IOSR Journal of Business and Management (IOSR-JBM)
e-ISSN: 2278-487X, p-ISSN: 2319-7668. Volume 19, Issue 12. Ver. II (December. 2017), PP 15-20
www.iosrjournals.org

World Business Markets's Competetion Regulators And Their Working: A Comparision To India

Ashank Yadav[1],Debarati Das[2]
[1]GD Goenka University, Gurgaon, India; [2] NEF Law College, Guwahati University, Guwahati, India.
Corresponding Author:Ashank Yadav

***Abstract**:The purpose of the study is to understand the working and impact of the Indian and international market competition regulators. Their work and how they determine the business crimes of abuse of dominance or formation of cartels. The main focus is on European Union, United States and United Kingdom while studying these regulators. Each of these international market regulators have uniqueness and are mature jurisdictions, thus suggestion have been drawn to conclude findings that the Indian market regulator could imbibe.*

***Keywords**: abuse of dominance, competition regulator, CCI,cartels.*

Date of Submission: 11-09-2017 Date of acceptance: 11-12-2017

I. Introduction

At the point when the progression and privatization that was activated in India in mid-nineties, an acknowledgment accumulated energy that the current Monopolistic and Restrictive Trade Practices Act, 1969 ("MRTP Act") was not prepared satisfactorily enough to handle the opposition part of the Indian economy. With beginning of the globalization procedure, Indian endeavors began confronting the warmth of rivalry from residential players and additionally from worldwide mammoths, which called for level playing field and financial specialist inviting condition. Thus, require emerged concerning rivalry laws to move the concentration from controlling imposing business models to urging organizations to contribute and develop, in this way advancing rivalry while keeping any mishandle of market control.In the international perspective, the antitrust law was enacted in the U.S. in 1890 primarily to control the concentration of economic and industrial power. The Clayton Act applies to both mergers with immediate anti-competitive effects and those that have a future probability of substantially reducing competition. In addition, the principal legislation Sherman Act broadly states that every contract, combination, or conspiracy that restrains trade or commerce among the states, or with foreign nations, is illegal and that every person who monopolizes, or attempts to monopolize is guilty of a felony.On the other hand European competition law is governed primarily by Articles 85 and 86 (now Article 101, 102) of the Treaty Establishing the European Community. Article 85 is designed primarily to achieve the same goal as the Sherman Act in U.S. legislation insofar as it prohibits all agreements and concerted practices that affect trade among E.U. members and which have as their main objective the prevention, restriction or distortion of competition. Article 86 is designed to meet the policy objectives of the Clayton Act in that it prohibits the abuse of a dominant market position through unfair trading conditions, pricing, limiting production, tying, and dumping. The European Court of Justice (E.C.J.) has also adopted a similar approach to extraterritorial enforcement of competition laws than that of U.S. courts.

II. Indian Background

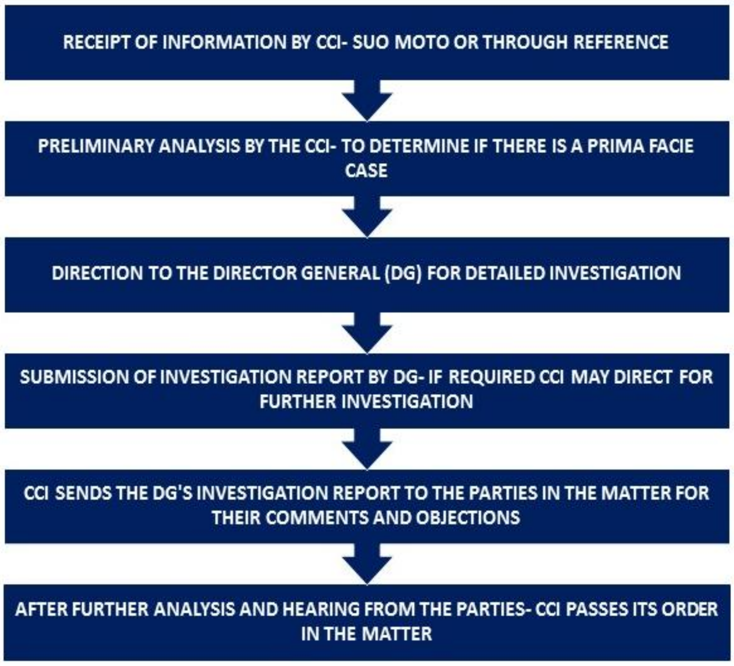
In India the primary legislation in the competition law regime is the Competition Act, 2002. Designed as an omnibus code to deal with matters relating to the existence and regulation of competition and monopolies, the Act is intended to supersede and replace the MRTP Act. It is procedure intensive and is structured in an uncomplicated manner that renders it more flexible and compliance-oriented. Though the Act is not exclusivist and operates in tandem with other laws, the provisions shall have effect notwithstanding anything inconsistent therewith contained in any other law. Section 3 of the Act, which states that enterprises, persons or associations of enterprises or persons, including cartels, shall not enter into agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which cause or are likely to cause an "appreciable adverse impact" on competition in India. Such agreements would consequently be considered void.

The species of agreement which would be considered to have an 'appreciable adverse impact" would be those agreements which:

1. Directly or indirectly determine sale or purchase prices;
2. Limit or control production, supply, markets, technical development, investment or provision of services;
3. Share the market or source of production or provision of services by allocation of inter alia geographical area of market, nature of goods or number of customers or any other similar way
4. Directly or indirectly result in bid rigging or collusive bidding.

Section 4 of the Act enjoins, "No enterprise shall abuse its dominant position". Dominant position is the position of strength enjoyed by an enterprise in the relevant market, which enables it to operate independently of competitive forces prevailing market, or affect its competitors or consumers or the relevant market in its favour. There shall be an abuse of dominant position if an enterprise indulges into the below mentioned activities:

1. Directly or indirectly imposing discriminatory conditions in the purchase or sale of goods or service, or setting prices in the purchase or sale (including predatory pricing) of goods or services;
2. Limiting or restricting the production of goods or provision of services or market therefore; or limiting technical or scientific development relating to goods or services to the prejudice of customers;
3. Indulging in practice or practices resulting in the denial of market access
4. Making conclusion of contracts subject to acceptance by other parties of supplementary obligations, which has no connection with the subject of such contract;
5. Utilization of the dominant position in one relevant market to enter into, or protect, another relevant market.CCI, entrusted with eliminating prohibited practices, is a body corporate and independent entity possessing a common seal with the power to enter into contracts and to sue in its name. It is to consist of a chairperson, who is to be assisted by a minimum of two, and a maximum of ten, other members.



III. United States

US competition policy derives from statutes enacted at different times in US history, and therefore the goals of these statutes are not identical. Overall, US antitrust policy is primarily designed to protect consumer welfare (i.e., produce a variety of products at reasonable prices), with modest elements of fairness (right of firms to be free of coercion) and of hostility to vast concentrations of economic power. Through much of its history, US enforcement agencies and courts were not very sensitive to claims of efficiency; they assumed that a robust competitive market would automatically be efficient. However, many contemporary commentators believe that efficiency claims are likely to be given more weight in the future.Sophisticated economic analysis is a centrepiece of American antitrust enforcement. "Industrial policy," defined here as overt efforts to strengthen domestic firms to serve goals other than competition and efficiency, such as successfully competing in global markets, has not had much influence on US antitrust law. Occasionally, industrial policy concerns such as promoting research and development influence competition rules, but those concerns rarely trump antitrust policy entirely. Fundamentally, competition has been the industrial policy of the United States.

3.1 Systems of Enforcement

US enforcement of competition policy is both complicated and litigation- oriented. The statutes are in most cases concise, and the law has been made through judicial interpretation during a century of litigation. Opportunities for the federal government to make law or adjust policy by edict or guidelines are limited.

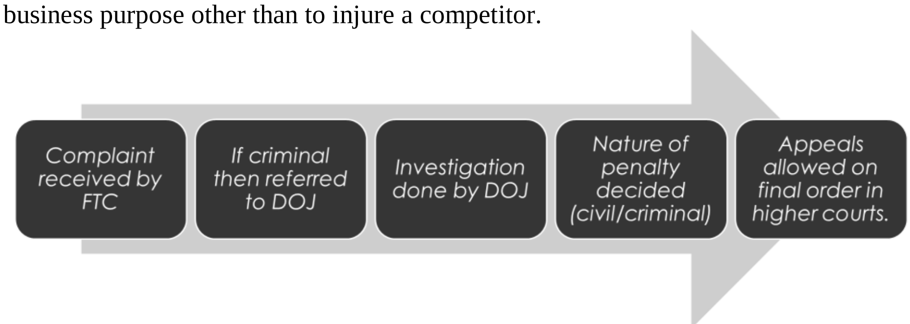
At the federal level, two agencies, the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC), have roughly coextensive jurisdiction, though the FTC has no criminal enforcement authority and the two agencies' policies are not always congruent. States and private parties injured in their business and property also have access to the courts, and they frequently bring cases that go beyond or are flagrantly inconsistent with prevailing federal policy. Finally, competition policy is sometimes influenced by protectionist efforts of the Department of Commerce and the International Trade Commission, and regulations and subsidies emerge from a broad variety of departments and agencies (for example, the De- partment of Defense with respect to the defense industry and the Federal Communications Commission with respect to telecommunications).

3.2 Enforcement Against Cartel Behaviour

In the United States, price-fixing and related behaviour is treated as illegal per se, which means that practices such as price-fixing violate the law regardless of the market power of the participants, their motives, or purported business justifications.[1]The assertion that price-fixing and related cartel behaviour is treated with exceptional severity under American antitrust law is subject to a qualification. When the effect on price is indirect and the practices being challenged can contribute to efficiency (for example, through integration of resources), courts will take a "quick look" to determine whether the strict per se rule, as opposed to a more lenient rule of reason, should apply.[2] The contours of this vague exception remain under consideration by the US Supreme Court, but in any event the US approach is not likely to undermine overall stringent treatment of hard-core cartels. Price-fixing and related practices often result in criminal penalties in the United States, and fines and damages to injured parties can be enormous. Price-fixing and other cartel behaviour usually fall within the province of the US Department of Justice and are commonly treated with criminal sanctions. A substantial staff in the Justice Department's Washington office, as well as in regional offices in several major cities, is primarily devoted to detecting and challenging cartels.

3.3Dominant Firm Behaviour

While the controlling US statute is silent on the point and case law somewhat ambiguous, leading US cases appear to treat firms as holding monopoly power only if they control about two-thirds or more of a relevant market.[3] Moreover, market power (even monopoly power) alone is not enough to violate American statutes; there must be an element of unacceptable conduct to achieve or maintain that position.US law on the question of monopolizing behaviour has changed markedly over the years. In early cases such as *United States* v. *Aluminum Co. of America* (148 F.2d 416, 2d Cir., 1945) and *United States* v. *Griffith* (334 U.S. 100, 1948), it appeared that virtually any conduct that had an exclusionary effect on actual or potential competitors would violate the statute unless it could be defended, in the words of the Alcoa decision, as an example of "superior skill, foresight, and industry." In recent years, American courts have backed away from such a stringent approach and generally allow firms to achieve or defend their legally acquired monopoly position through aggressive competitive behaviour.[4] Examples of conduct that go beyond acceptable behaviour include "predatory" pricing (i.e., below-cost pricing en route to greater power), acquisition of direct rivals, long-term lease arrangements with penalty clauses if the customer switches to a challenger of the monopolist, and refusals to deal for no business purpose other than to injure a competitor.



IV. European Union

In the European Union economic integration of the various member nations is a dominant objective of competition policy. The common market evolved from the perceived need to break down trade barriers between Western European nations, and Community policy therefore reflects as a cardinal principle the desirability of free movement of goods and people across member state lines[5].While economics has a role in EU analysis, it is much less centre stage than in the United States. The European Union is concerned about competitive opportunities for small and medium-size firms, raising the economic level of worse-off nations, and general notions of "fairness." There is also a sense in the European Union that joint ventures, mergers, and other collaborations may be necessary to enhance technological development and therefore to allow European firms to compete effectively in global markets. Article 85(3) of the EC Rome treaty embodies these notions, providing that otherwise void agreements or combinations may be exempted where they "contribute to improving the production or distribution of goods or to promoting technical or economic progress".

4.1 Systems of Enforcement

Enforcement in the European Union is far more regulatory and bureaucratic. Much regulation is based on a system of notification and approval by negative clearance, individual exemption, or block exemption. Block exemptions exist for the most common types of contracts for example, distribution contracts and companies seek the advantages of the block exemption by moulding their transactions to fit its rigid structure, which lists the clauses that are permissible and those that are not. In many areas of law merger enforcement is a notable example the substantive standard contained in the relevant EU regulation may be similar to the standard of US statutes and guidelines, but enforcement in the European Union to date has been more lenient.European Commission proceedings, Should the Commission initiate formal proceedings in relation to an agreement or conduct that affects inter-state trade, this automatically relieves the competence of the CMA and UK courts to apply Article 101 or 102 in that case.The Modernisation Regulation imposes a specific duty on courts to refrain from taking a decision which may conflict with a decision contemplated by the Commission. This may require the court to stay proceedings or to refer questions for a preliminary ruling to the European Court of Justice (ECJ) under Article 267 TFEU.

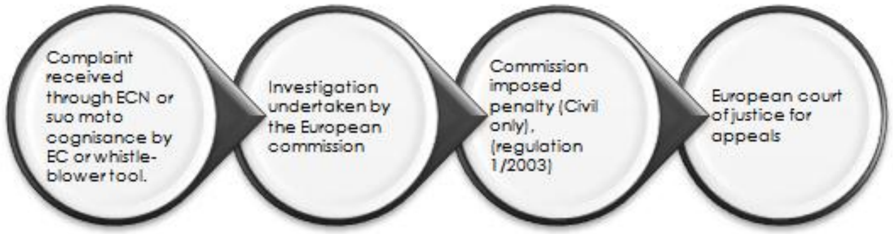
4.2 Enforcement against Cartel Behaviour

In the EU law, Cartels in the Community are covered by Article 85(1), which deals with market sharing, price-fixing and related practices. There are several EC exemptions that do not apply in US law. For example, there is some limited room for an exemption for crisis cartels (i.e., rationalization cartels in which there is chronic industry overcapacity) if the industry adheres to very strict conditions.[6] Also, small and middle-size firms may enter into specialization agreements, agreeing to specialize in certain product markets and stay out of the markets of one another.[7] Finally, collaboration among European firms is subject to a de-minimis exception not present in US law.[8]The EC staff for cartel enforcement is very thin. There is no investigative staff and, as a result, cartels are normally uncovered, if at all, by complaint. In many parts of Europe, cartels were a customary way of life before the Treaty of Rome was adopted, and there is a serious question concerning whether EC law (which has no criminal component) and EC enforcement have reduced the level of secret cartels significantly.

4.3Dominant Firm Behaviour

In the European Union, Article 86 declares illegal "any abuse of a dominant position within the Common Market" and goes on to indicate examples of dominant-firm abuse. The founders of the Community did not oppose bigness. Rather, they believed that European firms were often below optimum scale and therefore not large enough to achieve maximum efficiency or to compete with foreign-based multinationals, particularly those based in the United States. Therefore, the initial conception was to regulate power rather than to prevent its acquisition (Joliet 1970).

According to Hoffman-La Roche v. Commission (case 85/76, 1976, ECR 461, para. 38), a dominant firm under EU law is one that has the power "to behave to an appreciable extent independently of its competitors, its customers, and ultimately of the consumers." A 40 percent market share, in the presence of significant barriers to entry, can constitute dominance, and a firm with 50 percent of a market or more is presumed to have dominance (AKZO Chemie BV v. Commission, case C-62/86, 1991 ECR I-3359) a level substantially below the point that "monopolization" restrictions begin to apply in the United States.Article 86 itself lists some examples of dominant-firm abuse, including the imposition of unfair purchase or sales prices, limits to production, application of dissimilar conditions to equivalent transactions, and ex- traction of supplementary obligations from customers that are not connected with the subject of the transactionEC case law demonstrates that conduct constituting "abuse" ranges beyond the four examples in Article 86. A dominant firm has broad duties to deal and may offend the law by not serving all demand.[9] In other respects, standards of conduct may appear similar to those in the United States for example, abusing a dominant position through predatory pricing or discrimination in price is illegal, but EC law has far looser standards for proof of either offense.[10]Dominant firms may escape what otherwise might otherwise be a violation of Article 86 by "objective justification" of their practices e.g., that the conduct was important to serve the market (Gyselen 1989, 616, n. 49).



V. United Kingdom

The UK competition regime is the result of the Competition Act 1998, the Enterprise Act 2002, the Enterprise and Regulatory Reform Act 2013, the Consumer Rights Act 2015 and sector-specific competition legislation. This national legislation is underpinned by a European framework, with competition authorities across the EU having similar laws and requirements. The legal framework aims to ensure that markets work well, encouraging businesses to compete with each other and protecting consumers from anti-competitive practices such as bid-rigging, price-fixing and abuse of market power.The Competition & Markets Authority (CMA) is the main UK competition authority. It is a non-ministerial department funded by HM Treasury. Its duties include: advocating and enforcing competition law; identifying and remedying competition problems; and investigating mergers which could restrict competition. Additionally, eight sector-specific regulators, such as of gem in the energy sector, share competition powers with the CMA. The Department for Business, Innovation & Skills (BIS) sets the overall policy and legal framework for competition issues in the UK as well as the CMA's performance framework. It takes on many multinational cases that affect the UK, and is outside the scope of this report.

5.1 Systems of Enforcement

The Competition and Markets Authority (CMA) investigates allegations of anti-competitive behavior that may have an impact in the UK (breaches of Article 101 or 102 TFEU or Chapter I or Chapter II of the Competition Act 1998).The governing principle requires that every substantive provision of the Competition Act must be interpreted against the background of established EU law, and against the need to ensure a harmonious interpretation between the Competition Act and EU competition law. In the UK, the leniency programme of the Competition and Markets Authority (CMA) offers immunity or a reduction in fines (leniency) in return for an undertaking's cooperation with a cartel investigation under the Competition Act 1998. Immunity from prosecution is also offered to individuals who provide information in relation to the criminal cartel offence under section 188 of the Enterprise Act 2002. The Competition and Markets Authority (CMA) has powers under the Competition Act 1998 to impose fines for breaches of competition law. Sectoral regulators with concurrent competition powers have the same powers. The Competition and Markets Authority (CMA) has powers to investigate individuals suspected of involvement in the criminal cartel offence under section 188 of the Enterprise Act 2002.Any party affected by an infringement of competition law in the UK can make a complaint to the Competition and Markets Authority (CMA).

5.2 Anti-competitive agreements

Cartels are considered to be the most serious form of anti-competitive agreement. Criminal offences for individuals involved in cartels were introduced in the UK in 2003; participation by an individual in price-fixing, bid-rigging, market sharing or limitation of output or supply may lead to the imposition of a prison sentence of up to five years' duration, unlimited fines, or both.Chapter I of the Competition Act 1998 (the Competition Act) prohibits any agreement or concerted practice which has the object or effect of preventing, restricting or distorting competition unless an exemption from the prohibition applies. Where the agreement or concerted practice affects trade between EU Member States, it may also be prohibited by Article 101 of the Treaty on the Functioning of the European Union (TFEU). Companies and individuals found to have breached the Chapter I prohibition are liable to fine of up to a maximum level of 10% of worldwide turnover for companies and disqualification from serving as a director for a period of up to 15 years for individuals.The Competition and Markets Authority (CMA) is primarily responsible for enforcement of the Chapter I prohibition which may also be invoked in private litigation before UK courts. When applying the Chapter I prohibition to an agreement or concerted practice to which Article 101 also applies, neither the CMA nor the UK courts may prohibit the relevant agreement or concerted practice under UK competition law if it would be permitted under Article 101. Immunity from both civil penalties and criminal sanctions may be available to cartel whistle-blowers under the CMA leniency programme.

5.3 Dominant firm behaviour

Abusive behaviour by a monopolist, or by a dominant firm with substantial market power which enables it to behave as if it were a monopolist, can also be condemned by competition law. An example would be where a dominant firm reduces its prices to less than cost in order to drive a competitor out of the market or to deter a competitor from entering the market so that it can subsequently charge higher prices, a phenomenon known as predatory pricing.Chapter II of the Competition Act prohibits the abuse of a dominant market position in the UK. Such an abuse may also breach Article 102 TFEU to the extent that it affects trade between Member States. The civil sanctions for breach of the Chapter II prohibition are the same as those that apply to breach of the Chapter I prohibition and it can be enforced by the CMA or private litigants in the same way. There are no criminal sanctions for purely unilateral conduct which is deemed to constitute an abuse of market power.The CMA is primarily responsible for enforcement of the Chapter II prohibition which may also be invoked in litigation before UK courts. In contrast to the position in relation to Article 101, the CMA and UK courts are permitted to apply UK competition law relating to abusive conduct that is stricter than Article 102.

VI. Conclusion

While drawing the conclusion, the study ends up suggesting the learnings from USA, The System of enforcement in the USA has two arms for handling the antitrust cases that is the Department of Justice and Federal Trade Commission. The cartel cases are considered as felony and are penalised not only with fines but imprisonment. Such step prevents from any serious offence from happening in the market. This kind of system would definitely prove useful for India. Where else the learnings from EU is that the union is a strong one market and its commission has power to impose restrictions and penalties in a wider ambit than in India. Thus it is recommended to provide the CCI with wider powers. Lastly the learning from UK's system would be that the United Kingdom has sectoral regulators which are obliged to inform the Competition and market authority of UK if any infringement occurs, this helps in better accountability in the system. In India an amendment to the current competition law requiring the sectoral regulators to obligatorily inform any anticompetitive practice would prove to be useful.

References

[1]. The leading American case is United States v. Socony-Vacuum Oil Co. (310 U.S. 150, 1940).
[2]. Two cases exemplifying the approach are Broadcast Music Inc. v. Columbia Broadcasting System (441 U.S. 1, 1979) and Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co. (472 U.S. 284, 1985).
[3]. Companies with only 30 or 40 percent of a market may "attempt to monopolize," but conduct must be plainly anticompetitive and lacking in business justification to be deemed a violation, and it must predictably produce monopoly if allowed to continue to operate. For example, see Spectrum Sports, Inc. v. McQuillan (506 U.S. 447, 1993) and Turner (1975).
[4]. See, for example, Telex Corp. v. IBM (367 F. Supp. 258, N.D. Okla. 1973, rev. per curiam 510 F.2d 894, 10th Cir., cert. dismissed, 423 U.S. 802, 1975).
[5]. The Maastricht Treaty created the European Union (EU). The European Economic Community, now called the European Community (EC), is a constituent part of the European Union. The competition law remains in the EC Treaty of Rome.
[6]. See Synthetic fibers (Commission Decision 84/380, O. J. L. 207/17).
[7]. See Fine papers (Commission Decision 72/291, O. J. L. 182/24).
[8]. Regarding the de minimis exception, see Volk v. Vervaecke (case 5/69, 1969, ECR 295).
[9]. Höfner and Elser/Macrotron (case C-41/90, 1991 ECR I-1979). See also Radio Telefis Eireann v. Commission (cases C-241/91 P and C-242/91 P, 1995 ECR I-743) concerning the duty to license intellectual property when necessary to create a new product that consumers demand.
[10]. Compare AKZO Chemie BV v. Commission (case C-62/86, 1991 ECR I-3359) with Brooke Group v. Brown & Williamson Tobacco (509 U.S. 209, 1993).

IOSR Journal of Business and Management (IOSR-JBM) is UGC approved Journal with Sl. No. 4481, Journal no. 46879.

Ashank Yadav"World Business Markets's Competetion Regulators And Their Working: A Comparision To India." IOSR Journal of Business and Management (IOSR-JBM) 19.12 (2017): 15-20