction. In the same way competition law requires policy direction for achieving certain goals including protecting consumer welfare, promote economic growth, healthy competition and protecting small players in the economy. India is a developing country with large number of MSMEs which provided employment to 80% of population. It is possible that big companies and MNCs might use their economic muscle and unfair trade practices against the small players. It is the responsibility of the competition commission to protect these small players and promote healthy competition. Similarly consumers do not generally have bargaining powers against the vendors as a result often they are at the mercy of big companies who use unfair trade practices like cartels, predatory pricing, quantitative limits etc. It is the objective of the competition law to protect consumer's welfare. For instance the Cement Cartel case (Builder association of India),⁶ where nine companies came together to fix the prices impacting consumer welfare.⁷

Having a goal can help the judiciary, CCI and CCAT to interpret an administrative decision, rules or law passed by legislature to go the true meaning or spirit of the law rather than the letter of the law. As CCI is provided with wide judicial, legislative and executive powers, these powers could be misused or could lead to arbitrariness. Judiciary while interpreting the decisions can go into the duties and objectives of CCI while interpreting its decisions.

Due to the wide powers vested in CCI it is possible that it deviate from their core goals due to several political and business lobbies which could lead to inconsistent in policy approach. Having a goal can help the CCI to maintain consistency in policy approach and as a guiding principle in case of any deviation from its core goals or making a difficult economic decision for CCI members.

Finally goals like consumer welfare, fair competition, protection of small players, prevention of abuse etc. help in overall economic growth, predictability, attract investments and private sector confidence.

IV. COMPARISON OF OBJECTIVES OF COMPETITION POLICY OF INDIA AND EU

The competition policy of India and EU has evolved in different socio, economic and political settings, whereas the EU was a group of liberal democracies based on laissez faire system, India

⁵ Stylianou, K., & Iacovides, M, "The goals of EU competition law: A comprehensive empirical investigation", 42 Legal Studies 620, 620-648 (2022).

⁶ Case No. 29 of 2010

⁷ Stylianou, K., & Iacovides, M, "The goals of EU competition law: A comprehensive empirical investigation", 42 Legal Studies 620, 620-648 (2022).

on the other hand followed economic policies which have a welfare approach and tilted towards socialism and dominant role of the state with marginal role to private sector the result is the passing of the MRTP act with an objective to prevent concentration of wealth, monopolies and restrictive trade practices.

In order to understand the goals of EU and India it is important that we first identify the sources from which the policy goals of respective jurisdictions could be identified. As India is a sovereign independent nation the principal act that deals with Competition law is the Competition Act, 2002, decision of competition commission and CCAT and Central Government. The preamble of the Act specifically mention that the objective of is to ensure fair competition and to protect consumer interest. Further Section 18 of the Act provide that the CCI has the duty to eliminate practices that harm competition, fostering and maintaining competition, defending consumers' interests, and ensuring other participants' freedom of trade in Indian marketplaces.⁸

On the other hand the EU is an economic and political union of various countries and has a dual system (the individual country own competition policy which are not covered under EU and the EU policy). The EU competition policy is governed under the Treaty on the Functioning of the European Union (TFEU), the policy approach European commission decisions and its regulation and finally verdict of court of justice of European Union. Articles 101-109 deal with the competition policy of EU which talks about protecting consumer interest, integration of markets, efficiency, innovation and fair market competition.

The EU and India both belong to Harvard school where the primary goal is to protect consumer welfare by ensuring dispersed players in the market. For instance the European Commission in *Intel case*⁹ used the effect case doctrine to identify the true effect of the abuse of dominant position as consumer and accordingly imposed one billion euro penalty on Intel. Similarly in *Neeraj Mlhotra vs North Delhi Power*¹⁰, the Supreme Court reemphasized that the preamble of the Act entails that the consumer welfare if the guiding force for competition law in India.¹¹

Both India and EU believe in presence of dispersed market with large number of small players will protect the consumer interests. Unlike the Chicago school which supports monopoly, duopoly or few players as long as it is benefitting the consumers. As a result of this approach EU has several times penalized anticompetitive practices of Bigtech companies like Google and

⁸ Chintan Bharadwaj and Sakshi Agarwal, "Goals of Competition Law in India", 3 International Journal of Law Management and Humanities issue 3425, 3425-3432 (2019).

⁹ ECLI:EU:T:2022:19.

¹⁰ *Case No. 6 of 2009, dated 11-5-2011.*

¹¹ Aditya Bhattacharjea, "India's competition policy: an assessment" 3 EPW 24, 24-25 (2019).

Microsoft who are using their market share to drive out small players by entering into competitive markets. Similarly India follows similar approach where it believes in fair competition with large number of small players where it investigated several anticompetitive practices of Amazon and Flipkart (*Amazon/Flipkart v. CCI*),¹² which impacted the brick and mortar business.

But there are certain differences in approaches of India and EU, even though they are not significant but they are worth mentioning as part of the paper. India has a long history of welfare and socialist approach to economy as a result there is tendency to protect weaker and small business despite the fact that they are inefficient. there are several examples to the effect like despite the failure of Yes bank (private bank) it was taken over by public owned SBI, recently due to the entrance of JIO in the telecommunications market, Vodafone and Idea were close to winding up but government bought 35% stake in these companies to protect them.¹³

On the other hand even though EU supports dispersed and diverse players in the market, in the garb of promoting competition it does not protect inefficient players. Economic advisory group on competition policy (EAGCP), 2005 for economic approach to Article 82, in *Microsoft Vs Commission of the European communities*,¹⁴ the Microsoft was accused of anti-competitive practices for not sharing the data with SUN companies for interoperability of its operating system. while the Microsoft raised the issue that the court should not protect inefficient players in the garb of protecting competition, the court rejected the argument stating that the competition policy pursued by EU is not to protect inefficient companies as SUN companies was already a dominant player in the market, but to protect consumer choice.

There is lack of clarity and consistency and mechanical application of law in various decisions of the CCI that gives us no clear idea as to what the CCI policy sought to achieve. For instance in *Uber vs CCI* case¹⁵, Meru cabs accused the Uber being dominant player with 70% market as cab aggregator, abused its dominant position by entering into agreement with drivers, but CCI dismissed the case in 2021 stating that uber is not a dominant player in the market as per Section 4, as ola is also in the market, despite the fact that uber policies foreclosed new players into the market and ended into duopoly. On the other hand it held in the *Makemytrip vs CCI* case that makemytip was abusing its dominant position by giving preference to OYO linked hotels, even though there are several players in the relevant market, like goibibo, agoda, booking etc. and

¹² W.P. NO.3363 OF 2020 (Karnataka HC).

¹³ Aditya Bhattacharjea, "India's competition policy: an assessment" 3 EPW 24, 24-25 (2019).

¹⁴ 2007; T-201/04

¹⁵ CIVIL APPEAL NO. 641 OF 2017 (SC)

makemytrip market was only 30% and it was not able to act independently due to large numbers of players and cutthroat competition.¹⁶

As a result of this inconsistency it appears that CCI is deviating from its core objectives and there is lack of consistency and arbitrariness in decision making. On the other hand EU has maintained a consistent approach in protecting consumer welfare from its start till today.

V. IS THERE A SHIFT IN COMPETITION POLICY OF INDIA IN A NEO-LIBERAL ERA?

With the introduction of LPG reforms in India, there is gradual withdrawal of state from many economic activities as state is expected to play a facilitating and steering role and the state is expected to do least interference in economic activities and to promote competition and Privatisation in economy. Accordingly India has repealed the controversial MRTP with Competition Act. In the process of state withdrawal several sectoral independent Regulatory commissions like CCI, SEBI, IRDA were set up with primary objective of consumer welfare and regulating that sector.¹⁷

Even though India has embraced economic reforms in 1991, the constitutional goals of welfare state and socialistic ideals are still the guiding force of the government. But recent decisions by CCI and legislative changes like the Competition Amendment bill 2022 introduced in the parliament makes one to believe that there is a shift from consumer centric to pro-economic/business approach.

The recent decision of CCI in dealing with various tech companies that are practicing anti-competitive practices like predatory pricing, abuse of dominant position to drive out competitors have been ignored by CCI on technical grounds or literal interpretation of the Act, despite numerous complaint from small players in the market. For instance in the telecom sector the arrival of JIO as market disruptor by providing free data at very low prices has driven out other competitors like Aircel, Vodafone out of business leading to duopoly of JIO and Airtel. Even though CCI has rejected Airtel's plea but a closer look of the Section 4 explanation says that dominant position is the ability to act independently of competitive forces present in the market, JIO is owned by Reliance Company which is the richest company in India with strong financial support compared to other companies like Airtel and VI. So by giving free data and keeping the prices very low JIO was able to act independently of its competitors. But the CCI held that JIO was a new entrant and donot have market share to be in dominant position. This

¹⁶ Umut Aydin & Kenneth P. Thomas, "The Challenges and Trajectories of EU Competition Policy in the Twenty-first Century", 34 Journal of European Integration 531, 531-547 (2012).

¹⁷ MN Sharma, "India badly needs a National Competition Policy -Essential for growth in a free market economy", 34 EPW 34, 34-45 (2018).

verdict by CCI was criticised by many thinkers and academicians that it indicates a pro-business policy ignoring consumer interests. Theoretically this would be not accepted by Harvard school as the actions of JIO has reduced the number of competitors to only two and impacted the long-term interests of consumers, even though in the short term it has benefitted the consumers because of reduced prices.¹⁸

Adding to the fact government is bringing several reforms in the name of ease of doing business which have a pro-business stand. the recent changes proposed in the competition amendment bill 2022, might give the impression that there is shift in the goals of the government to take a more pro-business stance. the provisions include green channeling for mergers which reduces the number of days to accept the merger proposal, reduction in penalties for various offences and negotiated settlement between CCI and the accused party.

On the other hand the EU has always stood for the Harvard school where consumer welfare with small number of dispersed players has always been the guiding policy objective of the EU. the EU in its 2005 and 2009 regulations stated that consumer welfare based on effects doctrine is the objective of EU competition policy. accordingly the EU has been at time confrontational in protecting consumer welfare and dispersed market as it is visible in its huge penalties imposed on big tech companies GAFAM (acronym for Google amazon Facebook apple Microsoft).¹⁹

It could be argued that the recent decisions and legislative proposals are showing a shift towards a pro-business tilt, due to the pressure of neo-liberal market forces as government want to send a message that India has one of the best business environment policies to the world to attract investments. Recently many scholars and academicians have argued on these lines.²⁰

But it cannot be conclusively said that there is a shift towards a pro-business approach, but only points towards lack of consistency in CCI approach. It is not an official approach of the government or CCI that there is shift towards pro-business policy objectives. Regulatory commissions are appointed to regulate a particular economic field with a primary purpose to protect consumer interests. As recently in 2023 the SC held that in Google case that the primary purpose of Competition law is consumer interest. Also the proposed Competition law amendment also has several clauses which make it mandatory notification beyond a threshold for merger proposals to CCI, empowering CCI more powers and enforcement, research and investigation wing etc. The interpretation of Section 4 also supports CCI decision in JIO case,

¹⁸ Avimukt dhar & others , “Welcome amendments to the competition Law”, 32 EPW 470, 472-480 (2020).

¹⁹ Umut Aydin & Kenneth P. Thomas, “The Challenges and Trajectories of EU Competition Policy in the Twenty-first Century”, 34 Journal of European Integration 531, 531-547 (2012).

²⁰ Id.

as it is not a dominant player in the relevant market.

CCI being a statutory body created under CCI act cannot go against the clear mandate provided under section 18 and preamble of the Act, it is only the parliament that can give new policy goal to the CCI. Even if such a proposal made it would not stand judicial scrutiny as the Supreme Court would intervene to protect the spirit of the law and strike down arbitrary decision of CCI or central government. As a result consumer welfare continues to be core policy objective of CCI and central government.

VI. CONCLUSION

As mahatma Gandhi famously said “that the customer is the most important person for a business and he is not dependent on the business but the business is dependent on him”. This statement throws valuable insight into competition law policy. Companies are always at an advantage and they try to pursue various anti-competitive and unfair practices to acquire the market, manipulate the consumer. So it is important that in the words of robert Bork the sole purpose of competition law is to protect consumer welfare. Whether it is the Harvard school or Chicago school of thought the end objective should always be consumer welfare.

India and EU has evolved in different socio-political and economic setting, but today after LPG reforms India is pursuing more market approach as it is looking for massive private investments and private sector participation from India and the world. EU and India have mostly similar kind of policy goals, the only significant difference is that India has a tendency to support inefficient enterprises, whereas EU supports efficiency as primary goal. Another significant difference is that there is lack of consistency in approach of CCI in pursuance of its goal compared to EU.

Some recent decisions and changes might give the impression that CCI and central government is following pro-businesses policies ignoring the consumer interests which is part of its statutory obligations. But the research has turned out that this deviation is only points to lack of consistency in approach of CCI, but not of policy deviation. In this line the CCI has much to learn from its European counterpart to maintain consistency in policy approach.

VII. REFERENCE

- Martin, Stephen, "*The Goals of Antitrust and Competition Policy*", 50 *Antitrust Law Journal* 345, 345-354 (2018).
- Stylianou, K., & Iacovides, M, "*The goals of EU competition law: A comprehensive empirical investigation*", 42 *Legal Studies* 620, 620-648 (2022).
- Chintan Bharadwaj and Sakshi Agarwal, "*Goals of Competition Law in India*", 3 *International Journal of Law Management and Humanities* issue 3425, 3425-3432 (2019).
- Aditya Bhattacharjea, "*India's competition policy: an assessment*" 3 *EPW* 24, 24-25 (2019).
- Umut Aydin & Kenneth P. Thomas, "*The Challenges and Trajectories of EU Competition Policy in the Twenty-first Century*", 34 *Journal of European Integration* 531, 531-547 (2012).
- Vikas kathuria, "*Conflict between Regulation and Competition Law in the Indian Telecom Sector*" 53 *EPW* 234, 234-239 (2018).
- Avimukt dhar & others , "*Welcome amendments to the competition Law*", 32 *EPW* 470, 472-480 (2020).
- MN Sharma , "*India badly needs a National Competition Policy -Essential for growth in a free market economy*", 34 *EPW* 34, 34-45 (2018).
