GOALS OF COMPETITION LAW IN INDIA

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ABSTRACT

In this paper the authors will dwell into the jurisprudence of goals of competition law in India with respect to Structuralist School of thought and Chicago School of Thought. In the recent developments in The Competition Act, 2002 and influential scholarly debates around goals of competition law, consumer welfare as the only goal for competition law is a very broad and a complex topic. The origin of its jurisprudence comes from two main schools of thought, namely, Structuralist School of thought (Harvard) and Chicago School of thought. The former supports the structure to have multiple competitors in the market to avoid monopoly or oligopoly whereas the latter speaks highly of profit maximization which leads to consumer welfare or wellbeing through its services. The authors will take into consideration the domestic and international courts' interpretation of consumer welfare being the goal of competition law. The highlights of the above-mentioned schools of thought can be seen in the Google case and its interpretation in two different jurisdictions: The USA and The EU interpretation of goals of competition law in the box of market structure.

KEYWORDS: Consumer Welfare, Structuralist School of Thought, Chicago School of Thought, Legislative Intent, Judicial Interpretation.

Introduction

"The goal of consumer law is primarily to protect the end consumer from the market failure that may arise due to unequal bargaining power between the consumer and the seller. It is assumed that the consumer stands at a disadvantageous position in the market with respect to the seller due to which he/she needs to be protected from the potential malpractices of the seller. It seeks to correct the consumer's position in the market with respect to the supplier, so that cost effective and efficient transactions are ensured"[1]. In the parlance of competition law, a consumer is any person who buys goods for consideration

[1] Jenisha Parikh & Kashmira Majumdar, *COMPETITION LAW AND CONSUMER LAW: IDENTIFYING THE CONTOURS in light of the case of BelaIre owners association v. DLF,* 5 NUJS LAW REVIEW 249 (2012), available at

on the promise that he/she will be partly paid for their payment.[2] The jurisprudence of competition law comes from American Schools of Thought, namely, The Structuralist School of Thought and The Chicago school of Thought. These two schools represent a realm of different sets of governing competition laws in a concerned market with respect to its economy. The former projects the idea of a concentrated market with small competitors which would enable free-will and more options for consumers to exercise the right of choice, this school of thought oppose the idea of Chicago School of Thought primarily because -

- Chicago School of thought represents the idea of consumer welfare through monopoly and oligopoly. Such market structures give rise to market power in the control of few dominating actors in the market. These actors can regulate the price in a concerned market and conduct a tacit collusion.
- Chicago School believes in efficiency of a concerned service or a product, which may for above-mentioned reason can give a big enterprise a dominant position. Such an enterprise can act as a barrier to entry for small enterprises.

These two schools are the wagon of interpretation of courts and commission all around the world. The primary commonality between the schools is the primary aim to ensure consumer welfare and protect them from exploitation. In order to break down these two schools further, scholars like Robert Bork are firm believers that competition law does not have tools to fulfill non-economic goals of small businesses. In his Antitrust Paradox, Bork established that consumer welfare as the primary aim and efficiency is the key to attain it. Furthermore, he strongly emphasizes on economic theory to be part normative framework of competition law even if it must be delivered in a monopolistic structure.[3] Whereas, on the other hand Lina M. Khan promotes the structuralist school of thought, she believes that the market should be concentrated on every level and small business should be protected as this approach leads to innovation and better products and services which would lead to the primary goal of competition law: consumer welfare.[4]

The highlights of above-mentioned schools of thought can be seen in the *Google case*,[5] the primary contention in the case was on the issue of proving anti-competitive conduct of google search engine. The

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http://docs.manupatra.in/newsline/articles/Upload/03E26D51-BA75-4E0A-96CF-E4421360840E.pdf last seen on 15/11/2020.

[2] S. 2(f), The Competition Act, 2002.

[3] Heyer, Kenneth. "Consumer Welfare and the Legacy of Robert Bork." *The Journal of Law & Economics 57*, no. S3 (2014): S19-32. Accessed November 14, 2020. doi:10.1086/676463.

[4] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017).

[5] Federal Trade Commission, DOCKET NO. C-4499 (2014, FTC)

searches were automated, and the results were shown for services or products by the companies which were dominant in their concerned markets. In the given case we can dissect the underlying ideologies of Chicago School and Structuralist School of thought by interpretations in two different jurisdictions: The USA and The EU interpretation of goals of competition law in the box of market structure. The USA interpretation was formed on the base that the search engine provides the best result for the consumer after running the statistics through an algorithm which dictates the best quality service or the product at a reasonable price. The above interpretation sides with Chicago School of Thought. On the other hand, the EU interpreted the case from a different lens siding with Structuralist School of Thought and observed that such practices lead to monopoly and can kill the other business and leave no room for choice for the consumer. Chicago School of thought focuses on efficiency and profit maximization. This results in the best quality of goods for the consumers. Structuralist School of thought believes that there shall be multiple corporations at every level to keep the competition alive which can turn into better products and services for the consumers. The end goal of the schools is to cater to consumer welfare with different approaches.

In the landmark case of *Microsoft vs Commission of the European Communities*[6], Mr. Green, the VP of Sun, wrote a letter to Mr. Maritz, a VP of Microsoft. In this letter Mr. Green asked Microsoft to provide them with complete information that would enable Sun's Operating System (Solaris) to interoperate with Windows. Microsoft claimed that all the information that Sun needs is already available on the Microsoft Developer Network (MSDN) Universal product and they said that there are multiple ways to make Solaris interoperate with Windows. Effectively Microsoft refused to provide any additional information to Sun and said that what was available on MSDN was sufficient. Sun filed a complaint before the European Commission regarding the refusal of Microsoft to provide the information that had been asked by Sun.[7]

In February 2000, the EC on its own initiated an investigation against Microsoft particularly relating to Microsoft's Windows 2000 generation of client PC and work group server operating systems and to the integration by Microsoft of its Windows Media Player in its Windows client PC operating system. The question was raised whether such conduct by Microsoft is anti-competitive. The European Competition Commission held that such conduct of Microsoft was in the dominant nature and the company enjoyed certain limits of monopoly in the market. The Court and the Commission were of the opinion that the

[6] Microsoft v. Commission of the European Communities, T-201/04 (September 2007, European Commission).
[7] Commission of the European Communities v. Microsoft Corporation, COMP/C-3/37.92 (March 2004. Federal Trade Commission).

conduct/behaviour of Microsoft was anti-competitive in the market. Microsoft's conduct promoted the foreclosure and restriction of competition in the market under Article 82 EC[8]. As per the decision taken by the court or the commission: it sided with the structuralist school of thought as to promote an equal level of ground for all the companies in the market.

The decision of the commission further delves into the jurisprudence of competition law with respect to structuralist school of thought. The bigger consideration was that if a consumer who had to choose between Solaris and Windows, and Solaris could not interoperate with Windows easily, you would be more influenced to pick Windows, right? Windows is already used a lot so why purchase a software that cannot work with it as well as you want? This question established that the consumers were to get restricted with options to explore the market then this will be against consumer welfare.

History of competition law in India

An integral standpoint to comprehend when it comes to Competition Law in India is whether protection of interests of the consumers in the market is their primary goal or is it simply one of their many goals. In an older case of *Ashoka Smokeless Coal India (P) Ltd. v. UOI,*[9] It was held by the Apex court that in a free economy, it is possible for the producers to fix their own price. "Competition is the buzzword" but a middle ground must be established so that the constitutional obligations of the State are also achieved. Thus, making it possible for the consumers to exercise their choice while procuring goods in a market full of suppliers and competitors. Thereby, in a free and open economy, the States must ensure that consumer benefit is of the utmost importance.A series of judgements in the early stages of competition law focused on ensuring that consumer interests were being safeguarded[10].

The preamble of the Competition Act, 2002 states that, among others, the purpose and objective of this legislation is to protect the interests of consumers[11]. The same was emphasized by the Supreme court in the case of *CCI v Steel Authority of India*,[12] whereby the principal function of the commission is to supervise and maintain healthy competition and to protect the interests of the consumers. The

[8] EC Treaty, Article 82.
[9]Ashoka Smokeless Coal India (P) Ltd. v. UOI, (2007)2SCC640.
[10]M/s Bulls Machines Pvt Ltd. v. M/s. JCB India Ltd. and M/s J.C. Bamford Excavators Ltd., Case No. 105 of 2013, (Competition Commission, 11/03/2014), MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd, Case No. 13/2009, (Competition Commission, 23/06/2011).
[11]Neeraj Malhotra vs North Delhi Power Limited, MANU/CO/0026/2011.
[12] Competition Commission of India v. Steel Authority of India, (2010) 10 SCC 744.

supreme court opined that "the main objective of competition law is to promote competition for creation of market responsive to consumer preferences. "It must be observed that the evolving tendencies of competition law has been towards considering protection as a consequence or towards taking a conscious step towards consumer protection, so as to be able to put forth a change in policy. The competition commission intends to ensure that in the market there is maximization of consumer satisfaction, to further this view point, over the years competition law has striven to prohibit anti-competitive behaviour, abuse of dominance in the market and denying combination transactions that could adversely affect competition in the market.

Competition authorities in India have expressed constant unacceptability when it comes to abuse of dominance in the market. Though companies are not prevented from achieving a dominant position, such dominant position in the market must not be abused[13]. Section 4(2) and 19(4) of the Competition Act, 2002 throw light on what is considered as dominance by the Indian law. Competition law in India in general has reservations against practices that give enterprises the power to impose unfair prices or conditions on consumption of the products of the market, causing discriminatory barriers to entry to preserve market share. Predatory pricing is also regarded as an abuse of dominance. Chicago school would necessarily promote such reduction of prices but in India such drastic reduction in prices are seen as anti-competitive behaviour. It puts consumers in a vulnerable position and makes them susceptible to exploitation.

Google v. CCI[14], Google was held to have abused its dominant position in the relevant market in digital space. The commission found that Google produced the results in response to a search on the Search Engine Results Page (SERP) in a "fixed position" and on the other hand their syndication agreements for online advertising services were opined as denying market access to the consumers of their services and in turn abusing their dominance. This case is an epitome of strong inclination towards structuralist school of thought. The commission ruled in favour of a concentrated market on google platform with respect to advertising and held the conduct to be anti-competitive.

[13] S.4, The Competition Act, 2002.
[14] Google v. Competition Commission of India, Case Nos. 07 and 30 of 2012 (Competition Commission of India, 08/02/2018).

Competition authorities in India treat combination transactions seriously. Their intention behind the same is to prevent formation of oligarchies and monopolies. Assigning such power to a group of enterprises in the market leads to the negation of any market power to the consumers and leaves them to the mercy of these enterprises. Competition laws in order to prevent such concentration of control have laid down detailed merger-control regimes that have to be mandatorily complied with by the enterprises entering into combination transactions. Such combination transactions are tested for having any appreciable adverse effect on competition, whereby factors like the potential outcome in the market and its consequence on consumers is assessed before approving them. Non-compliance of these control regimes are termed as gun jumping and attract heavy penalties. Through multiple amendments, the commission has tried to provide more clarity and drive out ambiguities so as to ensure increased compliance by companies. In the larger scheme of things, compliance of statutorily mandated requirements encourages a healthy interaction amongst various market components. In a similar vein, cartels are strongly condemned by competition authorities. Cartels produce less in order to make high profits and this leads to disruption in the functioning of the free market. Through the 2020 amendment bills, the competition commission has inserted a provision whereby combinations which cannot be necessarily categorized into the existing forms of horizontal or vertical agreements and in essence performing as cartels, must also be brought under the scrutiny of the competition authorities for their effects on competition. These combinations are referred to as hub and spoke cartels.

Legislative intent and Judicial Interpretation

One of the first observations made by the Supreme Court of India with respect to goal of competition law in India was in the case of *Neeraj Malhotra v North Delhi Power*[15] the court emphasized that the preamble of the Competition Act enumerates that "it has been enacted inter alia to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India".[16] This objective of protecting consumer interest, among other provisions, has been further reinforced in Section 18 of the Competition Act, 2002. The court then briefly opined as to the nature of market activities that protect consumer interest. It stated that an economy, wherein the consumers can exercise their free choice, of the real and genuine kind and not notional, from amongst various

[15] Supra 11.
[16] Ibid.

substitutable products and the suppliers are able to supply their products without obstructions, is a healthy and competitive economy. It is in such an economic environment that consumer interests are protected in its truest sense.

The most recent developments in the field of competition law include a legislative shift and accordingly a judicial reflection. The Competition law Review report suggested significant changes to the existing competition law schema. The recommendations include structural changes in the mechanism of the committees and other significant substantive law aspects. The 2020 Amendment Bill[17] has imbibed around 45 out of the 50 suggestions put forth by the Committee. Upon gauging these proposed changes, it is evident that the commission is moving towards adopting a pro-business stance. Proposed amendments like recognition of green channeling which speeds up the approval process in matters of mergers and acquisitions and increasing the scope of the restrictions under section 3 of the Act to agreements entered in the digital market. In the earlier cases, the minimum standard required to prove "control" was not defined in the Act, the same had to be judicially interpreted on a fact to fact basis in order to check for anti-competitive behaviour. However, through the present proposed amendment, the commission intends to statutorily define "material influence" as the minimum standard. Similarly, definite penalty guidelines in the event of non-compliance with statutory requirements would drive out uncertainty and make investors aware of the ramifications of their actions. These amendments intend to decrease ambiguity regarding the various procedures under the law and in turn show the inclination of the competition commission towards favouring ease of doing business in Indian economy and factor in the interests of all stakeholders. If the trajectory of the commission over the years are mapped out, the ideology and the objective that the commission has been pursuing can be comprehended. The Competition Commission has undertaken several amendments in order to provide more clarity and definite legislation for the purpose of aligning the competition scheme with the economy. The commission has consistently laid emphasis on its merger-control regimes in the country and the same can be understood by its series of amendments. For instance in the 2016 amendment to the Combination Regulations under the Act, the Commission had made a provision for only a single notice to be filed by the enterprises that were entering into a combination transaction[18] and by the 2018 amendment to the above-mentioned statute, the parties could even withdraw and refile their notifications along with increased opportunities to the parties like

[17] Competition (Amendment) Bill, 2020 (pending).
[18] Competition (Amendment) Bill, 2016 (11/02/2016).

providing for modifications to their combination even post being served a show cause notice by the CCI and more pronounced timeline for approval of the combination.[19] It is no surprise that trends of legislative ventures so far represent the formation of an environment that is conducive for investors, both domestic and foreign. It seems to be advancing towards realizing the economic goals of competition law more so than anything.

The Supreme court in the case of *Excel Corp*[20], made a rather important observation regarding the goals of competition law. It stated that though the intention of the competition laws and the policies are to ensure efficient functioning of the market, the fundamental goal of competition law is "to enhance consumer well-being". It also highlighted that the reason for discouraging and restricting anti-competitive behaviour is so that a "level playing field" can be achieved in the market. Whereby, preserving competition by disallowing advantages to specific players in the market. Competition laws "sets 'rules of the game' that protect the competition process itself, rather than competitors in the market". The case was later on cited in the judgment of *CCI vs Bharti Airtel Limited & Ors*,[21] wherein the court had deliberated upon the competency of a proposed combination transaction and held the view that the slightest inkling of having an effect on competition, like in the present case, a tacit collusion between combining parties would also fall within the purview of having an effect on competition in the market and would be penalised.

Another aspect of competition law in India is subject to amendment in the Amendment Bill 2020, Under section 3(4)(e) of the Competition Act 2020.[22] The definitions of indirect sales are incorporated along with inclusion of services as Resale price maintenance. In the landmark case of *RPM M/s Fx Enterprise Solutions India Pvt. Ltd v M/s Hyundai Motor India Limited,*[23] Hyundai did not authorize its dealers to provide discounts to its consumers after a permissible amount. The Competition Commission of India penalized Hyundai, but National Company Law Appellate Tribunal (NCLAT) overruled this order. Another case which followed the precedent of Hyundai *case Tamil Nadu Consumer Products Distributors Association vs Fangs Technology Private Limited and Vivo Communication Technology*

[19] Competition (Amendment) Bill, 2018 (09/10/2018).
[20] Excel Crop Care Ltd. v. Competition Commission of India, AIR 2017 SC 2734.
[21] Competition Commission of India V. Bharti Airtel Limited and Ors. Civil Appeal No(S). 11843 of 2018.
[22] S.3(4)(e), The Competition Act, 2002.
[23] M/s Fx Enterprise Solutions India Pvt. Ltd v M/s Hyundai Motor India Limited, 2017 Comp LR 586 (Competition commission of India)

Company,[24] in it the product in question are the Vivo smartphones "the Informant is an association registered under the Tamil Nadu Society Registration Act, 1975. Its stated objective is to protect the interest of the distributors from unfair trade practices and stringent conditions imposed by the manufacturers of consumer products." They filed a report that Vivo has violated section 3 and 4 of the Act by asking for minimum price requirement from the distributors. The commission took cognizance of the fact that VIVO does not have market power and the dominant position in the market and thus the conduct cannot be said to violative of section 3 and 4 of the Act. These precedents set by the commission did not consider the primary goal of competition law which has been highlighted in the preamble in the statute. The RPMs are subject to agreements between the parties, but the distribution of concerned products or services are in the domain of consumers. Section 19(3)(d) states "The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to accrual of benefits to consumers" none of the above-mentioned cases contemplated on the provision. Although in the case of Hyundai the consumers were the buyers and similarly in the case of Vivo also, consumers were the buyers. With such practices, companies can exploit consumers in accordance with their own goals defying the primary goal of competition law. The following standing of the commissions in these cases can show inclination towards Structuralist school of thought. The commission let the products roll in the market and took care of non-dominant enterprise in the market keeping economic goal in consideration rather than non-economic goal.

Evolving Anti-competitive laws & consumer protection: Are existing legislations adequate?

Despite the goals of competition law being put in writing, the priorities of the competition law have evolved according to the demands of the economy. Protection of consumer benefits have come to be treated as a consequence rather than taking initiative to ensure socio-economic welfare. Even the competition law of India which considers protection of consumer interests as a crucial aspect, is concerned with the economic aspects of the market activities with little to no attention on the non-economic aspects. Regulating the behaviour of the competitors is only one among the several facets of protection of consumer interests. For instance, competition authorities that believe in the total welfare of the economy will approve of a merger if it increases the efficiency of the economy (a view shared by the Chicago school of thought). However, when it is consumer-welfare centric, a merger

[24] Case No. 15 of 2018 (Competition Commission of India, 04 /10/2018).

would not be approved, even though it improves the efficiency and total welfare of the economy if there is a shift of wealth away from the consumers. This instance represents why it is necessary to minutely and knowingly determine the stance that the competition policies adopt in an economy. Consumer welfare as an economic term is synonymous to consumer surplus. This surplus denotes much more than simply economic benefits of cost-savings but also has wide ranging social implications to it like quality, innovation, distribution, and other political factors as well. Chicago school of thought would generally favour a purely economic based argument and claims that the objective or the function of competition law is not to regulate such matters of public policy and the overall growth of efficiency in the market is ideal. At this point, it would be safe to say that the Indian understanding of the competition policy is not a staunch follower of such purely economic objectives and duly factors in the non-neutral and socio-political aspects of the market. As it has been contemplated so far, Indian competition policy's notion is that of achieving consumer welfare in the long run.

The recent 2020 amendment bill to the Competition Act, 2002 was proposed based on the Report presented by the Competition Law Review Committee (CLRC) in 2019.[25] It is significant to note that the composition of the abovementioned Committee was dominated by lawyers. A dearth of economists suggesting fitting amendments for the way forward, is reflected in the overall proposed recommendations. The result of the same was the introduction of minimal regulations like inter alia, the provision for green channeling. These were clearly inserted in order to promote ease of doing business and support the target clientele pool. The CLRC repeatedly mentions a lack of enforcement by the Competition authorities but little is done to concretely tackle such gaps. If an assessment has to be made regarding the evolution of competition policies in India, it wouldn't be a broad estimation to say that India heavily takes and attempts to take after the more mature jurisdictions of the US and the EU. The proposed alteration in the definition of control in the 2020 bill, is closely aligned with the regulation in US wherein the term control has been explained[26]. Additionally, the decisive influence factor was incorporated from the EU understanding of the influence as being actualized or in essence[27]. Aside from the advantages of deriving inspiration, the Indian socio-political aspect is unique, our economic structures are different. Thereby, the changes that are made must be conducive to the unique situation of India. The small-businesses industry in India is larger than one might imagine and

[25] Ministry of Corporate Affairs, Government of India, Report of Competition Law Review Committee, http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf last seen on 14/11/2020.
[26] 16 C.F.R 2020, § 801.1(b).
[27] Council Regulation (EC), No. 139/2004., Article 3(2).

when competitive authorities choose to simply play it safe, they end up turning a blind eye to such businesses. The laws are being formulated to keep the big and the giant corporations of international stature or otherwise as their pivotal point; Making it lucrative enough for foreign investors to enter the Indian markets. These raise cause of concerns for the authentic Indian elements and their policy requirements. The economic theories underlying and guiding its progress in India are rather murky. It is difficult to place our finger on and definitely claim whether it is being guided by the Chicago school of thought, a structuralist school of thought or any other. A clarification about the same would provide more certainty and provide for a possibility for personalized and individualistic Indian competition laws.

The opinions and the perspectives of economists and government bodies are crucial when a significant assessment of the goals of a specific statutory framework are being observed. In context of the present Covid-19 scenario and the uncertainties that surround us it is a befitting time for the Competition Authorities to give attention to the purpose and objectives and re-evaluate their plan of action accordingly. The pandemic caused a lull in business activities across the globe, which resulted in a fall in the global economy and the GDP of India.[28] It is imminent that the economies would undertake actions in order to restore and revive from these depressing conditions. Although, without a doubt, such initiatives are extremely imperative yet this 'comeback kid attitude', if we may say, of the enterprises and regulatory authorities could have serious ramifications upon consumer interests. Say for instance, in the wake of the economic struggles, competition authorities are being requested to reconsider legalizing "crisis cartels".[29] Cartels are inherently illegal under the Indian competition laws, but an exception is beckoned upon in the light of the present circumstances. Albeit the constant focal point being its benefits of restoring market efficiency, a serious discussion about its long-lasting effect on the interests of the consumers and the overall nature of competition in the economy must be called to attention. As it was mentioned above, the intention of competition policies that was envisaged was protection of competition without any advantages to a handful of or a category of players, and the novel events seems to incline away from these. Hence, in the opinion of the authors, a dedicated

[28] UNCTAD, The Trade and Development Report 2020 by U.N. Conference on Trade and Development, 3 , available at https://unctad.org/system/files/official-document/tdr2020_en.pdf , last seen on (15/11/2020)
[29] Manjushree RM, *Rethink role of crisis cartels, as Indian industries face risk of overcapacity,* The Print, (23/07/2020), available at https://theprint.in/opinion/rethink-role-of-crisis-cartels-as-indian-industries-face-risk-of-overcapacity/466636/ last seen on 15/11/2020.

appraisal by the competition authorities with regards to the protection of consumer interest must be exercised at the earliest.

Conclusion

The current competition laws may not have been adequate for consumer protection in India like it's in the jurisdiction of the USA and EU, although developments in India are inclining towards pro-business expansion which shall be imbibed as the primary ultimate goal of competition law recited in the preamble of Competition Act, 2002. Understandably, India cannot adopt the policies and structures from western jurisdiction. India is now a developing nation and its economy has been struck by Covid-19 global pandemic.

As we have securitized legislative intent and judicial standing in India, the jurisprudence of competition law seems to be inclining towards Structuralist school of thought. The legislation and the judiciary protect small businesses in the market consisting of dominant enterprises. Such small businesses keep multiple options available for consumers which adds onto the consumer welfare as per the doctrine of structuralism. In coming years, the trajectory of competition law shall have inputs from academicians and economists with the primary aim of protecting consumers and ensuring consumer welfare in India.