DRAWING PARALLELS AND MAPPING BREAKAWAYS: A COMPARATIVE ANALYSIS OF OFFENCES AND PENALTIES UNDER INDIAN AND US COMPETITION LAW

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ABSTRACT

Competition stimulates the economy, boosting productivity at the industry level, generating of jobs, and decrease in prices for consumers. It will not be wrong to state that the competition law is one of the most important laws particularly from the view point of economic development and survival of smaller business ventures among whale like corporations. An analysis of the present competition law in India in reference to a more mature competition law regime such as the US is even more necessary in the context of the recently proposed of amendments to the Co petition Act of India. This paper does not aim to examine the amendments, nor does it serve as a guide to the US competition law, there are far more detailed and in-depth works available about them. What this paper does is - it outlines the competition law regime or antitrust regime of both the jurisdictions before examining the current competition law act of India in context of the offences defined by it and the penalties levied for committing the said offences, and compares it with the competitive law framework in the US after a brief introduction. The paper draws parallels as well as indicates where Indian regime breaks away from the US regime and in what context. The latter part of the paper touches upon briefly on the amendments proposed and if they will usher India into a more mature stage of competitive regime.

DRAWING PARALLELS AND MAPPING BREAKAWAYS: A COMPARATIVE ANALYSIS OF OFFENCES AND PENALTIES UNDER INDIAN AND US COMPETITION LAW REGIME

Effective competitiveness in a market is a basic precondition for a market economy to operate smoothly while promoting development. Yet, competition in the present state of society does not happen independently and without any outside influence instead, it is affected by those participating in the market and those who develop an effective policy enabling competition and safeguarding it from anti-competitive practices, which is truly a reflection of the competition culture as well as the complex market structures that exist today. The need to have a new set of legislations and regulatory authorities was felt so that it can match with the 'New Economic Policy of 1991 when India embraced the idea of globalisation, liberalisation and privatisation. It became vital for the Indian market to have legal frameworks in place to face competition both within and outside the nation. The Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) had proven itself to be inefficient and superfluous in dealing with the unique anti-competitive approach in the market and hence compelling the Government to bring The Competition Act, 2002 (hereinafter referred to as "Act").

The Competition Commission of India (CCI) was constituted under this Act to keep a check on the violation of the Act based on the commission's own information or complaints received. This Act also provided investigation powers to the Director General to investigate the matter if in violation of this Act as per the recommendation of the CCI. It should be noted that the Director General cannot take *suo moto* cognisance of any act under the purview of this statute.

The CCI has extraterritorial jurisdiction i.e. it has the power to inquire into activities which have been prohibited under the provisions of the Act and which distort the competition in a given market. It has the authority to probe and inquire into an arrangement for abuse of a dominant position, or combination if such agreement is likely to have, a significant detrimental influence on competition in the relevant market. It represents a considerable shift from previous law, as the MRTP Commission had no statutory extraterritorial jurisdiction.[1] The Supreme Court of India specifically held that the MRTP Act does not have an extraterritorial operation

[1] B.S. Chauhan, *Indian Competition Law: Global Context*, Journal of the Indian Law Institute, Vol. 54, No. 3 (July-September 2012), pp. 319.

and cannot apply to goods to be exported to India or where neither party to the agreement is carrying on business in India.[2]

The Act seeks to restrict trade monopolies which may develop as a consequence of significant concentration in a specific industry. The most serious issue regarding monopolies and similar forms of concentrations is that because monopolies have the power to exert price control a possibility of damage being caused to market efficiency, quality of products and impairment of diversity, making it vital to maintain market competition exists. The core intent of the Act is to either correct or prevent situations in which specific firms' behaviours can result in the disintegration of the free-market system by establishing norms by which competing enterprises can compete with one another.[3]

It prohibits anti-competitive practices which cause or are likely to result in a substantial adverse effect on competition within India. It provides for the establishment of a quasi-judicial cum administrative institution like CCI to enforce the provisions of the act.

The majority of the penalties and punishments prescribed under this Act are deterrent in nature as evidenced by the fact that most of them are monetary and it is only post-non-compliance of such penalties that punishments such as imprisonment are meted out by the Chief Metropolitan Magistrate of Delhi on the application by the CCI.

OFFENSES AND PENALTIES UNDER THE COMPETITION ACT, 2002

CCI has inquisitorial, investigative, regulatory, adjudicatory, and, to a limited extent, advising jurisdiction under this Act. It has been bestowed with vast powers to deal with the information leading to the invocation of the provisions of Sections 3 and 4 read with Section 19 of the Act. The Act and the regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time-bound program.[4]

Anti-competitive agreements and abuse of dominant position are considered to be potential barriers to free and fair competition in markets, and a sanction is levied whenever the CCI deems that the company has/has engaged in anti-competitive behaviours with an Appreciable

[2] *Haridas Exports v. Alt India Float Glass Manufacturers Association*, (2002) 111 Company Cases 617.
[3] *Competition Commission of India v. SAIL*, (2010) 10 SCC 744
[4] *ibid*

Adverse Effect on Competition (AAEC). Regulation of Combinations is intended to evaluate Mergers and Acquisitions for any anti-competitive ramifications ex-ante.

In the case of Haridas Exports vs. All India Float Glass Manufacturers Associations, the Hon'ble Supreme Court remarked that the phrase 'Appreciable Adverse Effect on Competition' embraces acts, contracts, or combinations that function to the detriment of the public interest by unduly restricting competition or unduly obstructing the due course of the trade.

According to section 19 of this Act, factors determining whether an agreement has an AAEC are as follows –

- Accrual of benefits to the consumers.
- Creating barriers to the new entrants.
- Driving existing competitors out of the market
- Freezing of competition by restricting market entry.
- Improvements in the production or distribution of goods or provision of services.
- Promotion of technological, intellectual, and commercial advancements through improved manufacturing, distribution, or service provision.

ANTI-COMPETITIVE AGREEMENTS

Section 3 of the Act explicitly prohibits any business or association of businesses, or any individual or group of individuals from entering into a contract for the manufacturing, delivery, dissemination, stockpiling, procurement, or control of goods or the performance of services that is likely to result in a negative influence on competition in India. It deems such contracts are declared null and invalid.

Anti-competitive agreements can be either horizontal or vertical in nature. Such Horizontal Agreements in the form of cartels are presumed to be anti-competitive, Vertical agreements are never deemed to be inherently anti-competitive; rather, they are decided on a case-by-case basis.

While defendants have the responsibility of demonstrating that their horizontal agreement does not result in an AAEC in India, it is up to the CCI to prove that the Vertical Agreements have an Appreciable Adverse Effect on the Competition in India. Therefore, while Horizontal Agreements are presumed to be per se anticompetitive, the same is not the case with Vertical

Agreements. Vertical Agreements are checked on by the 'rule of reason' which checks both the positive and negative effects of the agreement on competition.

The essentials of Vertical Agreements are as follows:

a. An agreement must be established between individuals or companies.

b. The participants in this type of arrangement must be at distinct points or stages of the production chain in terms of manufacturing, supplying, distribution, storage, retail or pricing of items, trading in goods, or providing services.

c. The parties must be from separate markets.

d. The arrangement should or be anticipated to result in AAEC.

Vertical Agreements can be one of the following types –

- Tie-In Arrangements – Tying occurs when the consumers are forced to buy from a different market which they might not want to buy along with a product they want.
- Exclusive Distribution Agreements – In such agreements, the supplier commits to supplying his goods to only a single retailer within the region. and a distributor is limited to active selling only in his allocated territory.
- Refusal to Deal – It means restricting by way of agreement between competitors or any person or class of people to whom goods are sold.
- Re-sale Price Maintenance – It refers to the sale of commodities with the constraint of resale at predetermined rates.

A horizontal agreement is one reached between two or more competing enterprises that operate at the same step of the production process within the same market. These contracts are drawn up between two or more manufacturers, distributors or retailers or ones dealing in similar kinds of products. These agreements have a direct negative impact on effective competition and prices of commodities in the market.

Horizontal Agreements can be of the following types-

- Agreements which directly or indirectly fix the prices.
- Agreements which limit or control output, technological advancement, services etc.
- Agreements which share or divide markets.
- Agreements which indulge in bid rigging or collusive bidding.

When two or more businesses engage in an express or implied arrangement to set prices, constrain manufacture and distribution, apportion market share or sales quotas, or indulge in collusive bids or bid-rigging in one or more markets, a cartel is formed, as per the definition in Sec. 2 of the Act.

This limitation, however, doesn't really apply to a Joint Venture Agreement if it promotes performance in the production, supply, distribution, storage, procurement, or management of commodities or the delivery of services. Therefore, even if there is an AAEC, a Joint Venture Agreement will not be considered to be in contravention of the provisions of the Act if the parties can prove that there are efficiency gains due to the joint venture. The Burden of Proof to show that the Joint Venture Agreement has resulted in efficiency gains is on the joint venture partners.

Similarly, as a consequence of the impact of Section 3(5), the entire Section 3 pertaining wit the prohibition of anti-competitive agreements would not apply wherein the proprietor of any intellectual property under the enactments provided in the act does anything in the exercise of his right to restrain the infringement of any of his right or imposes reasonable conditions as may be necessary for the protection of any of his right.

It was held in the case of FICCI – Multiplex Association of India vs. United Producers/Distributors Forum and Ors. That “the extent of the non-obstante clause in Section 3(5) of the Act is not absolute as is clear from the language used therein and it exempts the right holder from the rigours.”

ABUSE OF DOMINANT POSITION

Similarly, Section 4 of the Act, forbids taking advantage of a dominating position and lists various circumstances under which it would be considered to be an abuse of a dominant position. It is noteworthy that the Indian Competition Act does not define the concept of dominance and it is neither prohibited. It is the abuse of a dominant position which is prohibited in the given market scenario under the Indian market.

The European Court of Justice defined a dominant position in the case of United Bands v. Commission as a position of economic power enjoyed by an enterprise that facilitates it to preclude fair competition from being maintained on the relevant market by granting it the strength to behave to a significant large extend freely of its contenders, customer base, and subsequently of consumers. The notion of dominant position alludes to a real-world situation and holds businesses accountable for not allowing their behaviour to impede fair, unaltered competition in the market.[5]

Section 27 of the Act, states that in case of contravention of Section 3 or Section 4, the CCI can impose penalty up to 10% of the average turnover for the last three financial years, upon each of the person or enterprises who contravene the above-mentioned provisions.

For instance, CCI imposed a penalty of Rs. 2554 crore in August 2014 on various automotive companies such as Maruti Suzuki India Ltd, Tata Motors, Toyota Motors, Honda Motors, Mercedes, and Skoda among others owing to the monopolistic grip over replacement parts and testing equipment, allowing them to impose unjustified costs and take advantage of their dominant position They were also instructed to cease and desist from participating in behaviour that was determined to constitute a violation of the Act's provisions.

Apart from the penalty, CCI may also direct the parties to discontinue the abuse of dominance, direct compliance with its orders/directions including payment of costs, direct for the division of an enterprise abusing the dominant position to ensure that it does not abuse its dominance.

OTHER OFFENSES AND PENALTIES

Section 43A stipulates that if any individual or entity fails to provide notice, and information regarding combination under Sec. 6 of the act, the CCI can impose a penalty on such person or enterprise which may extend up to one per cent of their turnover or assets, whichever is higher.

Section 42 of the Act specifies that refusal to conform with the CCI's orders is a crime that entails a penalty of up to one lakh rupees for each day of noncompliance, up to a maximum of ten crore rupees. It also specifies that if a person fails to pay the fee again, he will be sentenced to imprisonment for a term of up to three years or a fine of up to 25 crore rupees, or even both, as the Chief Metropolitan Magistrate of Delhi deems suitable.

As per Section 43 of, the act states that non-compliance with instructions given by CCI under Section 36(2) and Section 36(4) or by the Director-General (hereinafter referred to as DG) under the authority of section 41(2), such person shall be liable to be punishable with a fine which may extend to rupees of 1 Lakh rupees or for each day that such noncompliance persists, up to an upper limit of one crore rupees.

[5] Aparna Viswanathan, "*From Commanding Heights to Competition: A Comparative Analysis of India's Competition Act 2002 with UK/EC Law*", 14(7) ICCLR 229-36(2003).

Section 44 provides that if any party to the combination makes an untrue claim about any relevant detail, knowing it to be untrue, or fails to disclose such significant detail, such person shall be liable to a penalty of not less than 50 Lakh rupees extending to 1 Crore rupees.

Section 45 states that if an individual provides untrue information by way of making any statement or furnishing a document which they have a reason to believe to be false in any material particular or omits to state any material fact knowing it to be material or wilfully alters, suppresses or destroys any document which is required to be furnished, such person shall be punishable with fine which may extend up to 1 Crore rupees.

Section 48 of the Act states that where a company contravenes any provision of the Act, individuals who when the contravention was committed, were in charge and were responsible for the company's business operations in addition to the company itself will be considered guilty of the violation.

Under Section 53Q, if any person contravenes the orders of the Appellate Tribunal, he shall be liable for a penalty extending up to 1 crore or imprisonment up to a term of 3 years or both.

Rule 48 of The CCI General Rules, 2009, provides for the imposition of punishment under the Act. It states that no order or direction imposing a penalty can be made unless the individual or the business has been given a Show Cause Notice and reasonable opportunity to represent his case before the commission.

OBSERVATIONS OF THE SUPREME COURT ON PENALTIES IMPOSED BY CCI

Supreme Court in the case of Excel Corp Care Ltd. v. Competition Commission of India16 has restricted the power of CCI to impose penalties. Prior to this judgement, CCI imposed a penalty on the total turnover of the enterprise, irrespective of whether other products or services were a part of the anti-competitive activity or not. However, post this judgement, it has been made abundantly clear by the Supreme Court, that the CCI can only impose a penalty on ‘relevant turnover’ i.e., on turnover of the product or service with respect to which the anti-competitive activity was carried out. The Hon’ble Apex Court relied on decisions of various foreign judgements and on the principle of proportionality, has set limits on the power of CCI to impose penalties.

Recently Supreme Court of India upheld the judgment passed by the Punjab & Haryana High

Court in the case of Vodafone India Limited and Ors. Vs. The CCI and Ors.[6] held that, since the Telecom Regulatory Authority of India (TRAI) has the domain knowledge of the Telecom Industry, the CCI must wait for a prima facie view of TRAI before initiating any investigation in the Telecom Industry domain.

In Ultra Tech Cement Ltd. V Competition Commission of India, (2017 SCC Online SC 609), the Supreme Court held that Appellate Tribunal can pass conditional order i.e. 10% of the penalty imposed as a condition for grant of stay. However, in M/S. B. Himmatlal Agrawal versus Competition Commission of India & ANR[7], the Hon'ble Apex Court held that appeals cannot be dismissed merely on the ground that the appellant has not pre-deposited 10% of the penalty amount. The statutory clause makes no pre-deposit requirement for considering the appeal. As a result, the right to appeal the decision and to have it considered on merits if submitted inside the specified timeframe is given by the legislation, and it cannot be stripped away by simply attaching the requirement of depositing an amount, that leads to rejection of the main appeal itself if the requirement is not met. The situation might have been otherwise if the appeal provision itself required a pre-deposit of a specific sum.

OFFENCES UNDER US ANTITRUST LAW

Before discussing the offences of US antitrust law, it is necessary to examine the substantive and territorial scope of the law. U.S. antitrust law is not concerned with whether and how governmental units seek to influence the market. U.S. antitrust law applies to governmental units when they operate as economic actors - i.e. when they act within the market. Antitrust law may, for example, apply to the commercial and sometimes even quasi-regulatory conduct of local governments. The scope of U.S. antitrust also excludes disputes among competitors based solely on claims for compensation that one has harmed the other by virtue of the unfairness of its conduct.[8] The prescriptive scope of U.S. antitrust has thus come to be defined broadly. It includes conduct outside

U.S. borders, provided only that such conduct has significant and direct anticompetitive effects within the U.S. and that those claims do not directly conflict with the law of another state.[9]

[6] *Vodafone India Limited and Ors. Vs. The Competition Commission of India and Ors*, [2017]144SCL580 (Bom).
[7] *M/S. B. Himmatlal Agrawal versus Competition Commission of India & Anr.,* CIVIL APPEAL NO. 5029 OF 2018
[8] David J. Gerber, *Competition Law*, The American Journal of Comparative Law, Vol. 50, Supplement: American Law in a Time of Global Interdependence: U. S. National Reports to the 16th International Congress of Comparative Law (Autumn, 2002), pp. 275.
[9] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993)

The antitrust laws are applied both as a matter of public regulation and as a matter of vindicating private claims for injury resulting from anticompetitive conduct.

Section I of the Sherman Act prohibits agreements "in restraint of trade." There is no distinction between types of agreements as there is in Indian law. As a consequence of the usage of this general language, the courts use the same basic concepts in analyzing all types of agreements. Unless a contract restraining trade which restricts the right or capacity to compete has no significant effect on the competitive process or its harms are justified by its pro-competitive effects, it is held to be in violation of the antitrust law. Sherman Act thus focuses the legal analysis on the economic consequences of the agreements rather than on the types of agreements.

The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.[10]

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). Section 7 of the Clayton Act forbids mergers and acquisitions that might substantially decrease competitiveness or be likely to result in a monopoly. The Clayton Act, as amended by the Robinson-Patman Act of 1936, also prohibits certain unfair prices, services, and concessions in merchant transactions. The Clayton Act was amended once more in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act, which obliged corporations undertaking big mergers or acquisitions to inform the authorities ahead of time. The Clayton Act also allows private entities to sue for monetary damages if they have been injured by anticompetitive behaviour which breaches either the Sherman or Clayton Acts and to seek a court ruling barring the anti-competitive behaviour going forward.

Aside from that, all 50 states in the United States have some form of competition law framework. In terms of statutory similarity, certain states have legislative structures which

[10] https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws, accessed on 10/03/2019.

closely reflect the Sherman Act. Other states have enacted legislation that far more extensively condemns unfair or deceptive trade practices. Many states have specific statutory provisions covering particular industries including, for example, fuel, alcoholic beverages, and automobile dealers, as well as statutory exemptions for certain industries including farming cooperatives and organized labour.

PENALTY UNDER US ANTITRUST LAW

1. Penalty under Sherman Antitrust Act,1890:

The Sherman Act allows for sanctions in the way of monetary penalties and imprisonment, which are embodied in Sections 1 and 2, which specify that anti-competitive agreements, as well as misuse of its dominating position, in restraint of trade, are illegal.

Penalties for violating antitrust laws in the United States include both criminal and civil sanctions of up to USD 100 million and/or imprisonment for up to ten years. Only the DOJ has the jurisdiction to prosecute individuals for Sherman Act violations.

2. Penalty under Clayton Act, 1914:

The Clayton Act is civil legislation (it which permits civil lawsuits to be filed by the United States Government or private entities to implement antitrust laws, including Sherman Act. A much more common sort of antitrust action is civil claims to implement the Sherman Act. Individuals who have been harmed by anticompetitive practices have the right to challenge the offenders in court for three times the amount of damages they have incurred. These are termed treble damages, and they can be demanded in class-action antitrust litigation as well. Lawyers' fees as well as other legal expenses are also included in the compensation.

The US DOJ has the authority to hold an officer accountable for corporate breaches of penal provisions under section 14 of the act. This provision also allows for a suit for damages and compensation, including the expense of litigation (15 U.S.C. 15). Section 16 of the Clayton Act also allows for injunctive remedy.

3. Penalties under the Federal Trade Commission Act,1914

The Federal Trade Commission Act of 1914 forbids "unfair forms of competition" as well as "unfair or deceptive acts or conduct." The Federal Trade Commission was formed to enforce the law. The US Supreme Court ruled that any breach of the Sherman Act also violates the FTC Act.

Section 5 of the FTC Act forbids anti-competitive behaviour and empowers the FTC to pursue a cease and desist order against practically every violation of the letter or intent of antitrust statutes. Behaviour that contradicts the Sherman or Clayton Acts, as well as other restrictive activities that don't breach the literal terms of those Acts, may be deemed "unfair tactics of competition."

This Legislation does not impose any criminal sanctions, but it serves as a key regulatory mechanism for rectifying and/or eliminating unlawful activities. The commission can dispute such unfair practices under section 5(b). The FTC can issue a "administrative cease and desist order" under 15 U.S.C. s.41, and the US DOJ can prosecute under Sherman Act sections 1 and 2. Only under Section 16 can the FTC recommend a case to the DOJ for criminal prosecution (b). If an entity is subjected to an FTC enforcement order, any breach of that order may result in a penalty.

4. Penalty under Robinson-Patman Act,1936

The Robinson-Patman Act of 1936 is an amendment to Section 2 of the Clayton Act that was designed to insulate smaller businesses against predatory pricing and to recover treble damages. The FTC has statutory jurisdiction to implement the Robinson-Patman Act, but has mostly relied upon private litigants to do so.

5. Violations of state antitrust laws

State competition laws frequently restrict the very same types of behaviour as competition law statutes. As a consequence, the sanctions imposed by state statutes are comparable and might span from penal to civil sanctions.

In the event of a company's infringement, the US Antitrust Laws have very strict sanctions that must be computed in accordance with the approach specified in the legislation, however, these penalties are capped at a ceiling of US $ 100 million. However, the sentencing guidelines do provide for a substitute method for calculating a fine which is twice the gain or loss. In the instance of Hoffmann La Roche Limited, a criminal penalty of $ 500 million, was imposed (Vitamin case-1999).

Individual violators face both imprisonment and fines, with fine guidelines ranging from 1% to 5% and a minimum fine of US$ 20,000, whilst the Cartels face a sanction which is increased to compensate for aggravating circumstances ranging from 2% to 5%, as well as a decrease in the penalty for mitigating circumstances ranging from 2% to 4%.

DRAWING PARALLELS AND MAPPING BREAK-AWAYS: INDIAN AND AMERICAN REGIMES

The first stage in calculating a fine under US law is to establish a minimum standard that corresponds to the general severity of the violation. It is computed as a percentage of the turnover generated in the afflicted market during the violation period.

Indian approach is on the same lines but there is a slight variation regarding the maximum limit and the minimum limit. The maximum limit in India is 10% of the average turnover for the last three preceding financial years of the person or enterprise while there is no fixed upper limit set in the US under the 'Alternative Fine Provisions' but has been fixed to $100 million in the Sherman Act. While, there is no minimum limit in the case of India, while the US has a base level fine of 20% of the turnover.

Individual penalties in the United States are not classified into administrative and criminal punishments. In the United States, imprisonment is widely used, and both the amount and length of prison terms issued have risen over time. Imprisonment is commonly viewed as a highly effective deterrent to anti-trust violations, and even a relatively low likelihood of incurring a prison sentence can prove substantially discouraging in comparison to jurisdictions where this possibility is entirely non-existent.

Criminal penalties for persons are only granted in India under Section 48 of the Competition Act, which states that when a firm violates a commission order, any individual who was in command of the business's activities at the stage of the violation is culpable and liable. While still not absolving the enterprise of all obligations, this could appear unreasonable to find the enterprise solely accountable for the solitary and independent actions of one of its employees. Imposing a penalty on an enterprise damages its shareholders and clients because the latter will pay greater costs to meet such penalties if competition is not excessively fierce and the enterprise is able to hike its rates, for actions committed by individuals who might have left the enterprise in the interim. As a result, numerous individual sanctions should be implemented to discourage those guilty of anti-competitive activity, and such penalties should not be transferrable.

The United States provides fairly substantial protection to perpetrators via leniency rules, that are determined based on the activities and behaviour of the violating venture/organisation. In the United States, not only can individuals profit from protection from criminal prosecution, but companies that cooperate with plaintiffs in private actions and are given immunity by the US Department of Justice will no longer be subject to treble damages and instead will be liable only for actual damages. Furthermore, participating enterprises may no longer be held jointly and severally liable for the harm produced by other cartelists.US can even offer protection to a cartel member that reveals previously undiscovered antitrust violations involving a cartel other than the one that initially brought the cartelist to the notice of authorities.

In India, Section 46 of the Act gives the Commission the authority to levy a reduced punishment if it is reasonably satisfied that any producer, seller, distributor, trader, or service provider who has been accused to be involved in any cartel activity or has infringed Section 3 has made full and true disclosure in regard of the claimed infringements, which is critical for the commission in its inquiry, given such disclosure has been made prior to commissions report u/s 26 is received.

Another important aspect of an efficient disciplinary framework is a settlement programme. Settlement is the practice of agreeing on the magnitude of the punishment before an official verdict is issued. It contributes to reduced compliance costs by providing for faster settlement of enforcement actions in consideration of a (possibly) lesser penalty. Settlement is therefore more appealing a priori for corporations in jurisdictions in which the conclusion of legal processes is much more unpredictable. These are very frequent in the United States, where approximately 90% of cases are settled. However, in India, there is no such settlement procedure.

In the US the first stage, a base value is fixed which represents the overall severity of the offence. It is computed as a percentage of the turnover generated in the impacted market during the violation period. The US starts at 20 per cent. The base level is then adjusted to accommodate for the number of recent activities undertaken and to improve discouragement of exceptionally damaging behaviour. Lowering the penalties indicate non-intentional violation and cooperation in the probe by antitrust regulators. In the United States, the term is factored into the base fine since the impacted trade is defined as the company's turnover during the span of the violation. In India, however, the fine-determination mechanisms remain left to the Commission, and no trace of a comparable step-by-step approach can be observed.

The penalty clause contained in Section 27(b) of the Competition Act, 2002 stipulates a fine of up to 10% of the average revenue of the prior three years in the case of violation of competition laws by a company, enterprise, or person, whereas, in the case of a Cartel, the punishment regulations stipulate a fine of a maximum of the financial gain of each year of the continued existence of this kind of contract for violation or 10% of the revenue of each year of the continuance of violation, Following the preceding instance, the Commission considers the turnover of the infringing item, or the turnover of the impacted trade, as has been adopted by the US law as well.

Proposed Amendments by The Competition (Amendment) Bill, 2022

This article would be incomplete without a brief reference to the competition amendment bill, 2022 which is currently being considered by the standing committee in Rajya Sabha. While the current provisions and sanctions indicate a jurisdiction in a still young stage when it comes to competition laws, the amendments proposed to bring India in line with the more mature regimes.

Some of the key highlights of the bill include the introduction of a settlement framework for speedier resolution of the investigations, a process seen in US anti-trust laws. Furthermore, it also imposes an explicit pre-condition of deposition of a portion of the fine imposed by the CCI before being considered for the appeal. In line with the emergence of a market for digital companies relying on innovations and technology, while the act did not possess the framework for such transactions before the amendment introduces regulation of combinations based on transaction values which will allow the regulators to prevent anti-competitive practices in e-marketplace companies, much like the current practice in the US anti-trust regime. Furthermore, the bill also changes the nature of certain offences such as failure to comply with orders of CCI and Director General with regard to anti-competitive activities and abuse of dominant position, from the imposition of fine to penalty. The Bill also prescribes an increase in the penalty for anti-competitive and anti-consumer practices to INR 50 million from INR 10 million and provides a mechanism to incentivize parties during the probe with lesser penalties if they share information helpful in the investigation.

CONCLUSION

When the Indian and International markets are observing immeasurable competition, the Statute and the Courts need to follow the principle of proportionality while calculating the fine, otherwise it could have a deterrent effect on the existence of enterprises. As held by the Supreme Court in Vodafone Case (supra), there must be a uniformity in dealing with cases in dispute of jurisdiction. International Cooperation must be obtained for a better drafting of competition in the market as the majority of unlawful agreements are done internationally to obtain a market monopoly.

The Competition Act was drafted after examining the circumstances, market characteristics, and obstacles encountered by western countries, as the aim of the Act and the penalty provisions contained within it are to a large extent parallel to them. The distinctions between competition law regimes around the globe, in the present discussion, that of the US and the competition law of India are the outcome of due consideration of a plethora of variable factors impacted by the national past, level of education, non-exposure of most of the business ventures in the Indian market to the global market and lack of awareness of competition laws.

As seen from the analysis of the act, it is clear that the main focus of the act is on the prevention of the practices causing AAEC, with course correction being a secondary objective. The amendment bill furthers the attempt of the current regime by introducing provisions such as the framework for settlement to reduce litigation and incentivise cooperation with the probe. Although certain vacuums such as IP not being a defence to anti-competitive law violations remain unaddressed, it is clear that the Indian regime is striding towards a more mature and comprehensive competition law in hopes of improving commerce and entrepreneurial spirit.