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CCI'S JURISDICTIONAL ISSUES

AUTHORED BY - HARDIK LAROIYA

COMPETITION COMMISSION OF INDIA:-

The Competition Commission of India has been established under Sec 1 of the Competition Act, 2002 to prevent practices[1] having adverse effect on competition, to promote and sustain competition in Indian 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. It is mandated, inter alia, to take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues. It, therefore, pursues its objectives through two sets of instruments, namely, advocacy and enforcement targeted at enterprises. These measures are complementary and are expected to promote and ensure thereby freedom of trade by enterprises and consumer welfare to achieve 'fair competition for greater good'.

As a measure to promote competition advocacy, that is, to disseminate the message of competition law, promote competition culture and competition compliance, the Commission has proposed to maintain a panel of "Competition Resource Persons", to organise competition advocacy programmes for groups of stakeholders to supplement its own efforts on competition advocacy.[2]

THE COMPETITION ACT, 2002

The Vajpayee government developed the concept of the 'Competition Commission' and introduced it as the Competition Act, 2002. It was considered that competition and private enterprise needed to be encouraged, particularly in light of the 1991 economic liberalisation of India. Modern competition rules are based on the Competition Act of 2002, as updated by the The Competition (Amendment) Act of 2007. The President gave his approval to the Competition Act of 2002 in January of 2003, after Parliament enacted it in 2002. The

[1] Competition Commission of India, "Introduction to Competition Law" (August 2016) <https://www.cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-5-regulatory- bodies-and-coordination-between-the-competi1652182541.pdf> accessed 10 August 2023

[2] Anil Kumar Bhardwaj, 'Introduction to Competition Law' (Competition Commission of India, August 2016)< https://www.cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-5-regulatory-bodies-and-coordination-between-the-competi1652182541.pdf> accessed 10 August 2023

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Competition Commission of India (CCI) and the Competition Appellate Tribunal have been constituted in compliance with the Amendment Act's requirements. The Act forbids anti-competitive agreements, corporate abuse of dominant positions, and combinations (including acquisitions, takeovers of control, and mergers and acquisitions) that have or are likely to have a materially negative impact on competition in India.

In order to not only prevent negative effects on competition but also sustain and foster pro-competitive behaviour, the Competition Act was passed in 2002. The Act also aims to safeguard the freedom of trade practised by all market players in India, as well as any issues related to or incidental to freedom of trade. The new law's framework not only fixed the shoddy setup from its predecessor, but it also made adjustments and provided equipment for the time's economic environment. Extraterritorial jurisdiction, harmonisation with Intellectual Property Rights and other laws, overlaps between the Competition Act, 2002 and sectoral regulatory laws, and competition advocacy, were some of the Act of 2002's special features that, when combined with the spirit of the entire globalisation phenomenon, were extraordinary for their time.

The Act controls three anti-competitive behaviors, namely, mergers and acquisitions (combinations), abuse of dominant positions, and anti-competitive agreements. The basic standard for the control of anti-competitive behavior is that such behavior should not significantly harm competition within India. The definition of anti-competitive agreements is provided in Section 3 of the Act, which divides these agreements into two groups, namely, horizontal agreements and vertical agreements. It stipulates that, with a few exceptions as given in Section 3(5), all anti- competitive agreements that have the potential to have a materially adverse impact on competition in India shall be void.

Through the CCI, which the Central Government established with effect on October 14, 2003, the Act's goals are intended to be accomplished. The Central Government appoints the chairperson and six other members of the CCI. The commission has a responsibility to stop activities that harm competition, foster and maintain it, safeguard consumer interests, and guarantee trade freedom in Indian markets. The commission is also required to provide an opinion on competition-related matters in response to a referral from a statutory authority established by any law, engage in competition advocacy, raise awareness among the general public, and impart training on competition-related matters.

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The Competition Act of 2002 must now be explored, questioned, and investigated for its effectiveness in the technological age, in the face of digitalization, commercialization, and the Internet of Things. India has now reached another critical juncture, a crossroads in its antitrust regime.

OBJECTIVE AND SCOPE OF THE COMPETITION ACT, 2002

The Competition Act of 2002 is a piece of legislation that aims to defend consumer interests from anti-competitive behavior, foster and sustain market competition, safeguard consumer interests, and guarantee other market participants' freedom of trade. The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), which formerly applied only to India, has been replaced by the new law.

The three foundational pieces of competition legislation upon which the Competition Act has been built are the National Competition Policy (NCP), the Competition Appellate Tribunal, and the Competition Commission of India (CCI).

The major reason for passing this legislation is to make sure that market competition operates as intended and that customers have access to a broader variety of goods at reasonable costs.

SECTION 3 OF THE COMPETITION ACT, 2002

Any arrangement between businesses or individuals that could significantly harm Indian competition is prohibited by Section 3 of The Competition Act, 2002. There are certain exclusions to this rule. In Section 3(3) of the Competition Act of 2002, a list of the agreements that are considered anti-competitive is provided, namely:-

1. Price setting or any other type of trade condition (i.e. price-fixing).
2. Restricting or managing service provision, investment, markets, technological advancement, or manufacturing (i.e. limiting production).
3. Allocating a specific geographic market area, a specific product or service, a certain quantity of clients, or a source of production (i.e. market sharing).
4. Preventing or restricting competitors' access to the market (i.e. entry control).

Any agreements made by businesses or groups of businesses, or by people or associations of individuals, in connection with the production, provision, allocation, stockpiling, collecting, or acquisition of products or the provision of services linked to:-

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1. Research and development,
2. Technical data,
3. Standards,
4. Testing resources,
5. Accessibility to cutting-edge technology,
6. Marketing, and
7. Export-related operations.

SECTION 4 OF THE COMPETITION ACT, 2002

One of the three criteria outlawed by The Competition Act of 2002, along with anti-competitive agreements and abuse of dominance, is the dominant position. One of the key challenges that competition law, often known as antitrust law, addresses is dominance. The concept of "dominance" refers to the ability of a firm or group of firms to influence output or pricing in the relevant market. Abuse refers to the misuse, exploitation, or excessive use of a person's power. Therefore, to abuse a dominant position in the relevant market, one must misuse, exploit, or overuse it. According to Section 4(2), consideration must be given to all or all of the following considerations when determining whether a company has a dominant position:

1. The business's size and resources;
2. The magnitude and significance of its rivals;
3. The company's financial strength includes commercial advantages over rival businesses such as the right patents, licenses, and permissions;
4. The enterprise's vertical integration, including any backward or forward integration;
5. To compete successfully in a market where such supplies are dependent on other businesses, having access to sources of commodities or raw materials is crucial;
6. Where there is reliance on other businesses for such markets, the ability to access marketplaces for goods or services is critical to effectively compete in those markets.

FEATURES OF THE COMPETITION ACT, 2002

Some of the notable features of The Competition Act, 2002 have been laid down hereunder:

1. **Anti-competitive agreements:** Any agreement between two or more businesses or individuals to preserve market competition and protect consumers' interests in India is prohibited by the competition law. These agreements may be horizontal or vertical. Horizontal agreements are those between businesses at the same level of production,

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whereas vertical agreements are those between businesses at various phases of production.

2. **Anti-cartels:** Any business that abuses its dominant position will face consequences.
3. **Anti-abuse of dominance:** Any arrangement between businesses or individuals that lessens competition would be regarded as illegal.
4. **Combination regulations:** Only if a merger or acquisition does not damage market competition will the commission make a decision.
5. **Informative nature of this Act:** Before taking any action or signing any agreement, an organization must tell CCI of its dealings that are likely to harm market competition in order to ensure transparency and prevent any misunderstandings between businesses or individuals.

KEY CONCEPTS TO KNOW UNDER THE COMPETITION ACT, 2002

To understand the purpose, underlying principles, and functioning of the Competition Act, 2002, certain key concepts dealt with by the Act need to be known. The same has been explained hereunder.

Anti-Competitive Agreements

Anti-competitive agreements are those between the parties to a business transaction that have the potential to undermine competition in a specific market or that favor one person or group unreasonably above the interests of others. The Competition Act of 2002 forbids such anti-competitive agreements.

Because those participating in anti-competitive acts are not permitted to enter into formal written agreements to keep them secret, the term “agreement” has taken on a broad meaning under competition law. Cartels, for instance, are typically shrouded in secrecy. Any arrangement regarding the production, supply, distribution, storage, purchase, or control of commodities or the provision of services that substantially lessens competition within India is prohibited by Section 3 of the Act. Any agreement that violates this clause will be void, according to Section 3(2).

Abuse of dominant position

A person or business is said to be in a dominating position when it is in a strong position that allows it to function independently of the competitive dynamics present in the relevant market

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or has a favorable impact on its rivals, customers, or the relevant market. In the competition legislation of numerous other jurisdictions, the dominant position has been described in broadly comparable terms.

The meaning of "dominant position" for the purposes of the Competition Act of 2002 rests on the definitions of "relevant market" that were previously discussed. Therefore, in order to establish an abuse of dominance, it is first essential to establish that the firm in question held a dominant position in terms of the market for a certain product and the geographic market for that product.

Control of such abuse is provided for under Section 4 of the Act. It states that no enterprise or organization abuses its dominant position. It also outlines specific instances of behavior that constitutes an abuse of a dominant position. The following behaviors are defined as "abuse of dominant position":

1. Imposition of unfair or discriminatory terms or pricing (including predatory prices) in connection with the purchase or sale of goods or services may be done directly or indirectly. A "predatory price" is when a product is sold below what it costs to produce it or to provide the service in an effort to drive out or lessen competition.
2. To the detriment of customers, limiting or restricting the production of products or services or placing restrictions on technical or scientific progress related to such goods or services.
3. Engaging in actions that in any way prevent access to the market.
4. Using one relevant market's dominant position to defend or penetrate another relevant market.

One critique of Section 4 of the Act is that, unlike in the case of anti-competitive agreements and combinations, the offence of "abuse of dominant position" is not dependent on a determination of an appreciable adverse effect on competition. When dealing with matters falling under Section 4, the sole place where anti-competitive agreements is to be taken into account is in the list of considerations that the Commission is obligated to take into account when considering whether an entity enjoys a dominant position under Section 19(4) of the Act.

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Combinations and their regulation

The third area of competition law's concentration is the regulation of combinations. The three types of combinations regulated by the Competition Act, 2002 are as follows:

1. A person or business buying the stock, voting rights, or assets of another entity.
2. Individuals gaining control over an enterprise.
3. Combinations or mergers between or among businesses.

Combinations are defined in Section 5 of the Act by a set of cutoff points below which they are not subject to the Competition Act's scrutiny. The fundamental reasoning for imposing such restrictions is that joining forces between tiny businesses or entities may not significantly harm competition in Indian marketplaces.

Additionally, the provisions of the regulations for combinations are covered under Section 6 of the Act. It stipulates that within 30 days of the execution of any acquisition instrument or the board of directors' acceptance of the request for amalgamation or merger, the Commission must be notified in writing of the specifics of the proposed combination, together with the required costs. 210 days after giving notice to the commission or the date on which the commission has rendered any order with respect to that notice, whichever comes first, are required for the combination to go into force.

LIMITATIONS UNDER SECTION 5 OF THE COMPETITION ACT, 2002

The limitations set forth in Section 5 of the Act are described below:

1. In the event that shares, voting rights, or control are purchased: The shareholder and the company whose shares, assets, or voting rights are being acquired must both have:

- Assets in India: More than 1000 crores Turnover: More than 3000 crores
- Aggregate assets in India or outside India: More than 500 million dollars including at least 500 crores in India.

  Turnover: More than 1500 million dollars including at least 1500 crores in India.

2. In the event of a merger or amalgamation, the business that remains after the merger or the business that results from the amalgamation should have:

- Assets in India: More than 1000 crores Turnover: More than 3000 crores

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- Aggregate assets outside India: 500 million dollars, including at least 500 crores in India, or

  Turnover: More than 1500 million dollars, including at least 1500 hundred crores in India.[3]

REGULATORY BODIES AND COORDINATION BETWEEN THE COMPETITION COMMISSION AND SECTORAL REGULATOR

Regulatory Framework in India

Before the opening up of the economy, economic activity was mainly dominated by the government-owned companies. Apart from economic activities government also controlled, most of the factors that determine the level of competition in the economy, such as entry, price, scale, location, etc. For example, telecommunication services, oil exploration, drilling, refining and marketing were a government monopoly. Other sectors such as banking and electricity were also dominated by government undertakings. This situation did not call for independent regulators as government was generally believed to be acting in the interest of the public. However, the pattern changed significantly with new economic reforms which changed the manner in which business was conducted.[4]

This led to setting up of many sectorial regulators. The telecommunications regulator, the Telecom Regulatory Authority of India (TRAI), was set up in 1997, Petroleum and Natural Gas Regulatory Board (PNGRB) in 2006, Airports Economic Regulatory Authority (AERA) was established in 2008, Securities and Exchange Board of India (SEBI) was set up in 1992, Central Electricity Regulatory Commission (CERC) was constituted in 1998, etc. While these regulatory bodies were being set up to tackle various issues emanating from actual and anticipated private players behavior and other structural issues, the same concerns were also felt about the competition arena. This led to the setting up of the **Competition Commission of India**.

Both sectorial regulators and the competition authority have objectives which converge. Both

[3] Oishika Banerji, 'The Competition Act, 2002' (iPleaders, 15 October, 2022) <https://blog.ipleaders.in/the-competition-act-2002/> accessed 15 August 2023

[4] Anil Kumar Bhardwaj, 'Introduction to Competition Law' (Competition Commission of India, August 2016)< https://www.cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-5-regulatory- bodies-and-coordination-between-the-competi1652182541.pdf> accessed 10 August 2023

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of them aim to improve economic performance by preventing market power and avoiding inefficient regulations. Despite sharing common objectives, they have different goals and have different legislative mandates. They may also approach the same issue with different perspectives. The sector specific regulators are primarily concerned with attenuating the effects of market power whereas CCI basically focuses on reducing such power. The former typically impose and monitor various behavioral conditions whereas the latter is more likely to opt for structural remedies. In simple terms, competition regulator tells the incumbents what they should do whereas sectoral regulators tell them what to do. The regulatory interface problem is centred on the degree to which sectors being opened up to greater competition should also be subject to general competition laws and how and 4 by whom such laws are to be administered.[5] So there exist overlaps and complementarities between the sector-specific regulators and competition authority.

Regulatory Overlap

It is important to note that these institutions were established at different times and there are bound to be overlaps in their objectives. Further, each regulator was set up with different legislative mandates and as a result of which their perspective and approach towards competition matters may also be different. Some sector regulators were also given the responsibility to instill competition in the areas under their ambit, an objective which was later given to the competition authority, when eventually established. Some sectorial laws which were enacted after the Competition Act, 2002, also bestow sectorial regulators some competition enforcing functions. These include the Petroleum and Natural Gas Regulatory Board (PNGRB) Act, 2006, Electricity Act, 2003 etc.[6]

Some examples of overlapping provisions with Competition Act, 2002 in the respective Acts are as follows:

Examples of Overlapping Provisions

- **PNGRB Act, 2006**

The oil and natural gas sectors are regulated by the PNGRB, which was established under the

[5] Anil Kumar Bhardwaj, 'Introduction to Competition Law' (Competition Commission of India, August 2016)< https://www.cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-5-regulatory- bodies-and-coordination-between-the-competi1652182541.pdf> accessed 10 August 2023

[6] Anil Kumar Bhardwaj, 'Introduction to Competition Law' (Competition Commission of India, August 2016)< https://www.cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-5-regulatory- bodies-and-coordination-between-the-competi1652182541.pdf> accessed 10 August 2023

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PNGRB Act, 2006. The Act gives power to the PNGRB regulator to issue 6 directions and levy penalty in case of restrictive trade practices.[7]

- **Electricity Act, 2003**

Under the **Electricity Act, 2003**, SERCs and CERC have the mandate to ensure fair competition in the electricity sector. Section 60 of the Electricity Act gives SERCs and CERC powers to take corrective action if a licensee or a generating company enters into an anticompetitive agreement, abuses its dominant position or enters into a combination which causes an adverse effect on competition in electricity industry. Also section 174 of the Electricity Act, 2003 gives overriding power to itself. As seen above, there are areas of overlaps between the competition authority and the sector regulators. Overlaps are expected to either give rise to ambiguities resulting in stakeholders, regulated companies and consumers as they struggle to know which regulator is best suitable to deal with their grievances.

- **Important Cases of Regulatory Overlap CCI and PNGRB**

Reliance Industries Ltd alleged that its rivals **Indian Oil Corporation Ltd (IOCL), Bharat Petroleum Corporation Ltd (BPCL)** and **Hindustan Petroleum Corporation Ltd (HPCL)** formed a cartel for the supply of aviation fuel for Air India. However, during the course of the investigation of the case by CCI, the three companies namely **IOCL, BPCL** and **HPCL** filed a suit in the Delhi High Court challenging CCI's jurisdiction by claiming that the matter fell under the jurisdiction of the PNGRB, the sector regulator. The High Court gave an interim order that CCI did not have jurisdiction over the matter despite the fact that the **Petroleum and Natural Gas Regulatory Board (PNGRB)** Act did not give the sector regulator exclusive jurisdiction on the matter. At present, the appeal has been filed with the High Court and the Court has put a stay order on the Commission's proceeding.

CCI and Delhi State Electricity Regulatory Commission

CCI issued notices against three power distributors; BSES Rajdhani Power, BSES Yamuna Power and North Delhi Power Ltd after if found them guilty of abusing their dominant positions by imposing unfair and discriminatory conditions. However, the Delhi Electricity Regulatory Commission, the state electricity regulator objected to CCI's intervention claiming

[7] Anil Kumar Bhardwaj, 'Introduction to Competition Law' (Competition Commission of India, August 2016)< https://www.cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-5-regulatory- bodies-and-coordination-between-the-competi1652182541.pdf> accessed 10 August 2023

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that such matters falls under its jurisdiction as per the 8 powers vested in them by the **Electricity Act, 2003.**[8]

- **Complementarities of Regulatory Bodies**

In the overall scheme of regulatory landscape cooperation among regulatory bodies may ensure an outcome where various regulatory agencies are complementary for the overall growth of economy and consumer welfare.

These are as follows:-

1. Sectorial regulators are best suited for laying down standards for ensuring quantity and quality of products. Thus, their focus is on what to do and how to 9 do while CCI's focus is on curbing anti-competitive activities of enterprises.[9]
2. Sectorial regulators regulate specific sectors with an "Ex ante" approach i.e. they address issues before they occur. CCI on the other hand primarily addresses behavioral issues after problem arises.
3. Sectoral regulators' emphasis is on organised development of a sector that would ensure consumer welfare. CCI on the other hand ensures consumer welfare by ensuring that market players do not abuse their market power or collude.
4. At the same time, cooperation of various regulatory agencies with CCI can be beneficial for both consumers and economy. Section 62 of the Competition Act declares that competition legislation ought to work along with other enactments.
5. A platform for consultation is provided for under Sections 21 and 21A of the Competition Act. Under these provisions, both CCI and the sector regulators may cooperate when it comes to dealing with issues that appear to have an impact on the jurisdiction of the other. If a sector regulator is handling a case and it turns out that there is a possibility of the decision to be taken infringing the Competition Act, the sector regulator may refer the matter to CCI for its opinion. CCI is obliged to give its opinion within **sixty days.**
6. In a similar fashion, if CCI is investigating a case and it is pointed out that there is a possibility of the decision being contrary to the provision of the law entrusted to a sector regulator, then CCI may make a reference to the sector regulator, asking for its opinion and input into the matter. However, opinions from both the sector regulator and CCI will not be binding.[10]

[8] The Electricity Act, 2003, S 60
[9] The Electricity Act, 2003, S 2(h)
[10] Anil Kumar Bhardwaj, 'Introduction to Competition Law' (Competition Commission of India, August 2016)< https://www.cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-5-

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CONCLUSION:-

There are a number of approaches followed worldwide to resolve the dispute of overlapping jurisdiction including concurrent jurisdiction, exclusive jurisdiction and cooperative jurisdiction. However, different approaches are suited to different countries. Exclusive jurisdiction means that the sectorial regulators are demanding the power to deal with a particular matter. The regulators are given the freedom to follow the competition law or refuse to follow it. This kind of approach is unsuitable in the Indian context because such an approach would undermine the Competition Commission's powers and defeat the purpose for which it was formed. The second approach being the concurrent approach is likely to fail due to the power struggles in the Indian set up as has already been mentioned above.

According to the author, although the ideal approach would be the cooperative approach, the most pragmatic seems to be the one in which a single centralized authority is given primacy with the utilization of specialized knowledge and advice from the sectorial regulators. The approach will not only benefit the Competition Commission but will also meet the demands of the sectorial regulators. Since the necessary limits or standards for the protection and use of data have yet to be defined and are subject to appeal to higher courts, the CCI's investigation into these matters may be premature. At present, clear and comprehensive data protection legislation still needs to be implemented as soon as possible. If such legislation specifies a threshold for data collection, then the CCI could assess market power in digital markets accordingly. Therefore, it would make sense for the CCI to refrain from creating thresholds or standards in the data realm and instead strengthen its understanding of the underlying concerns through market research and preliminary conferences and focus on effects-based approaches.

However, several aspects of knowledge protection, conditions for registration as a consent manager and processing of private data and sensitive personal data of children, which can be key to an efficient and successful implementation of the new regime, are delegated to the DPA and/or the Central Government. With the inclusion of other aspects that will bridge the gap in the Bill, the Bill could be perceived as futuristic but the important impact of the Personal Data Protection Bill is going to be visible once the relevant rules and regulations are in place.

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The establishment of DPA and the provision regarding coordination between regulatory agencies provided under Section 56 of the PDP Bill will bring in the much needed legal mechanism in India to enforce data privacy laws and ensure that there is no abuse of position by dominant entities in the Indian digital markets.[11]

[11] Akash Krishnan, "CCI Vs DPA: The impending Conflict" (ipleaders, 24 November, 2021) <https://blog.ipleaders.in/cci-v-dpa-the-impending-conflict/> accessed 20 Aug, 2023.