THE EVOLUTION OF COMPETITION LAW: DISSECTING THE PROVISIONS AND REGULATORY INNOVATIONS OF THE COMPETITION AMENDMENT ACT, 2023

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ABSTRACT

This article certainly seeks to appreciate notable strides that the Amendment Act has made in widening the scope of Anti-Competitive agreements and pertinently emphasizes three facets of alterations and the plausible objectives behind them; firstly, it analyses the addition of the second proviso to Section 3 (3)[1] of the Act and how it widens the culpability enumerated under Section 3(1)[2] to agreements which are neither horizontal nor vertical; secondly, how the proviso to Section 3 (4)[3] of the Act excludes an agreement between an enterprise and an end consumer and its very purpose and repercussions and thirdly, it analyses the purpose behind inclusion of the word 'dealing' in the place of 'supply' in the Clause (b) of Section 3 (4) of the Act.

Keywords: Anti-Competitive, Cartels, Dealing, Supply, Restraints.

INTRODUCTION

On the 11th of April 2023, the Competition Amendment Act came into force following the passage of the Competition Amendment Bill, 2023 in both houses of Parliament on March 2023. The Amendment Act was brought to address the significant growth of Indian markets, the paradigm shift that has taken place in the nature of market dealings and agreements and also to address the lacunae the pre-existing regime had so that to make it in consonance with the changes that the evolving competitive ecosystem has undergone. The Act brought about glaring and consequential modifications to the existing Anti-Trust legal regime of the nation. One of the most potent modifications that the Act made to the pre-existing regime is with regard to the nature of the Anti- Competitive agreements. The alterations were made to further vindicate the purpose of the mother enactment which ensures protection inimical to dominance,

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[1] The Competition Act, 2002,§3§§3, No. 12 , Acts of Parliament, 2002 (India).
[2] The Competition Act, 2002, §3§§1, No. 12, Acts of Parliament, 2002 (India).
[3] The Competition Act,2002, §3§§4,No. 12, Acts of Parliament, 2002 (India).

cartels and unfair trade practices. Galloping and noteworthy remoulding of the provisions were carried on to widen the scope of anti-competitive agreements and cover the loopholes that the pre-existing regime did not address.

ANTI-COMPETITIVE AGREEMENTS

Section 3 of the Competition Act, 2002 provides for Anti- Competitive Agreements. Section 3 (1) of the Act provides that agreements among enterprises or association of enterprises or persons or association of persons in relation to production, supply, distribution, storage, acquisition or control of goods and services which cause or likely to cause an appreciable adverse impact (AAEC) on competition in India are Anti- Competitive agreements. These forms of agreements are explicitly barred by the Competition Act. In order to delve deeper into what constitutes an anti-competitive agreement, it is pertinent to examine the phrase 'appreciable adverse impact on competition'.[4] No explicit definition of what creates an appreciable adverse impact is found in the Competition Act but Section 19 (3)[5] certainly enumerates the factors or ingredients whose presence in an agreement may attract the application of Section 3 (1) of the Act and renders it anti-competitive by the Competition Commission of India (CCI). Both horizontal and vertical anti-competitive agreements among enterprises have been comprehensively addressed in the Act but the recent amendment broadened the horizons of what constitutes an Anti- Competitive agreement and that is the sole locus around which the article revolves.

BROADENING THE SCOPE OF CULPABILITY TO INCLUDE NON-HORIZONTAL AGREEMENTS

The inculcation of the second proviso to Section 3 (3) provides that every such agreement which has been entered into by enterprises or association of enterprises though not dealing with identical goods or services shall be deemed to be anti-competitive under Section 3 (1) if the agreement has the potential to create an adverse impact on competition and satisfies the ingredients enumerated under Section 3 (3) of the Act. The Purpose behind the inculcation of such a proviso seems to be two-fold:

[4] Rajat Sethi & Simran Dhir, *Anti-Competitive Agreements under the Competition Act, 2002*, MANUPATRA (August. 31, 2024, 11:30 PM), https://docs.manupatra.in/newsline/articles/Upload/7182BCB8-7FFD-4D9A-8F53-8606AE3BEBD7.pdf

[5] The Competition Act, 2002, §19§§3, No. 12, Acts of Parliament, 2002 (India).

Firstly, it seems to address the potential loophole in the Act to include such agreements which do not fall into the category of either horizontal agreements under Section 3 (3) or Vertical agreements under Section 3(4) of the Act. Horizontal agreements provide for agreements entered into by enterprises or associations which engage in similar trade having an adverse impact on competition in India whereas Vertical agreements are those which are entered into by enterprises or persons at an upstream or downstream level i.e. at different stages of production in different markets. So, this creates a lacuna in the regime as it does not cover such agreements which are entered into by enterprises which don't fall into any of these categories leaving scope for market players to engage in anti-competitive practices.

Secondly, Hub and Spoke Cartels have finally been accorded statutory recognition bringing them into the ambit of competition scrutiny in line with the Samir Agrawal v Competition Commission of India[6] case. This is one of the most significant achievements of the New Competition Amendment Act. So to delve deeper into why it is a landmark step in the Indian Ant Trust framework, it is pertinent to have a concrete understanding of what constitutes a Hub and Spoke cartel. Hub in the phrase stands for a common manufacturer, retailer or service provider and Spoke stands for individual retailers and suppliers. The model resembles a bicycle model of the distributive network where all the spokes meet at a common hub. Hub and Cartel agreements[7] are arrangements which impose horizontal restrictions or impediments on the retailer level (spokes) implemented through players serving as a common hub. The first instance in which the contention with regard to the hub and spoke cartels was raised is in the case of Fx Enterprise Solutions India Private Limited v. Hyundai Motor India Limited[8] in 2014.

FX Enterprises, an authorised dealer of Hyundai Motor India Limited (HMIL) which was involved in the business manufacture, sale and servicing of Hyundai cars, its accessories and spare parts had filed a case against HMIL alleging it to have imposed an unfair condition by putting a limit on the maximum permissible discount that may be given by a dealer to an end customer. The case revolved around the concept of Resale Price Maintenance (RPM) and the exclusive vertical agreements which may have anti-competitive effects on the market. It was alleged that the HMIL ensured a very stringent mechanism and used it to check on the dealers who sold the products at a rate below the maximum permissible discount rate and penalize the

[6] Samir Agrawal v. Competition Commission of India, MANU/SC/0932/2020
[7] Ariel Ezrachi & Jioi Kindl, *Criminalization of Cartel Activity – A Desirable Goal for India's Competition Regime?*,MANUPATRA(August.28,2024,11:20PM),https://docs.manupatra.in/newsline/articles/Upload/C4CC25AB-8C8F-4C9D-9C0E-A369D01611A9.pdf .
[8] Fx Enterprise Solutions India Private Limited v. Hyundai Motor India Limited, MANU/CO/0111/2014

dealer for the same. Further, the dealers were not supposed to source spare parts from any other source other than the approved vendors of HMIL.CCI after careful consideration held that such a prohibitive arrangement constitutes an exclusive supply arrangement and is a sheer contravention of Section 3(4) of the Competition Act.

The CCI further held that the restrictions on the maximum permissible discount by HMIL on FX enterprises constitute Resale Price Maintenance and is a sheer violation of Section 3 of the Act. In this case, The CCI had to take the long route to prosecute HMIL because the hub and spoke cartels were not recognized back then but if things had been different back then, the whole scheme of HMIL and its dealers which prima facie constitutes a hub and spoke cartel arrangement would have been prosecuted at the first instance. The subsequent case of Samir Agrawal v. Competition Commission of India[9] recognized the hub and spoke cartels and made it imperative for the legislature to take the anti-competitive arrangement into the scope of scrutiny of the Competition Act. In the impugned case, the Supreme Court gave legal recognition to the hub and spoke cartels.

The case revolved around an allegation over Ola and Uber that the automobile giants have indulged in a hub-and-spoke cartel model to fix the price of bookings by the customers hence resulting in an anti-competitive arrangement in contravention of Section 3 of the Act. The Supreme Court in the case examined the allegations and upheld the verdict of CCI and NCLAT and held that there is no scheme of arrangement between Ola and Uber for price fixation as there has been no hub and spoke model kind of arrangement and the market is quite open to price fluctuation and hence there has been no contravention of Section 3 of the Competition Act. Following this landmark verdict of the Hon'ble Apex court, the Ministry of Corporate Affairs in a report in 2019 recommended adding an Explanation in Section 3(3) of the Act to expressly attribute the liability of the hub based on the rebuttable presumption rule already mentioned in Section 3 (3) of the Act. Hence, this stride that the Amendment has made has bolstered the Anti-trust framework of the country and is an affirmative step towards curbing anti-competitive practices in the Indian market

EXCLUSION OF ENTERPRISE–CONSUMER AGREEMENT FROM SCRUTINY

The inculcation of the proviso to Section 3 (4) of the Competition Act explicitly excludes an agreement between an enterprise and an end consumer from being anti-competitive on the

[9] MANU/SC/0932/2020

grounds enumerated under Section 3(4). That means any vertical agreement between an enterprise and an end consumer (the person who is engaged in the final purchase or use of a product) though satisfying the ingredients provided under Section 3 (4) shall not attract scrutiny of being anti-competitive under Section 3 (1). This confers an absolute exemption to vertical agreements between enterprises and consumers. The Purpose behind such an exemption seems to be to prevent unnecessary allegations and complaints by buyers against real estate companies, builders and agents which do not enjoy a dominant position in the market and hence prevent unnecessary clogging of cases.[10]

SUBSTITUTION OF THE WORD ' SUPPLY' WITH 'DEALING' IN SECTION 3(4)(B)

The Amendment has further substituted the word 'supply' in the term exclusive supply agreement mentioned under Section 3(4)(b) with 'dealing'. Section 3(4) provides for vertical agreements which are barred by the Competition Act as being anti-competitive. An Exclusive trade agreement between two parties in the market refers to an agreement in which the dominant party imposes or puts a curb on the serving party thereby curbing his freedom to make choices to which the party is otherwise legally entitled. Section 3 (4) (b) which earlier provided for an exclusive supply agreement (otherwise known as an exclusive vendor agreement) meant that any vertical agreement between a vendor and a supplier restricts the supplier to supply the product to any other party than the vendor. This is an Anti-Competitive agreement which aims to curb competition by ensuring that both businesses profit. It ensures that the supplier has steady business and at the same time provides the advantage to the vendor in terms that there is an assurance that the competitors don't have access to the product he sells, hence ensuring a massive market leverage.

But the most pertinent issue with the pre-existing clause was that although it covered supply agreements it did not cover the genus. Dealing agreements are the genus and supply agreements are the species.[11] If a species is addressed, the other species within the genus is not addressed whereas if it is the other way round, all the species are addressed.[12]

[10] KHAITAN & Co., https://www.khaitanco.com/Amendments-to-the-Indian-Competition-Law-Framework-Go-Live (last visited August 31, 2024).
[11] MANU/SC/0231/2022
[12] Vikas Kathuria, *Vertical restraints under Indian Competition Law: whither law and economics*, OXFORD ACADEMIC(September 01, 2024, 10:30 PM), https://academic.oup.com/antitrust/article/10/1/194/6207552 .

Exclusive dealing agreements cover all such agreements between parties which puts restrictions or conditions on the other party with regard to a wide range of market activities including exclusive supply agreements. Hence, all the exclusive dealing agreements qualify as anti-competitive and hence the substitution serves the purpose of broadening the scope and making the provision more comprehensive.

CONCLUSION

The Competition Amendment Act 2023 provides for pathbreaking remoulding of various provisions of the Competition Act, 2002. The Act serves the purpose of broadening the scope of competition scrutiny by the inclusion of provisions which cover several other facets of anti-competitive agreements that the Pre-Existing legislation did not address. The Act is in consonance with the changing environment and bolsters the checking mechanism on market players which resort to competitive malpractices by addressing the loopholes. On a concluding note, it can be said that Parent legislation becomes redundant if it does not mould itself to the needs of the changing circumstances and that is the purpose that the Competition Amendment Act serves.