



## Competition Law In India Vs USA And EU

"How did competition law evolve in India? How is it different from that in the US or the European Union. An analysis..."

India is hailed as a green-field competition regime. However, India's competition law jurisprudence is older than many of its developing country counterparts. The Monopoly and Restrictive Trade Practices Act, 1969 ("**MRTP Act**") was the first competition related legislation of India followed by the recent enactment of the Competition Act, 2002 ("**Act**"). This article traces the evolution of competition law in India and takes a comparative snapshot between the Indian competition law framework and that of United States ("**US**") and European Union ("**EU**").

### MRTP Act — Where it all originated

The MRTP Act, conceived and formulated more than 40 years ago, was a consequence of "*Command-and-Control*" policy approach of the Government<sup>1</sup>. It was brought in to prevent concentration of economic power, control monopolies and to prohibit monopolistic trade practices, restrictive trade practices and unfair trade practices.

### Leap from MRTP to the Competition Act

The economic reform of the nineties brought a rapid change in India's business environment. The MRTP Act was amended from time to time to keep pace with reforms. Despite such amendments, it was felt that the MRTP framework was not adequate to accommodate the demands of a changing economic landscape. The then Finance Minister of India, Mr. Yashwant Sinha, on February 27, 1999, made the following announcement in his budget speech: "*The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in light of the international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our conditions*".

The Government set up the High Level Committee on Competition Policy & Law chaired by Mr. S. V. Raghavan. This Committee made recommendations and submitted its Report on May 22, 2002. After completion of the consultation process, the Act was enacted in the year 2002. As per the Statement of Objects and Reasons appended to the Competition Bill, this enactment is India's response to the opening up of its economy, removing controls and resorting to liberalisation.

The Supreme Court ("**SC**") in a case decided under the Act observed that "*The primary purpose of competition law is to remedy some of those situations, where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other... The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of a market responsive to consumer preferences.*"

The Act has brought India's competition regime at par with international standards. The Act's objective is to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets. The constitutional validity of the Act was challenged in the SC soon after its enactment.<sup>4</sup> The principal ground for challenging the Act was the appointment of a retired bureaucrat as the head of the Commission having judicial powers. The Government agreed to amend the Act and the competition authority, as envisaged in the original Act, was divided into two (i) the Competition Commission of India ("**CCI**") as an administrative expert body; and (ii) the Competition Appellate Tribunal ("**COMPAT**") to carry out adjudicatory functions. The Act lays down provisions to control various forms of anti-competitive practices and it also has an extra-territorial reach.

### Enforcement Structure: US-EU vis-à-vis India

As opposed to the Indian framework comprising single legislation and single agency, the US enforcement framework comprises multiple agencies and legislation. In the US, two federal agencies bear the major responsibility of enforcing antitrust laws, the Antitrust Division of the US Department of Justice ("**DoJ**") and the Federal Trade Commission ("**FTC**"). The former is part of the executive branch of the government and the latter is an independent administrative agency, similar to the CCI. The Sherman Act is the oldest federal antitrust statute, enacted in 1890 and deals primarily with anti-competitive agreements and monopoly exercised by firms. The Clayton Act, 1914 deals with specific business practices including mergers, price discrimination and tying, exclusive supply etc. The DoJ and FTC independently enforce the Sherman Act and the Clayton Act. However, if the violation entails criminal prosecution, then the DoJ has the exclusive authority to prosecute.

The EU competition law framework originates from the Treaty on the Functioning of European Union ("**Treaty**"). The Treaty covers a wide variety of subjects; however the substantial legal development has come in the area of competition law covered by Articles 101 and 102. The Treaty is generally applicable to agreements and conduct between the EU member states though



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each constituent state of the EU also has their respective national competition agencies and legislations. The Treaty did not specify the institutional structure for the competition law enforcement and the same was framed by the European Council (“**Council**”). The Council entrusted the European Commission (“**EC**”) with the duty to ensure compliance with the Treaty and enforcing, implementing and developing the European community’s competition law and policies. The Indian competition law framework is similar

to the European enforcement structure and the provision of the Act as well as the powers and functions of the CCI have been broadly fashioned on the applicable provisions of the Treaty and the powers of EC. Though the Act has much in common with the US and EU enforcement structure, yet the systems differ significantly in the matter of levels and quality of enforcement.

## Regulation of Anti-Competitive acts across jurisdictions

The Act is drafted in fairly general terms and is not limited to regulation of commercial acts of the private parties.

The Act prohibits and regulates:-

- (a) Anti-competitive agreements.
- (b) Abuse of dominant position.
- (c) Combinations.

## Anti-Competitive Agreements

Section 3 (1) of the Act prohibits any agreement with respect to “production, supply, distribution, storage and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India. The corresponding provisions are found in Section 1 of the Sherman Act<sup>5</sup> and Article 101 of the Treaty<sup>6</sup>.

The term appreciable adverse effect on competition (“**AAEC**”) is not defined in the Act. However, Section 19 (3) of the Act specifies certain factors for determining AAEC.<sup>7</sup> The intent of legislature reflected vide the mandatory language of Section 19 (1) of the Act is that the CCI is required to carry a balanced assessment of anti-competitive effect as well pro-competitive justification of the agreement. This balancing approach under the Act is similar to the rule of reason analysis found in the competition law jurisprudence of the US and the EU.

The Act does not characterise agreement into horizontal or vertical category however the language of Section 3 (3) and 3 (4) makes it

abundantly clear that the former is aimed at horizontal agreement<sup>8</sup> and the latter at vertical agreements<sup>9</sup>. Horizontal agreements defined under Section 3 (3) of the Act are presumed to have AAEC within India as distinguished from all other agreements which has to be analysed in accordance with the rule of reason analysis under the Act. The SC in *Sodhi Transport Co. v. State of U.P.*<sup>10</sup> has interpreted ‘shall be presumed’ as a presumption and not evidence itself, but merely indicative on whom burden of proof lies.



## Abuse of Dominance

Section 4 (1) of the Act prohibits any enterprise from abusing its dominant position<sup>11</sup>. The list of abusive activities under the Act covers both exploitative abuses as well as exclusionary abuses.<sup>12</sup> The lists of abusive practices under the Act are almost a replica to those listed in Article 102 of the Treaty. Section 2 of the Sherman Act prohibits monopolisation or attempted monopolisation. As distinguished from the Act, the Sherman Act doesn’t lay down the list of conduct that shall constitute as monopolisation or attempted monopolisation. The US Supreme Court lays down that, at its core, Section 2 makes it illegal to acquire or maintain monopoly power through improper means.<sup>13</sup> Similar to the EU and the US, determination of relevant product and geographic market is the starting point of investigation under the Act.

## Merger Regulation

Sections 5 and 6 of the Act are the operative provisions for the regulation of combination. The CCI has notified the procedure vide Combinations Regulations, 2011. The Act along with the Combination Regulation provides

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an exhaustive framework for the merger regulation in India. The combination as defined under the Act includes ‘acquisition’, ‘acquiring of control’, and any ‘merger or amalgamation’ of one or more enterprise by one or more persons. The Act sets a threshold, below which a combination is not regarded as a combination and therefore it is outside the merger regime of the Act. The threshold is defined in terms of assets or turnover. The threshold varies depending on whether the combination involves an enterprise or a group or whether the enterprise or group has assets or turnover only in India or worldwide. The mergers in US are regulated by the Clayton Act, further amended by the Hart–Scott–Rodino Antitrust Improvements Act of 1976.

Section 7 of the Clayton Act prohibits mergers which are likely to substantially lessen competition or tend to create a monopoly. The major difference between the US and Indian control system is that CCI being an administrative body, is empowered to approve or prohibit merger whereas the US system being judicially driven, requires the agencies to approach federal courts to enjoin a merger.

The mergers in Europe are regulated by the Council Regulation (EC) No. 139/2004. The EU law prohibits any concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly and lastingly impeded in the European Community market or a substantial part of it. Generally, the mergers with EU dimension are investigated by the European Commission while mergers without EU dimensions are investigated by the member state’s respective competition authority.

## Conclusion

The Indian competition regime is based largely on the jurisprudence developed in the EU and the US. The CCI and COMPAT have taken an active role in developing the law and creating awareness among the industry players and have imposed hefty penalties by way of Orders to deter anti-competitive practices and develop a stringent competition law framework in India.

### Footnote–

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5 Section 1 of the Sherman Act provides that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 6 Article 101 provides that an agreement to be competitive to be anticompetitive, its main object should be to prevent or to [distort competition](#) and one needs to prove that the effect of agreement was anti-competitive.

7 The factors under Section 19 (3) includes six factors, first three being anti-competitive remaining three being pro-competitive factors (a) creation of entry barrier (b) driving existing competitors out of market (c) foreclosure of competition (d) benefits to consumers (e) improvements in the production or distribution of goods or the provision of services, and (f) the promotion of technical, scientific and economic development. 8 between actual or potential competitors operating at the same level of the supply chain 9 between firms operating at different levels, i.e. agreement between a manufacturer and its distributor 10 (1986) 2 SCC 486 11 The term “dominant position” is defined as “a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour.” 12 (1) imposing an unfair or discriminatory condition or price. (2) limiting or restricting production of goods or provision of services. (3) denial of market access. (4) making conclusion of contract, subject to acceptance of condition having no connection with the subject of the contract (5) Using dominance in one market to enter into another relevant market. 13 United States v. Grinnell Corp., 384 U.S. 563, 57071 (1966)

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