

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

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Escape Clause in the Competition Act 2002

SANGEETH KRISHNA G.S.¹

ABSTRACT

The Monopolies and Restrictive Trade Practices Act, 1969 was passed to restrain monopolistic and trade restrictive practices. But this act proved ineffective in the era of new economic reforms coupled with liberalization, privatization, and globalization. Thus, this act was repealed and replaced by the Competition Act, 2002. The purpose of Competition Act 2002 was to ensure democratic setup in the Indian market by upholding free enterprises and averting market distortion practices. Consequently, the act created a statutory body called Competition Commission of India which encourages competition and discourages any activities that can have a detrimental effect on healthy competition. Accordingly, Competition Commission of India nurtures a level playing field for all the stakeholders by regular monitoring and taking action against violations.

The Competition Act was passed in 2002. Thus, it has been 20 years since any significant changes in the act. During these 20 years, new businesses have emerged, and many old businesses have transposed. More importantly, technology began to take the pivotal position of businesses. But the Competition Act has not been able to keep pace with the accelerating changes in the business environment. Consequently, many loopholes exist in the Competition Act, which are successfully used by the business players to circumvent the restrictions placed by the Competition Act to prevent any market distortion practices.

In Bharti Airtel Ltd. v. Reliance Jio Industries Ltd., Airtel accused Jio's action of providing freebie services as predatory practice which is in contravention to the provisions of the Competition Act 2002. But the competition commission dismissed the case by stating that the above provision applies only to dominant players and not to Jio, who is a new entrant with a market share less than 30%. This study focuses on the above irrational clause in the Competition Act 2002.

Keywords: Competition, Market, Economy.

I. INTRODUCTION

Economic reform was a single step, but a giant leap for the Indian market. This economic reform introduced the concept of Privatization, Liberalization and Globalization, commonly called LPG. Though the term sounds simple, the reality was very complex indeed. The giant leap was accompanied by giant chaos. The state driven market was being replaced by a demand and

¹ Author is a student at Government Law College Ernakulam, India.

supply driven market.

This paved the way for the entry and strengthening of private players into the Indian market. They were more effective and efficient than the state players. But contrary to the state players whose sole aim is to benefit society with less or nil interest in the profit, the private players focused on accumulation of profits. It would be precise to say, they were driven for profits and even driven by profits, because they do not have the luxury of budget allocation. They have a fixed pool of investment. Consequently, focused on maximizing the revenue and minimizing the expenditure.

It is common human nature to enhance progress. Thus, the same companies which were controlled by humans were raising the bar of profits expected year after year. It started to equate between need and greed. Greed was considered good. Whatever nefarious means adopted was justified for the end called profit.

This resulted in a virtuous cycle in the Indian economy. Big companies increased their profit by hook or crook. Amassed wealth was further employed to increase the profit. The magnitude of this cycle becomes bigger and bigger with the completion of each cycle. This blatantly violated the concept of reducing the concentration of wealth enshrined in our constitution, which aimed at a socialist society. It worsened to a point that the very act of privatization which envisioned the encouragement of healthy competition, resulted in killing of competition by some big private firms.

No responsible government could not stop itself from acting on this dire situation, because this not only affected the Indian market, it even dictated the income, expenditure and savings of each citizen of this country. The nostrum to all the problems was the creation of a comprehensive law, which came to be known as the Competition Act 2002. This also created the Competition Commission of India.

It is undoubtedly certain that the Competition Commission of India was working effectively and efficiently to ensure that the market is driven by demand and supply forces and no other invisible hands of any firms play any notorious act in it. It focused on wiping out anti-competitive agreements, exploitation of dominant positions by firms and terminating anything and everything that has an adverse effect on the competition environment within India.

To a great extent, the Competition Commission of India was very successful. But with the passage of time, the world has shrunk to a global village and new businesses have started dominating the World. The multinational corporations were even having the budget challenging the budget of nations too. This huge mass of wealth and resources enable them to rewrite the

rules in their favor. Unfortunately, the age-old Competition Act is ill equipped to deal with the new reality. The provisions of the act are thus easily circumvented by the firms with ease to reach their objective, which diluted the very purpose for which the act was introduced. Thus, it even calls for the question, if the Competition Act is still relevant.

The only way to make the act pertinent is to fix the leaking holes in the act. Consequently, this study tries to point out the most important escape clause in the Competition Act.

(A) Research Problem

- a. The Competition Commission of India is ill-equipped to deal with fair and non-market distortion market environment?
- b. Companies can escape CCI citing many reasons such as technology advantage which they are not competent to deal with.

(B) Research Objectives

The objectives of the research are the following:

- 1) To study the escape clause in the Competition Commission Act 2002.
- 2) To study the method employed by the firms to circumvent the Competition Commission Act 2002.
- 3) To study the externalities caused due to such escape clauses in the Competition Commission Act 2002.

(C) Research Question

CCI has a narrow view of its scope, and it is not possible for them to challenge the complaints made against certain companies. A question arises whether CCIs existence itself is futile?

(D) Hypothesis

The researcher assumes that the Competition Commission of India is unequipped to tackle the loopholes that exist in the Competition Commission Act 2002.

(E) Research Methodology

This research paper is doctrinal and material available in public domain. The method followed by the researcher is Doctrinal. The researcher takes the aid of legal manuals, research studies, secondary literature, legal commentaries and US and EU Copyright laws.

(F) Citation Mode

Researcher has followed Harvard Bluebook (21st edition)

(G) Scope and limitation of study

The study focusses on the escape clause that exists in the Competition Act 2002. The predatory pricing aspect in the telecom sector is given the prime importance.

(H) Review of literature

- Research paper on Competition Policy in Telecommunications in India by Subhashish Gupta². According to Subhashish Gupta in his work regarding 'Competition policy in telecommunications in India'. He explained the evolution of competition in the telecom sector. His critical thinking attempts to ascertain the degree of competition. But he failed to explain about regulations and how far it is succeeded in India.
- Research paper on Role of competition commission of India in Consumer protection: A critical study³. According to Rajat Dayal in his article he well explained about objective of promoting competition in the market & ultimately protecting the interest of consumers.
- Complexities surrounding SEP cases in India: An overview of decisions by the High Court and Competition commission of India⁴ by Ameya Pant & Dipesh Jain. In this work researcher explained about SEP's in India. Further they include details about granting of injunctions, unwilling licensee etc.
- According to Leela Kumar on her article MRTP Commission and Competition Commission of India⁵, he had made an comparison between CCI and MRTP Commission and paper success to explain the working of both the commissions.

(I) Research question with answer

The Competition Commission of India, interpreted the terms like dominance and predatory pricing just as a literal meaning, which undoubtedly makes the Competition Commission of India restrictive and limited in scope. Consequently, defeating the very purpose for which it was created.

(J) Hypothesis Tested

The assumptions of the researcher can be held valid by the tunnel vision adopted by the Competition Commission of India, to elucidate predatory pricing and dominance in different

² SSRN: <https://ssrn.com/abstract=2161713>

³ 14.139.58.147 2021

⁴ Journal of Intellectual Property law & Practice, VOL:12, ISSUE 2, Page no. 132-142 (2018)

⁵ SSRN: <https://ssrn.com/abstract=2429261>

scenarios, by interpreting it within limited scope.

II. CONTENT

The Indian political system is a democratic system, which follows universal adult franchise, where the susceptibility for concentration of power is negated. This is reflected in our economic system too, where the measures are taken to stave off concentration of wealth.

Consequently, The Monopolistic and Restrictive Trade Practices Act, 1969, was enacted. Thus, the utmost focus of the act is to prevent the concentration of wealth, controlling the monopolies and prohibiting trade restrictive practices. A regulatory body, Commission of The Monopolistic and Restrictive Trade Practices was established to deal with the offenses under Monopolistic and Restrictive Trade Practices Act.

The wave of globalization demanded a paradigm shift in the approach. The new issue in focus was, improving competition and not just restricting monopolies, as solely envisaged by the Monopolistic and Restrictive Trade Practices Act. As a consequence, the Monopolistic and Restrictive Trade Practices Act was repealed and replaced by the Competition Act 2002, whose immediate preferences were to promote a favorable environment for competition and ensure freedom of trade. The above preferences were reflected in the objectives of the Competition Act 2002.

“An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto”⁶.

The first and foremost priority was to assure the interests of the consumers with proactive steps to choose good products at reasonable prices. The Competition Act, 2002 strictly prevents any such agreement between an enterprise or person or association of any of two in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India⁷.

The Competition Act 2002 also tries to regulate the combination i.e. acquisition, mergers and amalgamation. In order to meet the objectives of the Competition Act, a regulatory body,

⁶ The competition Act 2002, Preamble, No12, Acts of Parliament,2003(India)

⁷ The competition Act 2002, Section 3, No. 12, Acts of Parliament,2003(India)

Competition Commission of India was established.

The pivotal concern of the Monopolistic and Restrictive Trade Practices Act was on monopolies. However, it contains no provisions to prevent the abuse of the market by dominant players. The Competition Act, 2002 had a proper plan of action to prohibit the abuse of the market by dominant players. Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumers or the market in its favor⁸.

In Spite of all such checks and balances, and a very wide circle of objectives and functions, the Competition Act, 2002 is being circumvented by some manipulative practices. It has been more than two decades since any major reforms nor any fruitful amends being added to the Competition act. Consequently, the Competition Act is outdated.

This study tries to focus on the telecom sector, where the provisions mentioned in the Competition Act are circumvented by the players of the telecom sector. The case in point is *Bharti Airtel Limited vs. Reliance Industries Limited and Anr*⁹

Reliance Jio, popularly known as Jio was launched in 2016. During its launch, as an introductory offer, Jio offered many unprecedented rains of offers never witnessed in the Indian telecom market. Unlimited voice calling and unlimited data packages were given without any cost to the subscribers. The entry of Jio opened a new Pandora's box for the existing telecom players who are already reeling under huge losses.

Bharti Airtel limited filed suit against Jio claiming that the actions of freebies by Jio is nothing less than predatory pricing.

In the case of *MCX Stock Exchange v. National Stock Exchange of India Limited &Ors.*¹⁰, the Commission observed that the predatory pricing claim can be maintained only when a claimant meets two prong test: first, the plan of action must drive the competitor out of market; second, there must be conclusive evidence showcasing that the monopolist then could make up the losses by raising the prices without allowing the entry of new players.

In the case of *Fast Track Call Cab (P) Ltd. v. ANI Technologies (P) Ltd.* (2017)¹¹, the petitioner purported that the deeds of predatory pricing were proof of dominance. But the Commission observed that Ola does not enjoy any dominant position in the Indian market and it is quite

⁸ The frequently asked question booklet, advocacy series on Competition Act 2002, CCI

⁹ The *Bharti Airtel Limited Vs Reliance Industries Limited and Anr*, Case No 3 of 2017, CCI

¹⁰ *MCX stock exchange v National stock exchange of India Limited & Ors.*, 2011 SCC Online CCI 52

¹¹ *Fast Track Call Cab(P)Ltd V.ANI Technologies(P)Ltd*, 2017 SCC Online CCI 36

common for new entrants to indulge in such practices to gain market share. Also the acts of punishing them for such innovative steps to gain market share will lead to terminating the opportunities of new entrants to gain market share, which will lead to chilling of competition.

In 2017, Jio acquired a user base of 108 million users and became the fastest growing telecom in the World. Jio acquired a staggering user base of 388 million in 2020 and became the largest telecom in India. While, year after year, the user base of Jio is accelerating and the user base of other telecom players are dwindling. This clearly shows that Jio engaged in providing lower prices to users with a view to oust the other players from the market. It is also observed that Jio was increasing the price of its package and reducing the freebies. Knitting all of the acts, it is crystal clear that the observed ignoble actions perspicuously comes under the definition of "Predatory Price", which reads as the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors¹².

Dominance refers to a position of strength which enables an enterprise to operate independently of competitive forces or to affect its competitors or consumers or the market in its favor. The above definition is endorsed by the Competition Commission of India. The freebies provided by Jio during its launch conclusively points to the facts that Jio was acting independently of competitive forces which adversely affected its competitors whose losses mushroomed, even though some players try to reduce the cost of the plans they rolled on to the customers. This clearly indicates that the price which the competitors of Jio provided was not enough to at least meet the break-even point. Hence it proves that the price of plans provided by Jio was less than the cost incurred by Jio for those plans. This is definitely predatory pricing and Jio was using the position of financial strength derived from the gargantuan wealth pool of Reliance Industries Limited, to shift the market in its favor. Consequently, this act fits very much with the definition of Dominance.

Unfortunately, the Competition Commission of India tried to elucidate predatory pricing and dominance in different aspects by interpreting it within limited scope. There is a well-known saying, a stitch in time saves nine. Well, if the interpretation is limited without widening the scope and understanding the spirit, this loophole will be exploited habitually. Hence it is of alarming importance to rewrite the interpretations in the Competition Act to widen the scope of predatory pricing and dominance.

¹² The competition Act 2002, Section 4, No. 12, acts of parliament, 2003 (India)

III. CONCLUSION

The Monopolies and Trade restrictive practices act was repealed and replaced, as it was ineffective to deal with the myriad of issues created by Liberalization, Privatization and Globalization. The Competition Act 2002 arrived as a savior to deal with the new economic order. Competition Commission of India was to monitor the interplay of modern firms in the Indian market without itself being a red tape.

The times have changed since the Competition Commission of India was created. The global economy and the Indian economy have changed and become more interlinked than ever. Unfortunately, the Competition Commission of India has not evolved to cope up with the altered scenarios. Hence, it is quite evident, the Competition Commission is incapable and ill equipped to solve the modern challenges to ensure a favorable climate for healthy competition and prohibit any acts that threaten fair play. The farther the wait to fix the leak, the more the abuse on the Indian market. Thus, with each passing time, the leak increases both in size and number. Consequently, it is of utmost importance to rectify the loopholes in the Competition Act as early as possible. After all, an ounce of prevention is worth a pound of cure.

(A) Recommendation

The Competition Commission of India must interpret the terms like dominance and predatory pricing not just as a literal meaning, which makes the Competition Commission of India restrictive and limited in scope, instead a wider interpretation is to be adopted by inculcating the lessons learnt from various judicial pronouncement, both from India and abroad. Proper research must be conducted on the various measures taken across the World to ensure healthy competition in their respective countries. Such strategies can be included in the Indian market after taking valuable suggestions from all stakeholders through a new statute.

Delayed justice is injustice, and it is of utmost importance to ensure adequate manpower and resources to the Competition Commission of India at the earliest, so as to make the justice deliverance speedy and effective.

IV. REFERENCES**(A) Case Laws**

- Bharti Airtel Limited vs. Reliance Industries Limited and Anr
- MCX Stock Exchange v. National Stock Exchange of India Limited & Ors
- Fast Track Call Cab (P) Ltd. v. ANI Technologies (P) Ltd. (2017)

(B) Articles

- Research paper on Competition Policy in Telecommunications in India by Subhashish Gupta

(C) Statutes

- The Monopolistic and Restrictive Trade Practices Act, 1969
- The Competition Act, 2002
