

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

www.ijlra.com

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EXTRATERRITORIAL ENFORCEMENT OF COMPETITION LAW IN INDIA: A STUDY OF SECTION 32

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Abstract

In order to regulate liberalisation of economy and promote health competition in the market, Competition Act was enacted in 2002. The Act replaced MRTP Act, as approach of Competition Act has more modern approach in promoting competition, MRTP primarily focused on controlling monopolies and restricting trade practice whereas In order to guarantee fair competition among companies in the Indian market, the Competition Act of 2002 was authorized. Its core aim is to **promote healthy competition**, prevent practices that could harm the market, and most importantly, **protect the interests of consumers**. At the same time, it seeks to **preserve the freedom of trade**, allowing businesses to operate without unfair restrictions or dominance by a few players. Section 7 of the Act establishes the Competition Commission of India to execute the Act's objectives. Competition Commission are provided with several power, functions and duties in order to create a fair and secure environment in the market. The Commission has the authority to investigate into any agreement or abuse of dominant position or any combination that has appreciable adverse effect in the market. The power of the commission to carry out enquiry are not limited only to domestic jurisdiction. Section 32 of the Act, empowers the commission to action against any agreement or arrangement, acquisition, merger or amalgamation or combination that have or are likely to have adverse effect on competition in India. The commission shall have the same power of enquiry as if they were taking place in India and pass orders as it may deem fit under the Act. This provision marks a remarkable legislative step. This provision is one of its kind. This article focuses on understanding the scope of extraterritorial jurisdiction of CCI and the extend of power granted to commission through section 32

¹Introduction

The increasing liberalization of the Indian economy in the 1990s, called for modern legal framework to ensure fair competition. Competition Act of 2002 was enacted replacing the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act)

The Monopolies and Restrictive Trade Practices Act of 1969 (MRTP Act) established the groundwork for the Competition Act. How-ever MRTP Act was not proving to be efficient in addressing the evolving economic landscape and promoting fair competition. The replacement was also necessary because MRTP Act majorly focused on restricting monopolies. With the expanding scope of trade market MRTP Act was seen insufficient in enforcement power too, and there was a need to bring in the legislation to promote economic advancement of trade market, and to mitigate the anti-competitive behaviour. Competition Act 2002, not only focused on restricting monopolies but promoting fair competition, avoiding economic concentration. Competition Act 2002 intends to promote the interest of consumer, restricts any unlawful practice and contributes to not only economic development but also towards the social development.

The Act is divided in 9 chapters and has 66 sections. The Act primarily deals on anti-competitive agreement, abuse of dominant position, and regulation of combination. Anti-competitive agreements are arrangements or understanding between enterprise, person or association that adversely affects or likely to affect competition in the market. Such agreements have the potential to disrupt market dynamics by curbing healthy competition, often resulting in practices like price-fixing, allocation of markets, limiting production or supply, bid rigging, or other forms of collusive conduct.. Section 3 restricts an enterprise or a person or any association of enterprise or persons from entering into an anti-competitive agreement. Such agreements are void under the section. Agreements pertaining to the manufacture, distribution, storage, purchase, or control of goods or services that have a significant negative impact on competition in India are covered in this section. Section 4 prohibits abuse of dominant position. Entities are deemed dominant if they have a significant market share that permits them to act independently of competitors, customers, or ultimately consumers. Imposing unfair purchase or selling prices, limiting production, or hindering technical or social development to prejudice consumers, or applying dissimilar condition to equivalent transaction thereby placing certain partners at a competitive disadvantage can be some forms of abuse. And to regulate health

market competition and to prohibit anti-competitive agreement, the Act has established Competition Commission of India under section 7. The Commission consist of a Chair-person and minimum 2 and maximum 6 other members, all appointed by Central Government. the later part of the Act, states about power, duties and responsibilities of the commission.

A primary responsibility of the Commission is to eliminate practices that result in an appreciable adverse effect on competition. Additionally, it is the commission's responsibility to uphold and encourage competition, safeguard the interests of consumers, and guarantee the freedom of trade practiced by other players in the Indian market. The commission is governed by the principles of natural justice. The Commission has the similar power as of civil court in context summoning and enforcing the attendance of any person and examining him on oath, requiring discovery and production of documents; receiving evidence on affidavits and issuing commission for examination of witness or documents. However the power granted to commission under section 32 is not ordinary

²Section 32

The authority bestowed upon it by section 32 of the Act is what distinguishes the Competition Commission of India. Section 32 of the Act gives power to the commission for extraterritorial jurisdiction, meaning the power to investigate into any anti-competitive agreement or abuse of dominant position is not only limited to domestic territories but the commission shall have the power of enquiry as if they were taking place in India and pass any order as it may deem fit under the act. [Section 32](#) applies to the following types of condition

1. An agreement referred to in section 3 entered into outside India or;
2. Any party to such agreement is outside India
3. Any enterprise abusing the dominant position is outside India; or
4. A combination has taken place outside India; or
5. Any party to the combination is outside India; or
6. Any other matter or practice or action arising out of such agreement or dominant position or combination is outside India

This provision marks a remarkable legislative step. Section 32 is derived from “effects doctrine” which empowers the legislative body to practice their jurisdiction beyond the principal territory. The effect doctrine is a concept of international law that allows a country to

UNITED STATES VS ALUMINIUM CO. OF AMERICA 148 F.2d 416 (1945)

extend its jurisdiction over the borders. Effect doctrine originated from 1945 [Alcoa Case](#) (United States vs Aluminium Co. of America). It was held by United States Courts of Appeals for Second Circuit by L. Hand, Swan, and A. Hand, J, that Any state may impose liabilities even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders that the state reprehends.

In today's World, participation in global market and trade is important for overall development of a Country, for that opening gates for foreign countries is necessary and allowing the national companies to expand beyond the horizon of borders, however there should be a liability on the foreign as well as national companies to not harm the market by engaging into anti- competitive agreements.

Competition Commission under section 32 of Competition Act has the power to inquire into any anti-competitive agreement or abuse of dominant position or any combination that has or is likely to significantly harm the competition in the relevant Indian market. This comes along with the power to conduct enquiry as well the procedure for investigation. The Act is also empowering the commission to enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country in order to discharge its duty under the provision of this Act, under section 18 of the Act. ³

Cases law

Goggle Llc & Anr vs Competition Commission of India & Ors 2023 SCC OnLine NCLAT 147, ⁴ is one of the latest judgement passed by National Company Law Tribunal in the favour of Competition Commission of India practicing its jurisdiction under section 32

The judgement was passed when order date 20.10.2022 was challenged by Google LLC and Google India Pvt. Ltd. in Mr. Umar Javeed v. Google LLC wherein competition commission found that google has abused its dominant position and violated provisions of Section 4(2)(a)(i), Section 4(2)(b) (ii), Section 4(2)(c), Section 4(2)(d) and Section 4(2)(e) of the Competition Act, 2002. It was alleged that google mandates exclusive pre-instalment of its own application on smartphones and tablets manufactured in/sold in/exported to/marketed in India. Google's actions violated section 4 read with section 32 of the Act by impeding the

³ UNITED STATES VS ALUMINIUM CO. OF AMERICA 148 F.2d 416 (1945)
[Goggle Llc & Anr vs Competition Commission of India & Ors](#) 2023 SCC OnLine NCLAT 147

development and market access of competing mobile applications or services.

Another contention stated that google prevents smartphone and tablet manufactures in India from developing and marketing modified and potentially competing versions of Android on other devices. This conduct resulted into, restricted access to innovative smart mobile devices based on alternative, potentially superior versions of the Android operating system in contravention of Section 4 read with Section 32 of the Act. On which commission expressed its prima facia opinion stating mandatory pre instalment amounts to imposition of unfair condition on the device manufacturers and is thereby contravention of Section 4(2)(a)(i) of the Act. The director general initiated inquiry under section 19 of the Act, after an order dates 16.04.2019 was passed by the Competition Commission under section 26(1). The report submitted by director general stated that, google has engaged in unfair or discriminatory condition, by limiting and restricting the technical and scientific development of apps. Section 4(2)(a)(i); Section 4(2)(b); Section 4(2) (c); Section 4(2)(d) and Section 4(2)(e) of the Act were breached by the google as per the conclusion of the report After the submission of report parties were directed to appear for final hearing on 24.11.2021 by the commission. The commission ordered to submit its Audited Financial Statement of Google India Private Limited and Annual Reports of Alphabet Inc., which were submitted by google. Arguments by both the parties were heard. The commission came to the conclusion that Google has contravened various provisions of section 4(2) of the Act after hearing the parties and perusing the materials on record. And after considering the submissions of the parties and examining the evidence on record, the Commission determined that Google had violated multiple provisions of Section 4(2) of the Competition Act. It observed that: (a) the compulsory pre-installation of the entire Google Mobile Services (GMS) package imposed an unfair condition on device manufacturers, thereby attracting Section 4(2)(a)(i); (b) Google, by maintaining its dominant position in the online search segment, effectively restricted market access for rival search applications, amounting to a contravention of Section 4(2)(c); and (c) Google exploited its dominance in the Android app store market to reinforce its strength in the online general search market, which constitutes a breach of Section 4(2)(e)d Google has violated Section 4(2)(e) of the Act by using the Google Chrome App to support its dominating position in the app store market for Android OS and to defend its position in the non-OS specific web browser market.(e) Google has leveraged its dominant position in the app store market for Android OS to enter as well as protect its position in OVHPs market through YouTube and thereby contravened provisions of Section 4(2)(e) of the Act.(f) Google, by making pre-installation of Google's proprietary apps limited technical

or scientific development to the prejudice of the consumers, in violation of the provisions of Section 4(2)(b)(ii) of the Act. The Commission further identified five distinct relevant markets for the purpose of its analysis. These were: 1.the market for licensable operating systems for smart mobile devices in India; 2.the market for app stores catering to Android-based mobile operating systems in India; 3the market for general web search services in India; 4.the market for mobile web browsers that are not tied to any particular operating system in India; and 5.the market for online video hosting platforms (OVHPs) in India. The Commission found that Google was the most influential in all relevant markets and had misused its power, which is against Sections 4(2)(a)(i), 4(2)(b)(ii), 4(2)(c), 4(2)(d), and 4(2)(e) of the Act. The commission also directed some remedies to google. Penalty of Rs.1337.76 Crore was imposed on google for violation of section 4 of the Act, and receipt of which was ordered to deposit within 60 days by the Commission.

This case highlights the procedure the commission has to adhere to while carrying about the enquiry. When a case of anti-competitive agreement, abuse of dominant position, or any combination that has appreciable adverse effect on Indian market is reported to the commission, the commission forms a prima facia opinion about the same. If the case needs more enquiry, director general. If the case needs attention, director general is required to carry out the investigation and enquiry of the same. Collecting material facts, evidence and generating report for the commission are some of the key responsibilities of the Director General Further the director general is supposed to prepare a report about the findings of investigation and submit it to commission in given time. The report should mention any contravention if found. Upon submission of report, both the parties are called and given opportunity to present their case. During this process the commission can ask any party to present any document if needed. Upon hearing the sides of the party, the commission passes its order. Depending upon the gravity of violation the commission can impose penalty or restrict the entity from certain actions which has appreciable adverse effect on Indian market.

It is important to note that, even though CCI has extraterritorial jurisdiction it is bound to certain procedure which needs to be adhere, in order to protect the interest of the party. The act is not bias regarding procedure for a foreign entity or a domestic entity.

Provisions like section 32 are important for under developed as well as developing countries. This section contributes not only towards making entity liable for their actions but also

contributes towards developing infrastructure of a county. Sections like this promotes awareness about wrong going and avoids exploitation of market. The expansion of market size and complexity necessitates a corresponding enhancement in regulatory oversight, in order to prevent anti-competitive practices, ensure the maintenance of a level playing field, and protect consumer well-being in accordance with the objectives of competition law.

While economic liberalization is the need of the hour, regulating it has become more necessary. And section like 32 of Competition Act 2002 seeks protection of interest of stakeholders push the nation towards more secure and liberal economic development.

