Scholarly Research Journal for Interdisciplinary Studies,
Online ISSN 2278-8808, SJIF 2021 = 7.380, www.srjis.com
PEER REVIEWED & REFEREED JOURNAL, NOV-DEC, 2022, VOL- 10/74

A COMPARATIVE ANALYSIS ON THE COMPETITION LAW REGIME OF US AND INDIA WITH RESPECT TO THE LOOPHOLES IN THE INDIAN COMPETITION ACT

Shivangi Sharma
Ph.D. (Law) scholar of Rabindranath Tagore University, Bhopal.

Paper Received On: 25 DECEMBER 2022
Peer Reviewed On: 31 DECEMBER 2022
Published On: 01 JANUARY 2023

1.0 Introduction

The main objective of this research project work is to create awareness regarding the Indian and US laws related to competition among the consumers, business owners, companies and other related persons who get affected by the competition either in the form of anti-competitive agreements or abuse of dominance or in any other form in their daily life. In this research work I will try to find out the loop holes in Indian laws in framing the Competition Act of India 2002 and will try to compare the Indian laws with the laws of US with regard to the Competition.

1.1 History of Competition Law Regime in India

The need of Anti-trust laws was felt for the first time after the first industrial policy came in 1948. There were no Anti-trust or Competition laws in India before 1969 so there was a need to introduce the . The first ever Act that was introduced to restraint and regulate the monopolistic practices, restrictive and unfair trade practices came in 1969 that was named as Monopolies and Restrictive Trade Practices Act,1969.

1.1.1 MRTP Act, 1969

This Act was intended to control Monopolistic behaviour of the people, organization, companies etc. and to provide the prohibition of Monopolistic and restrictive Trade practices. This Act worked well till the introduction of the new financial policy by the then financial Minister Mr. Man Mohan Singh according to which the barriers on entry and exit in Indian

market were removed from the corporate sector. After introducing new policy this Act became ineffective as the preamble of the Act mainly was mainly focusing on prohibition of economic concentration of the powers and prohibition of monopolistic and restrictive trade practices only.

After the introduction of LPG policy India became the part of two main agreement the GATT and TRIPS. Now many countries were able to enter into the Indian market. The Central Government constituted the Committee of higher level committee of competition policy and law. This committee recommended the repeal of MRTP Act and introduction of a new Act that was named as Competition Act, 2002.

1.1.2 Competition Act, 2002

This act extends to the India only except Jammu and Kashmir (section 1) and it was enacted to control the mergers, acquisition (combinations section-5&6), anti-competitive agreements(section-3) and abuse of dominance(section-4). This Act received the assent of president on 13.01.2003. The Central Government also notified the rules for the selection of chairperson and other members of the Competition within some months. This Act consists in total of 9 chapters. The Preamble of the Act says that this Act was introduced to provid the economic development of the country for the establishment of a Commission to prevent practices having adverse effect on competition to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by the other participants in market in India and the incidents related thereto. Competition Commission was formed under this Act and its appeal can be done in COMPAT (from 2017).

In the case of **Brahm Dutt v. Union of India**[1] the validity of formation of Competition Commission of India was challenged. During the hearing of the case Central Government intended that they want to amend the Act. Then Act was amended in 2007 where CCI had to perform only the advisory and regulatory functions. The Act was again amended in 2009.

This Act describes the formation, terms of office, procedure of selection, duties etc of CCI and the powers of CCI like power to investigate and pass orders. CCI can pass order to reimburse, to discontinue, to modify, to impose penalty in the agreements of dominant position and modification in the agreement of combinations if its possible, to stop such combinations and to investigate such combinations. According to section 6 the CCI will decide whether combination is having appreciable adverse effect on the competition or not.

[1] Brahm Dutt v. Union of India 2005(1) TMI 410 SC

1.2 History of Competition Law Regime in US

If we see the history of US laws the first ever Anti-trust law of US was named as

1.2.1 **Sherman Act,1890**

This Act was enacted in 1890 for the prohibition of the activities in restraint of trade. This was considered as the first ever anti-trust law statute in the World. The word 'restraint of trade' came in a case law of **Business Electronics Corporation v. Sharp Electronics Corporation**[2]. In the Sherman Act the main focus was to prohibit the economic concentration of power in few hands and to provide the benefit to the small enterprises and to prevent anti-competitive agreements and monopolization. Under this Act monopoly was considered as illegal. The language used in this act was vague which allowed the companies or the organization to misuse the power and to throw out the small competitors out of the competition and there arose a high need to introduce a new Act. After Sherman Act Clayton Anti-trust Act was introduced to cover up the loopholes left in Sherman Act.

1.2.2 Clayton Antitrust Act

Clayton Act came in 1914 under this Act unethical business practices, monopolies, price fixing etc has been defined. The Act used to deal with predatory pricing, discriminatory pricing, mergers and acquisitions etc. It even included the rights of the private individual to file a suit against such practices which is nowhere found in the Indian laws till now. FTC and DOJ are the enforcement body for the provisions of this Act just like CCI in India. Under this Act if the people or enterprise or firms or any other person intended to create monopoly such operations will be banned. Under this Act there were total of 26 sections under which price discrimination, price cutting, price fixing etc. were defined properly. This Act is still in operation the big companies seeking mergers and acquisitions they have to take prior permission from the Government before doing so. This Act was somewhat amended by the Robinson Patman Act,1936 and Sherlock Celler Kefauver Act,1950. Hart Scott Rodino Anti-trust Improvements Act,1976 the Webb-Pomerene Act,1993 and the International Antitrust Enforcement Assistance Act,1994.

2.0 Legal framework of the study

1. In US if we see the first Anti-Trust law was formed in 1890 i.e. Sherman Act that actually restricted the agreements in restraint of trade and mergers that were anti-competitive in

[2] Business Electronics Corporation v. Sharp Electronics Corporation 285 US 717 (1988)

nature it also prohibited the monopolistic practices. After that Federal Trade Commission Act, 1914 came than Clayton Act,1914 came and this Act was somewhat amended by the Robinson Patman Act,1936 and Sherlock Celler Kefauver Act,1950. Hart Scott Rodino Anti-trust Improvements Act,1976 the Webb-Pomerene Act,1993 and the International Antitrust Enforcement Assistance Act,1994. The Anti-trust Acts of the US are framed very well and considered as the best laws in the World.

2. Important sections of the Competition Act,2002 of India:

1. To control anti-competitive agreements (such agreements are described u/s 3),
2. To control abuse of dominant position (u/s 4), when the firm or group of person will be considered in state of the dominant position has been defined in section 19.
3. To control Mergers and Acquisitions (u/s 5 and 6)
4. Competition Commission of India its Establishment, Composition, Selection, Resignation, term of office etc.(Chapter-III)
5. Penalty/ Remedies against abuse of dominance and combinations(Sections 27,section-31)
6. Appeal can be made in COMPAT(u/s 53A)

Above given sections are the main sections of the Act through which the whole Competition Act revolves.

3.0 Comparative Study between the Indian and US laws

There are many differences between the US and Indian laws of Competition lets find out them one by one:

1. National Jurisdiction

The geographical jurisdiction extends to the whole of US and the federal court of US have jurisdiction to listen the interstate trade related issues and. If any competition related issues arise anywhere in US it has the power to listen it. While in India anyone can file a complaint in CCI in its National or Regional office from anywhere in India and its jurisdiction is in all over India except the state of Jammu and Kashmir. CCI will confirm in 15days and revert with the reply whether the case is Prima Facie per se or not. But there is nothing like that in US laws anyone can file a case in the Federal Court easily without waiting for 15 days above that it is not sure whether the case will be admitted or not after a long wait of 15 days.

2. International Jurisdiction

For establishing international jurisdictions US has its own Court of International trade that sees all the disputes related to International Trade arise anywhere in US. It can even

conduct hearings in foreign countries. Under the US custom Act,1980 it has residual powers to conduct hearings if it is against the US officers or its agencies.[3] Court has total of 9 judges that hears the matter related to International trade. The appeal of International court can be done in US court of Appeals for the Federal Circuit. Hence, in total US have good laws to decide the International Jurisdictions on the matters arising anywhere in the country and are related to some other country. In India there are no International Trade Courts which can hear the competition related matters in a speedy manner. Also, India has no such Act that specifies the International Jurisdiction matter clearly so there will always remain a confusion regarding jurisdiction until and unless India frames a strong laws regarding jurisdiction in the matters of International trade and matters related thereto.

3. Competition Commission/Enforcement Agencies

In US there are two agencies that sees the working of Federal Trust Commission (FTC) and Department of Justice (DOJ) The former is part of the executive branch of the government and the latter is an independent administrative agency, similar to the CCI. It works as an Enforcement Agency for both the US Act Sherman Act and Clayton Act. If the case is related to criminal prosecution than the DOJ is having authority to hear the case. US competition laws works on multiple legislation while Indian Competition laws work on single legislation as India is having a single agency named as CCI. In India there is no such enforcement agency but there is only one whole sole body i.e. CCI it was established in October 2003 for hearing the cases related to the Competition and deciding whether there exists a prima facie case per se or not. It is the work of CCI to decide whether there is abuse of dominance position, or there exists anti-competitive behaviour in case of vertical agreements and an enterprise is required to take prior permission before coming into mergers or acquisitions if it thinks fit than it will allow such mergers.

There are lot of powers that has been given to CCI it will decide the following factors under the Competition Act:

1. Whether there exists a prima facie case per se or not otherwise it can refuse to admit the case filed by the company or by other person;
2. It will decide whether there exists an AAEC on competition in the matter of vertical agreements as it cannot be presumed having AAEC like horizontal agreements, where even the chance is not given to the person to justify whether there is some AAEC is there or not.

[3] About the Court | Court of International Trade | United States (uscourts.gov)

3. The CCI will decide whether the enterprise is having dominant position in the market or not or whether the abuse of dominance position is there or not as only having dominant position is not illegal according to the Act no matter a firm has worked in a dominant way to achieve dominant position in the market.
4. Only the CCI has right to pass orders and its appeal can be done in COMPAT and that too CCI will decide whether the appeal should be entertained or not most of the cases goes in the favour of CCI or we can say Government. Government indirectly has hold on CCI. Till now only few handful of cases has been resolved by CCI.

5. Agreement in restraint of trade

In Indian context the word 'Restraint of Trade' was first ever used in Contract Act,1872 (u/s 27) while this word was first used in Sherman Act of US in 1890 under section 1 where its been said that if there is any contract or combination in the form of trust or conspiracy in restraint of trade or commerce among the several states or with foreign nations is declared to be illegal. Under this Act the penalty can be asked for 1 million dollar and punishment can be given upto 10 years. Here we can see that mere the conspiracy is considered as illegal unlike Indian Competition laws where the word 'conspiracy with other foreign countries' is not used anywhere in the entire act and has not been declared illegal. Neither there is any punishment or penalty provided for the violation of any provision of the competition act. The word 'restraint of trade' is not used anywhere in the entire competition Act although it has been used in the Contract Act and therefore it is not illegal as well.

6. Appreciable Adverse Effect on Competition

The term AAEC has not defined anywhere in the Sherman Act where as it has been defined in the Competition Act 2002 in below given provisions:

a) Anti-competitive agreement (section 3) where there can be two types of agreement one is horizontal and other one is vertical, in horizontal agreement will be presumed to have an AAEC they will not be provided with any sort of Right to be heard where as in Vertical Agreement the CCI will decide whether there is AAEC or not (according to the factors given in section 19).

b) Abuse of Dominance (section 4) where the CCI will decide according to the factors given in section 19 whether there is abuse of dominance or not and its having AAEC or not. Dominance per se is not illegal in India unlike EU no matter the company or person has used illegal ways to achieve such dominance in the market.

c) Regulation of Combination (section 5&6) the CCI will decide whether there is some AAEC on the market or not and persons are required to take prior permission before the combination takes place in written.

7. Monopoly

Under US Sherman Act(section 2) Monopolizing or even if a person attempts, combines or conspires to monopolize with other person it is considered as crime and the person can be asked for the penalty upto Rs. 1 lakh and punishment upto 10 years can be given. In India the word Monopoly has not been used anywhere in the new Competition Act,2002 earlier it was there in MRTP Act,1969. After that the word Monopolies has been used in COPRA, 1986 and COPRA,2019 which is illegal according to that Act but not the Competition Act. As monopoly is ok but not its abuse according to new Indian Laws.

8. Forfeiture of Property in Transit

Under US Sherman Act, section 6 the property that has been found during the transportation and that is the result of some combination conspiracy or attempt to restraint of trade can be forfeited by the US Government under this section. There is no such provision found in Indian Competition Act 2002.

9. Remedies/Powers under Competition Act

Remedies that CCI can provide are following:

a) An agreement can be discontinued
b) It can ask to modify such agreement if its possible in any manner
c) Some penalty can be levied 10% profit of the average turnover of the preceding three financial years can be asked as compensation
d) Any such orders
e) It can enquire into agreements containing abuse of dominant position (u/s 19) and combination (u/s 20)
f) It can issue interim orders (u/s 32)

Remedies under Sherman Act:

Remedies that can be given under this act are following:

- Compensation upto dollar 1 million if there is civil suit (it can be given by DOJ and FTC)
- Punishment upto 10 years if there is criminal suit(it can only be given by DOJ)

5.0 Suggestions

THE STABILITY AND SUCCESS OF THE NATIONAL GOVERNMENT DEPEND IN CONSIDERABLE DEGREE ON THE INTERPRETATION AND

EXECUTION OF ITS LAWS' it is said by the **George Washington** that the success of any Government depends upon the proper interpretation of its laws and their execution. As we have seen during the comparative analysis a lot of loopholes has been left by the Central Government while forming the Competition Commission of India. Therefore, I would like to suggest the following points to improvise the Competition Act,2002 of India:

Suggestions

1. India should extend its jurisdiction to all the states of the country properly including Jammu and Kashmir as now the Article 370 has been removed. CCI is not enough there should be separate courts to listen the matters related to Competition at District level, National Level, and State Level just like Consumer Redressal Commissions in a manner to reduce the pendency of cases.
2. Either India should workout on the foreign relations and sign more treaties with the countries related to international competition geographical jurisdictions or it should increase the scope in its section 1 only in order to increase the power to deal with the international trade issues like, US. So that India will no more be dependent to presume the jurisdiction of other countries in competition related or other International trade related matters. When the country like India cannot have jurisdiction on its own state than how come it can expect that others countries will allow India to have jurisdiction in the matters of competition laws at international level.
3. I feel there is lot of importance has been given to CCI alone. There should be some other strong body to regulate the affairs of competition and there should be some proper court at District, State and National Level that can hear the hearings for the speedy disposal of cases that are pending from last many years and no action has been taken yet.
4. I feel the remedies provided under the Competition Act are very common like modification of the agreement, discontinuance of the agreement, penalty of small amount etc. its nowhere talking about the punishment that should be given if a person found indulge in forming cartels or association or anti-competitive agreement or any other kind of anti-competitive agreement. There is requirement of introducing some harder punishments and penalties like Consumer Protection Act,2019 to make the Act much stronger.
5. I feel there should be a separate bodies for both (criminal or civil cases) just like DOJ and FTC in US. The nominal penalty or compensation or discontinuance of agreement or modification of agreement is not enough, the competition Act should provide some better

remedies to the person who is seeking justice from the court. Competition Act of India should also introduce the provisions where imprisonment will be required in order to avoid restriction on the supply distribution etc. by the different people and for those who are hindering the competition by unfair means. Only the law is not required the fear and the execution of law is also required to maintain fair competition like US.

6. I feel that the presumption that has been made under section 3 of Competition Act "all the horizontal agreements are presumed to have an AAEC" should be removed and they should be provided a chance to be heard under natural justice. CCI should not be given entire power to decide presumption in case of vertical agreements too this work should be left on the counsel.
7. Dominance is not per se bad in India what if the company has used some illegal manner to achieve that so called "dominant position"? I think it should be per se illegal and punishable to use any illegal means or behaviour to capture the market by uncompetitive means like EU.
8. If the Horizontal agreements are in the favour of consumer welfare than they should be allowed and should be considered legal. As far as they are for the benefit of the people.
9. CCI should not be given that much power that only it will decide everytime whether there is AAEC of dominance position, combination or anti-competitive agreement on the market. It should be left on the prosecution who has initiated the case.
10. We are also required to work on Competition Advocacy as suggested by OECD by creating a proper roadmap so that consumer can be benefitted with such step. Conferences, Seminars, Programs can be arranged for the small shop keepers, companies, consumers etc. Training programs can also be started in order to fulfill the goal of competition Act.