
SHAPING INDIA'S COMPETITION LAW: INTERNATIONAL COOPERATION AND DOMINANCE PERCEPTION

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ABSTRACT

By drawing insights from established global regimes, this paper emphasises the significance of international cooperation in shaping India's competition law. It explores the concept of dominant position and its implications for anti-competitive practices across different jurisdictions, with a specific focus on the United States, the United Kingdom, and India. The article also highlights the legal frameworks and enforcement mechanisms in each country, examining how they address the challenges posed by abuse of dominance.

India's relatively young competition law has assimilated international experiences to address the challenges of its dynamic and globalised economy. The article dissects the essential aspects of a dominant position, underscoring its ability to grant firms independence from competition and influence competitors and consumers. Throughout the article, the importance of international cooperation is highlighted, as the CCI collaborates with counterparts from different countries, fostering the adoption of common approaches to cross-border competition law issues, ultimately benefiting consumers and promoting fair business practices.

In conclusion, the article underscores the impact of global perspectives on India's competition law while incorporating international insights and cooperation. India demonstrates its commitment to aligning its competition regime with global standards while addressing unique domestic market challenges.

Keywords: competition, enforcement, practices, dominant, cooperation, countries

Introduction

India's competition law has been in effect for a relatively short period of 14 years, yet the Competition Commission of India (CCI) has been tasked with addressing intricate cases involving anti-competitive practices across various industries. While India is often recognized as a green-field competition regime, it is worth noting that its competition law jurisprudence predates that of many other developing countries. The Monopoly and Restrictive Trade Practices Act of 1969 served as India's initial legislation in this realm, followed by the more recent enactment of the Competition Act in 2002.

The economic reforms of the 1990s brought about rapid changes in India's business landscape, necessitating amendments to the existing Monopoly and Restrictive Trade Practices Act of 1969 in order to keep pace with evolving market dynamics. However, it became evident that the amended framework was inadequate in addressing the demands of a rapidly changing economic environment. In response, the Indian government established the High Level Committee on Competition Policy & Law, chaired by Mr. S. V. Raghavan. This committee provided recommendations, which were subsequently submitted in a report on May 22, 2002. After a comprehensive consultation process, the Competition Act was enacted in the same year.

The enactment of the Competition Act was India's proactive response to the liberalisation and opening up of its economy. It aimed to remove controls and foster a climate of liberalisation. Thereafter, the evolution of jurisprudence in competition law continues to be an ongoing process, with India drawing inspiration from established jurisdictions to shape its own legal framework. Notably, India is one of the last major common law democracies to adopt a modern competition law, allowing it to incorporate persuasive principles from jurisdictions with more mature competition regimes.

International cooperation arrangements between the CCI and its counterparts in the United States, Russia, the European Commission (EC), Canada, and Australia have played a crucial role in converging and developing international standards when necessary and feasible. Active participation by Indian agencies in the events organised by the International Competition Network (ICN) further strengthens the collective interests of diverse economies, fostering the adoption of common approaches to cross-border competition law issues for the overall benefit

of consumers¹.

India's competition law, while may be a relatively young regime, has drawn from international experiences and collaborations to develop a robust framework that addresses the challenges of a dynamic and globalised economy.

Understanding Enforcement Framework:

1. United States & Indian Laws

In the United States, "antitrust" commonly refers to laws against cartels or "business trusts." These laws promote fair competition and protect consumers from potential monopolies.

The procedure for endorsing mergers and acquisitions in the United States entails a thorough assessment to confirm alignment with antitrust and competition regulations. Although distinct from consumer protection laws, these regulations still provide a level of safeguard for consumers against unethical suppliers aiming to control a particular market segment. By preventing monopolistic practices, antitrust laws aim to maintain a competitive marketplace. Meanwhile, in India, since gaining independence in 1947, the nation took a distinct route, mainly embracing strategies referred to as "Command-and-Control" statutes, principles, and guidelines., and executive orders for nearly half a century thereafter².

In contrast to India's enforcement structure, which revolves around a singular legislation and agency, the United States boasts a more intricate system involving multiple agencies and statutes responsible for enforcing antitrust laws. In the US, two prominent federal entities—the Antitrust Division of the US Department of Justice (DoJ) and the Federal Trade Commission (FTC)—assume pivotal roles in upholding antitrust laws. These organisations are essential in maintaining equitable competition and preventing actions that stifle competition within the

¹ G. Seetharaman, *Can CCI Be More Agile Like Its EU and US Counterparts in Disposing of Cases?*, THE ECONOMIC TIMES (Nov. 25, 2019), <https://economictimes.indiatimes.com/news/economy/policy/can-cci-be-more-agile-like-its-eu-and-us-counterparts-in-disposing-of-cases/articleshow/72201833.cms?from=mdr> (last visited Aug. 1, 2023).

² Payal Chatterjee, *"How Did Competition Law Evolve in India? How Is It Different From That in the US or the European Union. An Analysis..."*, NISHITH DESAI ASSOCIATES, https://www.nishithdesai.com/fileadmin/user_upload/pdfs/New_Competition_Law_in_India_vs_USA_and_EU.pdf (last visited Aug. 7, 2023).

market. While the DoJ operates within the government's executive branch, the FTC functions as an autonomous administrative agency, akin to India's Competition Commission (CCI).

The oldest federal antitrust law in the US dates back to 1890—the Sherman Act. This legislation primarily addresses agreements that impede competition and monopolistic practices by companies. In contrast, the Clayton Act, established in 1914, pertains to specific business conduct, encompassing regulations concerning mergers, price discrimination, binding agreements, and exclusive supply arrangements. Both the Sherman Act and the Clayton Act are independently enforced by the DoJ and FTC.

However, in cases where antitrust violations involve criminal prosecution, the exclusive authority lies with the DoJ. This division of enforcement responsibilities ensures that both civil and criminal aspects of antitrust laws are effectively addressed and monitored in the United States.

Like the Sherman Act, the Indian Competition Act focuses on anti-competitive agreements and practices, aiming to prevent abuse of dominant market positions. Similarly, the Clayton Act's concern for addressing specific business practices finds resonance in the Indian law's provisions on mergers, acquisitions, and combinations. By adopting elements from the US antitrust legislations, Indian competition law seeks to foster healthy competition, curb monopolistic behaviour, and protect consumer interests.

While the US and India differ in the structure of their enforcement agencies, the utilisation of similar principles from the US acts enriches the Indian competition law, making it more comprehensive and effective in safeguarding competitive markets and promoting fair business practices. The amalgamation of these shared concepts empowers the CCI to play a pivotal role in regulating competition and ensuring a level playing field in India's dynamic business landscape. In embracing principles from the US antitrust legislations, the Indian competition law has taken a forward-thinking approach towards ensuring a robust and competitive economic landscape.

2. United Kingdom and Indian Laws:

The Indian Competition Law bears a striking resemblance to the UK Competition Law, sharing a similar enforcement structure concerning the regulation of abuse of dominance and restrictive

agreements. The UK introduced its first competition law framework in 1948, known as the Monopolies and Restrictive Trade Practices Act, 1948, in response to the surge of anti-competitive agreements dominating the market after the Second World War. The main idea behind this enactment was establishing an administrative body that would regulate the market functioning against the public interest.³

In 1965, the Monopolies and Mergers Act was introduced as an extension of the Monopolies and Restrictive Trade Practices Act, 1948. Its purpose was to investigate specific mergers and identify anti-competitive practices in both public bodies and certain privatised industries. However, in 1973, a new regulation known as the Fair Trading Act 1973 was formulated to replace the existing two acts. This new act included a more comprehensive mechanism to address competitive market issues, with a focus on resolving matters referred by the Director General. Despite these efforts, the act also failed to adequately protect individuals' interests and their ability to participate freely in the market.⁴

In the late 1990s, a comprehensive overhaul of the previous laws took place with the introduction of the Competition Act, 1998. This new act aimed to regulate Mergers and concentration (Schedule 1), Competition Scrutiny (Schedule 2), and Other General Exclusions (Schedule 3). Its primary goals were to foster a more competitive business environment for the benefit of the market participants and to prevent industries from dominating the market. Alongside the Enterprise Act 2002, the Competition Act sought to establish a market that promotes fair competition among all players.

While both the Competition Commission of India and the UK work towards preventing the exploitation of public interest by market regulators, they differ in their enforcement mechanisms. In the UK, enforcement follows a two-fold process, involving an assessment of the credibility of evidence followed by a criminal investigation conducted by the office of fair

³ Maulik Vyas, *Great Similarity Between Indian Competition Law and the UK and EU Antitrust Acts*, THE ECONOMIC TIMES (Sept. 11, 2011), <https://economictimes.indiatimes.com/great-similarity-between-indian-competition-law-and-the-uk-and-eu-antitrust-acts/articleshow/10070356.cms?from=mdr> (last visited Aug. 4, 2023).

⁴ *Comparison of Competition Laws Between India and UK* » Legal Window, LEGAL WINDOW (Oct. 10, 2022), <https://www.legalwindow.in/comparison-of-competition-laws-between-india-and-uk/#:~:text=Indian%20Competition%20Law%20is%20widely,dominant%20position%20and%20restrictive%20agreements.> (last visited Aug. 2, 2023).

trading. On the other hand, in India, the Competition Commission is the sole regulatory authority responsible for investigating prima facie cases to ensure free trade.

3. European Union and Indian Laws:

Competition laws within the European Union (EU) aim to unite its member states into a cohesive entity that competes collectively against global economies. This perspective resembles the notion of considering all members as a single nation. While most governments strive to encourage fair competition within their borders, the EU, on the contrary, appears to emphasise the eradication of internal competition. Instead, it fosters a collaborative approach among its members to present a unified stance against other nations.

The foundation of the EU's framework for competition law can be traced to the Treaty on the Functioning of the European Union. Although the Treaty encompasses a broad array of topics, notable legal advancements have transpired in the realm of competition law, especially concerning Articles 101 and 102. The Treaty's jurisdiction encompasses agreements and behaviour among EU member states. However, each member state also maintains its individual national competition agencies and laws.

Regarding competition law enforcement, the Treaty does not specify an institutional structure, and the responsibility for framing the enforcement mechanism was given to the European Council. As a result, the Council assigned the European Commission with the responsibility of guaranteeing adherence to the Treaty. This involves the enforcement, execution, and advancement of competition laws and policies within the European community. In the context of competition laws, many countries implement pre-merger notification processes, which can be either mandatory or voluntary. Both the European Union and India follow a mandatory filing system, requiring companies to submit notifications before proceeding with mergers or acquisitions.

Likewise, the framework of competition law in India bears resemblances to the enforcement system in Europe. The stipulations of the Act and the authorities and functions of the Competition Commission of India (CCI) are broadly shaped after pertinent provisions of the Treaty and the authorities of the EC. Despite these resemblances, noteworthy distinctions exist among the enforcement structures of India, the US, and the EU, particularly concerning the extent and effectiveness of enforcement.

The EU strives to counteract anti-competitive practices that emerge from agreements. Put differently, India seems to concentrate on identifying the origins, while the EU places its focus on extinguishing the consequences arising from those origins.

The framework of Indian competition law is somewhat influenced by the EU's enforcement structure⁵, but disparities exist in the extent and effectiveness of enforcement when compared to the US and EU systems.

The Perception of Abuse of Dominance

1. United States of America

Sherman Act, 1890

The Sherman Act deems contracts, combinations, or conspiracies that restrict trade between states, territories, or foreign countries as illegal. The key requirement is the presence of mutual agreement or commitment to engage in anticompetitive conduct.

Section 2 of the Sherman Act prohibits monopolisation, attempt to monopolise and conspiracies to monopolise. Monopolisation requires possession of monopoly power in a relevant market and the willful maintenance of that power. Intent is essential to establish an attempt to monopolise, which can be inferred from evidence of unfair tactics.

To establish a conspiracy for the purpose of monopolising, three key components need to be demonstrated:

- (a) evidence of a coordinated plan
- (b) clear intent to achieve monopoly, and
- (c) a noticeable action taken to advance the coordinated plan.

Price Fixing

The Competition Act incorporates the concept of "price association" (price fixing) without

⁵ Akhila Achuthan, Comparison of Competition Laws Between Usa, Uk, Eu and India, I The Journal of Unique Laws and Students, XXXX (2021), <https://doi.org/10.59126/v1i1a1> (last visited Aug. 1, 2023).

providing detailed explanations of vertical and horizontal price fixing. Vertical price fixing, alternatively referred to as price maintenance, takes place when a dominant entity establishes prices in collaboration with retailers. Horizontal price fixing happens when manufacturers fix prices with each other. Sherman Act Section 132 clarifies that the exchange of price information alone does not violate Section 1, but when combined with criminal intent to set prices, it becomes a violation.

Tying Agreement

The Competition Act defines tie-in arrangements but lacks detailed elaboration. In contrast, the Sherman Act provides a comprehensive definition. An illicit tying arrangement transpires when a seller mandates a buyer to acquire an extra, less favored product, consequently diminishing competition in the linked product. It's important to note that identical products and markets do not constitute an unlawful tying agreement.

Amalgamation

The Competition Act mentions amalgamation without extensive explanation. The Sherman Act considers amalgamation unlawful if it eliminates substantial competition or creates a monopoly. Horizontal amalgamation is illegal if it ends competition, while vertical amalgamation's legality depends on intent and market power.

Clayton Act

The Clayton Act supplements the Sherman Act and was enacted in 1914 as another Federal Antitrust Law.

Mergers

The Clayton Act defines vertical and horizontal mergers. Vertical mergers involve buyer-seller combinations, while horizontal mergers involve direct competitors. Conglomerate mergers, unrelated mergers between the buyer and acquired company, are not mentioned in the Competition Act.

2. United Kingdom

Within the United Kingdom, a range of legislation has been implemented to protect consumer

rights. Notable examples include the Consumer Credit Act 1974, Unfair Contract Terms Act 1977, Unfair Terms in Consumer Contract Regulations 1999, and Unfair Contract Terms Bill. These regulations are in harmony with the directives on consumer protection outlined by the European Union. Over time, the judicial and international approach to consumer protection has evolved, leading to an expansion of the scope of application, including criminal liability.

The definition of an average consumer, as stated in Article 2 of the Unfair Commercial Practices Directive of 2005 and interpreted by the European Court of Justice, describes a person who is reasonably informed, attentive, and aware, considering various social, cultural, and linguistic factors.

In the United Kingdom, dominant companies are subject to two parallel sets of regulations. Should a British company hold a dominant position within the UK market, it falls within the scope of Section 18 of the Competition Act 1998 (amended by the Enterprise Act 2002). Conversely, if a UK company possesses dominance in a market that encompasses other EU member states, the provisions outlined in Article 82 of the EU Treaty come into effect. Given that EU law has been integrated into UK law, the prerequisites for both scenarios are largely comparable⁶.

To whom do the dominance rules apply?

The regulations concerning the misuse of dominant positions pertain to "undertakings," encompassing all entities involved in economic endeavours, irrespective of their legal standing or funding approach, as defined by EU legislation. Consequently, even public institutions engaged in economic activities are bound by the rules addressing the abuse of dominant positions.

3. India

In the context of Indian competition law, "dominant position" refers to a firm's significant influence or control over a specific market, enabling it to act independently without facing strong competition. As a result, the dominant company possesses the freedom to set prices and dictate its strategies without being restrained by competitive pressures or the need to consider

⁶ Martin Stanley, *Understanding Regulation - Competition Regimes Compared*, UNDERSTANDING REGULATION (Feb. 12, 2021), https://www.regulation.org.uk/competition-regimes_compared.html (last visited Aug. 6, 2023).

the interests of competitors, customers, suppliers, or end consumers. However, this unchecked power can lead to potential concerns such as the possibility of offering lower quality products or services, reduced incentives for innovation, and the unfair exploitation of consumers through pricing strategies.

A dominant position in the context of Indian competition law entails two significant aspects. Firstly, it grants the firm the capability to function independently, shielded from substantial competition, which can impede healthy market dynamics and consumer welfare. This autonomy may lead to potential abuses, such as setting unfair prices or offering subpar products or services without the fear of losing customers to competitors.

Secondly, a dominant company possesses the power to influence its competitors or consumers strategically. This advantage allows it to adopt various tactics, such as predatory pricing or imposing non-tariff barriers, to suppress competition and solidify its market dominance⁷. Such practices can harm smaller competitors, limit consumer choices, and hinder innovation within the industry.

Assessing a firm's dominant position in the Indian competition law context involves evaluating two crucial factors: its market share and the conditions of market entry. A company can achieve a dominant position through legitimate means, such as product innovation or employing superior techniques, which are acceptable under competition rules. However, competition authorities closely scrutinise various indicators, including market share, sales data, and consumer behaviour patterns, to identify instances of dominance and potential abuse.

While market share is a significant factor in determining dominance, it is not the sole criterion. Competition authorities consider a broader range of elements to gain a comprehensive understanding of the firm's position in the market and its potential impact on competition and consumers⁸.

The Competition Commission of India follows specific steps to establish dominance and

⁷ Aditya Bhattacharjee et al., *Competition Law and Competition Policy in India: How the Competition Commission Has Dealt With Anticompetitive Restraints by Government Entities*, 54 REVIEW OF INDUSTRIAL ORGANIZATION 221, XXXX (2018), <https://doi.org/10.1007/s11151-018-9641-0> (last visited Aug. 4, 2023).

⁸ Viswanath Pingali et al., *Competition Law in India: Perspectives*, 41 VIKALPA: THE JOURNAL FOR DECISION MAKERS 168, XXXX (2016), <https://doi.org/10.1177/0256090916647222> (last visited Aug. 7, 2023).

potential abuse:

1. Defining the relevant market.
2. Evaluating the firm's market strength to determine significant power.
3. Considering whether the firm's conduct amounts to abuse.

By considering these crucial steps, authorities aim to prevent abuse of dominance and ensure fair competition in the market.

Conclusion

The Competition Law regime of the three countries are somewhat similar in framework with differences in its implementation and regulation. India's competition law framework draws inferences from the jurisprudence formulated in the US and UK. While the regulatory framework of the countries aims at preventing anti-competitive conditions that could hamper the competition, it differs in the approach towards tackling such practices.

India's competition law being governed by the Competition Act, 2002 has seen drastic change post the 1990 liberalisation. Earlier, the MRTP act mainly concerned at curbing the monopolistic behaviour of the individuals while the approach has been towards promoting small businesses by regulating anti-competitive agreements and abuse of dominance that restrict the market.

However, the UK's Competition Act, 1998 showcases a stronger regime while dealing with anti-competition behaviour with the establishment of the Competition and Markets Authority (CMA). The authority aims at encouraging competitive behaviour and resolving unfair market practices. The country's old regime along with the alignment with the EU's principles, makes the system more robust to balance the market conditions to be more consumer oriented.

Similarly, US's competition law covered by the Sherman and Clayton act that played a catalyst in imposing anti-trust laws in the nation. Antitrust law in the USA focused on behaviour directed towards price fixing, tying arrangements and amalgamation that brought the competitive market to a disadvantage. The Federal Trade Commission (FTC) and Department

of Justice (DoJ) both work towards enforcing these laws to tackle the concerns of market entities being webbed by monopoly.

To conclude, in the fast moving world with rapid growth in technology, it is important to recognise the intricacies of the competition law of the global economy. It is crucial for smooth and efficient functioning of cross-border businesses. The regulatory authorities of both US and UK as well as India have played an active role in developing the laws and imposing penalties on the violators of the competition law of the countries.