Law & Policy BRIEF

O.P. Jindal Global University
A Private University Promoting Public Service
NAAC Accreditation - 'A' Grade

Vol. IV | Issue 1 | January 2018

INDIA'S COMPETITION JURISPRUDENCE: IN NEED OF A MORE ECONOMIC APPROACH?

Economic theory is an essential aspect of competition law. The use of economics in competition law varies by jurisdiction with each country adopting its own approach to competition law and economics. India's competition law jurisprudence is at a nascent stage and its approach to economics is still developing. This issue of the Law and Policy Brief examines to what extent recent Indian decisions in competition law follow an economic approach. Three decisions in different areas of competition law and at different stages of the enforcement process are discussed from the perspective of examining their fidelity to economic theory. The first case considers the Indian Supreme Court's views on the goals of Indian competition law, the second case examines a recent decision on resale price maintenance and finally this paper discusses CCI's preliminary views on the relevance of market power to competition law. The objective of this paper is to throw light on the manner in which economics is being employed in competition law in India. This paper concludes that India does not follow a strictly economic approach to competition law.

As a market regulator with the power to charge businesses substantial penalties, the Competition Commission of India (CCI) has found itself quite regularly in the news. The CCI regulates competition in Indian markets through the provisions of the Competition Act, 2002 (hereinafter the Act). The Act was intended to modernise competition laws in India and bring the Indian regulatory framework closer to competition jurisprudence in western countries. Competition law is heavily shaped by economic theory, making it an extremely technical area of law. In the past few decades, economics has become the dominant organising principle of competition law. Economists contribute significantly to building scholarly knowledge in competition law and are also employed to aid in the enforcement of competition law in many jurisdictions.

Despite the presence of economics as a guiding force, there is some disagreement about the proper role of economics in competition law and also varying degrees of prominence given to different schools of economic thought in competition law. While the rise of the 'Chicago School' and neoliberal economics in the United States has brought about a high level of consistency to US competition or antitrust law, other countries have not embraced economic principles as openly. In Europe, for instance, there has been some resistance to the Chicago school approach to competition enforcement because of the particular historical and political context in Europe that prioritised the prevention of monopolies, encouraged competition on the merits and market integration over the pursuit of pure neoliberal economic theory. Yet, economics provides a compellingly unambiguous framework for competition enforcement and even the EU is now gravitating towards what is known as the 'more economic approach'. A 'more economic approach' is attractive because it is based on scientifically constructed economic models but also because it appeals to the conservative idea of lesser regulation and non-interference in markets. The use of economics in competition law thus, arguably also serves a political agenda.

In India, competition law is still at a nascent stage and has not reached the same level of technical sophistication as the US and the EU. The neoliberal economic framework also does not entirely suit the Indian political context.

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Editors
Dr. Ashish Bharadwaj
Saptarshi Mandal
jgls-lpb@jgu.edu.in
www.jgu.edu.in
www.jgls.edu.in

With this context in mind, the purpose of this brief is to examine to what extent Indian competition law is following or is likely to follow the Chicago school approach. The discussion refers to a few selected recent competition law decisions in India and comments on to what extent these are consistent with an economic approach. Three different topics of competition law are discussed: the goals of competition law, resale price maintenance and market power.

Competition Goals

In its recent judgment in Excel Crop Care v. CCI,[1] the Supreme Court made an important contribution to Indian competition law by ruling that penalty for competition violations will be calculated based on an enterprise's relevant turnover and not it's total turnover. The implication is that only that portion of an enterprise's turnover that is connected to the anticompetitive conduct would be used to calculate penalties under competition law. This ruling will substantially reduce the quantum of penalties levied for competition violations. Equally importantly, the court also discussed in some detail what it considers to be the goals of Indian competition law and how those goals are not served through excessively harsh penalties. The Supreme Court's views are intended to guide the CCI and are thus, worthy of analysis.

In the words of the court, "In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices. Another purpose in curbing anti-competitive agreements is to ensure 'level playing field' for all market players that helps markets to be competitive. It sets 'rules of the game' that protect the competition process itself, rather than competitors in the market."[2]

The bedrock of the economic approach involves developing a clear vision of economic goals of competition law and filtering out all non-economic considerations from these goals. A strong impetus to the growth of the economic approach in the US was Robert Bork's influential treatise, The Antitrust Paradox that laid the foundation for consumer welfare maximization as the primary goal of US competition law. Bork's treatise was extensively used to show that competition law was not the appropriate tool to address previously popular non-economic objectives of competition law such as protecting small businesses because this would create inefficiency. Thus, a normative framework that is aligned to economic theory is required for competition law to fit within the modern economic approach. Absent this guiding framework, the complexity of markets can make it difficult to consistently enforce competition law. For instance, if the goal of competition law in a jurisdiction is to maximize consumer welfare (which in its economic sense is consumer surplus and not consumer well being mentioned by the Supreme Court), then particular types of anticompetitive conduct will not be punished unless it adversely effects the welfare of consumers such as through higher prices even if competitors exit the market. Whereas, if the goal is to provide a level playing field to competitors, then conduct harming competitors acquires a much greater relevance to competition law and can be punished even if consumers are otherwise benefited through lower prices. A good example of the impact of differing goals on competition enforcement is the different outcomes arrived at against Google by US and EU competition agencies.

It is thus disheartening to see that given the opportunity to clarify the purpose of competition law in India, the Supreme Court is content with re-stating generally known goals of competition law without providing any inputs of its own on how these goals may be relevant to the Indian situation. Moreover, the Supreme Court has taken both economic and non-economic goals into account as the goals of Indian competition law. This will only serve to increase the confusion about which of many competing goals Indian competition law should pursue. The Supreme Court's statement that "consumer well being" is the ultimate goal of competition law is very ambiguous as it could mean consumer surplus or other non-economic goals such as consumer choice or preventing exploitation of consumers. More clarity is needed for a stronger competition law jurisprudence to develop in India.

Resale Price Maintenance

The CCI's recent decision in FX Enterprises v. Hyundai Motor Co.[3] on Resale Price Maintenance (RPM) is the first case where it has struck down RPM and provides a useful illustration of the CCI's approach to economic analysis. It also sheds light on the CCI's thinking about a market practice i.e. RPM that is becoming increasingly significant in e-commerce transactions. RPM is classified as a vertical restraint since it operates between enterprises that are at different levels in the chain of production such as manufacturers and retailers. It involves an arrangement between entities involving the price at which goods or services should be sold. Vertical arrangements are generally viewed as less of a threat to competition than horizontal agreements, which are entered into between entities that are at the same level in the production chain and are competitors in the market, thereby directly impacting competition.

It was alleged in the complaint that Hyundai was engaging in RPM through a Discount Control Policy which required its car dealers not to discount the cars they sold at a higher rate than that mentioned in the policy. Hyundai allegedly closely monitored and punished any retailers violating this policy by imposing high penalites or even refusing to supply cars to them. The CCI found that Hyundai's policy constituted RPM and was in violation of section 3(4) of the Act.

Hyundai on the other hand argued that the reason it instituted the policy was to protect the financial health of some of its dealers which was being effected due to aggressive discounts offered by other dealers.

Electronic copy available at: https://ssrn.com/abstract=3135831

Hyundai further argued that, "maintaining the financial health of the dealers is an extremely important factor to ensure a robust and healthy dealership network for HMIL [Hyundai], so that the dealers have the ability to invest in sales, services, and promotion of new and existing products."[4] This was an ostensibly pro-competitive reason for the RPM arrangement.

The CCI's decision while attempting to conduct an economic analysis only cursorily examined some well-settled economic principles relevant to the analysis of RPM. This is substantiated in greater detail below. According to the CCI the economic harm from RPM is the following: (i) RPM facilitates formation of cartels at the level of manufacturers and retailers, (ii) it reduces inter-brand and intra-brand price competition, (iii) reducing intra-brand price competition can generally cause higher prices across brands; (iv) RPM raises barriers to entry in the market because new retailers who could have competed against incumbents on price to make a presence for themselves in the market are not able to do so. These are all factors that are relevant to an RPM investigation but there are other factors as well that should have been considered.

The US position on RPM appreciably changed with the landmark judgment of the US Supreme Court in Leegin Creative Leather Products v. PSKS[5] where the court relied on expert economist opinions to hold that RPM which was till then a *per se* illegal restraint would now be analysed through a rule of reason analysis. Indian competition law also follows a rule of reason approach to RPM as only those RPMs that cause an appreciable adverse effect on competition are punished. The reason for moving to a rule of reason approach according to the *Leegin* court was that economic theory and empirical evidence had shown substantial pro-competitive effects of RPM. The *Leegin* judgment also noted that a majority of RPM schemes are not introduced for anticompetitive reasons. Further, the court cited studies that it was wrong to assume that RPM would lead to higher prices absent further evidence of anticompetitive conduct.[6] Thus, given the potential economic benefits of RPM, competition agencies should examine the competitive effects of each RPM arrangement. The CCI however, did not evaluate the competitive effects of RPM in the Hyundai case and under-appreciated Hyundai's arguments.

The procompetitive effects of RPM are that it gives retailers more incentives to invest money in promoting the manufacturers products. Without RPM retailers will compete only on price and not on the quality of services and brand promotion. As the *Leegin* court explained, "absent vertical price restraints, retail services that enhance interbrand competition might be underprovided because discounting retailers can free ride on retailers who furnish services and then capture some of the demand those services generate…Factors relevant to the inquiry are the number of manufacturers using the practice, the restraint's source, and a manufacturer's market power."[7] Hyundai's arguments before the CCI were that its RPM arrangement would benefit smaller retailers, which is consistent with the pro-competitive benefits of RPM highlighted in the economic literature. The CCI did not however, take these arguments seriously.

Economists believe that manufacturers are unlikely to have anticompetitive incentives to impose RPM. It is unlikely that an RPM will facilitate a cartel when only a single manufacturer or a few manufacturers without market power adopt it because rival manufacturers can reduce prices and take away sales from cartel participants. Hence, an RPM is only likely to be anticompetitive when almost all the companies in the market adopt similar arrangements. Further, a manufacturer has little incentive to needlessly overcompensate retailers through RPM arrangements because it will increase the price of its products or services, which may cause customers to switch to cheaper products. On the other hand, it could be that at the retail level a few powerful retailers pressurize a manufacturer to put an RPM arrangement in place. If there is evidence of this, it means there is a higher likelihood of RPM being anticompetitive because it could facilitate a retail cartel or support a dominant, inefficient retailer.[8] Thus, competition agencies should examine market power at the manufacturer and retailer level when considering if an RPM is anticompetitive. Such an analysis was not conducted by the CCI here.

RPM can, as Hyundai also argued, be useful to smaller retailers who face higher costs but add diversity and innovative services to the market. Thus, RPM could stimulate inter-brand competition even if it reduces intra-brand competition. The Supreme Court in *Leegin* felt that this could have a positive impact on consumer welfare. The CCI's economic analysis did not seriously consider any of the vast literature on these pro-competitive aspects. The CCI solely stated that the DG found the Discount Control Policy to have an appreciable adverse effect on competition because the DG found that these arrangements did not give consumers any benefit and it decreased price competition.[9] This comes across as a half-hearted economic analysis. The CCI needed to do more than simply state that consumers were not benefited because of reduced price competition as economic opinion cited in *Leegin* has disproved that hypothesis.

One potential anticompetitive effect of RPM that may have been relevant to this case and was not examined by the CCI is whether RPM was offered by Hyundai as a way to pacify retailers in exchange for pushing them to accept other costly and potentially anticompetitive vertical restraints such as tying and exclusive dealing. Since the complainants alleged that Hyundai was engaging in both tying and exclusive dealing, this aspect may have been worth examining.

The *Leegin* judgment used economics to suggest three factors to consider in RPM, none of which were examined by the CCI. These are: (i) whether competing manufacturers adopted the [RPM] policy; (ii) whether powerful retailers pushed Hyundai into an RPM arrangement and (iii) whether Hyundai had market power. By ignoring these critical aspects of RPM, the CCI's economic analysis in the Hyundai case was incomplete and lacking in rigour.

Market Power

The CCI's April 2017 order stating its *prima facie* view that abuse of dominance had occurred and directing further investigation into these allegations against Hoffmann-La Roche (Roche), a large multinational pharmaceutical company has been at the centre of media attention. The case concerns Indian companies, Biocon and Mylan that began selling a cheaper, biosimilar version of a breast cancer drug called Trastuzumab being sold in its original form by Roche in India at a much higher price. These companies brought a complaint before the CCI alleging that Roche took anticompetitive steps to stop their entry and growth in the Trastuzumab market.

CCI stated that Roche had a dominant position in the relevant market, defined as the market for biological drugs based on Trastuzumab including its biosimilars in India, which dominance in it's *prima facie* view, was being abused.[10] However, a critical fact also acknowledged by the CCI was that after the entry of the complainants into the market, the market share of Roche was steadily declining and that of the complainants was increasing. Yet, the CCI did not consider Roche's declining market share relevant to the determination of dominance as it felt that market share is only one of the factors relevant to determining dominance under section 19(4) of the Act.

Economists believe that a company with a declining market share, such as Roche in this case, is unlikely to possess market power. Absent market power, economists believe that it is unlikely that particular conduct will have a harmful effect on the market. As pointed out by Kaplow and Shapiro, "antitrust violations typically require the government or a private plaintiff to show that the defendant created, enhanced or extended in time its market power."[11] For conduct to be anticompetitive under US law, market power must not only exist but also be durable rather than temporary. This means that it should be demonstrated that the monopolist could hold on to its monopoly position in the future. Without market power, economists view companies' aggressive market behaviour as a rational product of the desire to make more profits, which is unlikely to be harmful.

The Roche order reflects CCI's tendency to align to the letter of the law rather than adopt its economic spirit. There could also be a non-economic motive behind the CCI's order that large, multinational companies such as Roche should compete fairly in the market and not engage in activities harmful to their smaller competitors.

The above discussion shows that the CCI and the Supreme Court do not follow a rigorous economic approach although there is an attempt to incorporate economic theory into the analysis. Indian competition jurisprudence rather, reflects the realities of Indian markets and the limitations of its regulators. Given the political context of India, it seems unlikely that India's competition law will be as faithful to economic theory as some of the more developed competition law jurisdictions. However, if India intends to follow a more economic approach to competition law, it needs to consciously take more effort to build capacity that allows its decisions to be better aligned with economic theory. ■

1 Civil Appeal No. 2480 of 2014 (May 8, 2017), available at https://barandbench.com/wp-content/uploads/2017/05/excel-crop-v-cci.pdf.
2 *Id.* at 21-22.
3 Order of the Competition Commission of India in Case Nos. 36 & 82 of 2014 (June 14, 2017), available at http://www.cci.gov.in/sites/default/files/36%20and%2082%20of%202014.pdf [hereinafter Hyundai case]
4 Hyundai case, *id.* at 12.
5 551 US 877 (2007) [hereinafter Leegin case].
6 Leegin case, *id.* at 892-93.
7 Leegin case, *id.* at 879 (2007).
8 Leegin case, *id.* at 896.
9 Hyundai case, *supra* note 3, at 29.
10 Biocon & Ors. v. F. Hoffmann-La Roche AG & Ors., Competition Commission of India, Case No. 68 of 2016 (April 21, 2017).
11 Louis Kaplow & Carl Shapiro, *Antitrust*, in HANDBOOK OF LAW & ECONOMICS 1073, 1078 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

About the Author

Shilpi Bhattacharya, B.A. LL.B. (National University of Juridical Sciences, Kolkata), LL.M. (University of Virginia), Ph.D. (Erasmus University Rotterdam - European Doctorate in Law & Economics) is an Associate Professor at Jindal Global Law School.