

Consumer Protection under the Competition Law

5th December is celebrated as the World Competition Day and 24th December is declared as the National Consumer Day. Though we have a powerful consumer law in the form of the Consumer Protection Act, 2019, yet protecting the interests of consumers and thereby ensuring total consumer welfare is an important object of the Indian Competition Act also. This article highlights the provisions under the Competition Act which are specifically designed for the protection of consumers interests.



Surendra U Kanstiya, FCS

Practising Company Secretary
Mumbai
kanstiyask@rediffmail.com

COMPETITION AND CONSUMERS

Competition between business entities benefits both, producers and consumers. Competition triggers economic efficiency, greater innovation, improved quality, wider choice, affordable prices, adequate supply, easy access. However enterprises generally indulge in distorting or limiting or eliminating the competition in the market. Collusion between the producers or traders or service providers for designing unfair business practices and thereby reducing the competition is a common feature of a market. Hence in the context of the general consumer welfare the role of competition authorities while enforcing competition law is very crucial. In *Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd. & Ors.*¹, Mr. P N Parashar's Order quoted from the European Commission Annual Report, 2005, that 'competition authorities all around the world are becoming more conscious of the impact that competition policy and law enforcement has on consumers. They seem to be ever more anxious to declare and demonstrate the significant role they play as enforcers of competition law in consumers' economic life'. This article deals with the recognition and protection of the consumer interests under the competition law.

COMPETITION DAY AND CONSUMER DAY

Few years back, UNCTAD was to study the feasibility of establishing a UN World Competition and Consumer Day to publicise the benefits competition can make to consumers and the public at large. Unfortunately that did not happen. Yet for India, the month of December has two special days prompting us to enjoy exploring the interface between

the competition and consumer protection. Every year 5th December is observed as the *World Competition Day* since 2010 to commemorate the adoption of the 'United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices' (The UN Set) on this date in 1980. The UN Set, a milestone in the history of competition law and policy, is the first, and thus far the only, multilateral agreement addressing anti-competitive practices. In India, every year, 24th of December is observed as *National Consumer Day*. On this day the Consumer Protection Act, 1986 had received the assent of the President. Celebration of this day provides an opportunity for individuals to highlight the importance of the consumer movement and promote the basic rights and responsibilities of all consumers. This day is an annual occasion for celebration and solidarity within the national consumer movement and is an opportunity to promote the basic rights of all consumers. The Consumer Protection Act, 1986 which was enacted for better protection of the interest of the consumers was found to be inadequate to address the problems caused by the new economy. Therefore it has been recently replaced by the Consumer Protection Act, 2019.

THE COMPETITION ACT, 2002

The Competition Act, 2002 (the Act) has *inter alia* the protection of the interests of the consumers as an objective. The predecessor of the Competition Act 2002 was the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) and the said Act contained the consumer protection provisions in the form of regulation of unfair trade practices. For over two decades, unfair trade practices were sought to be curbed by the authorities under two legislations namely the competition law and the consumer law. With the repeal of the MRTP Act on 1st September 2009, the UTPs have been in exclusive purview of the consumer law. Highlighting the significance of consumer protection under the Act, the Supreme Court of India in the case of *Competition Commission of India v. Steel Authority of India Ltd.*², observed as under:

"[T]he principle objects of the Act, in terms of its Preamble and Statement of Objects and Reasons, are to eliminate practices having adverse effects on the competition, to promote and sustain competition in the market, to protect the interest of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments of the country. In other words, the Act requires not only protection of trade **but also protection of consumer interest.**" (emphasis added)

¹Case No. 5 of 2009

²[2010] 98CLA 278 (SC)

“ Every year 5th December is observed as the World Competition Day since 2010 to commemorate the adoption of the ‘United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices’ (The UN Set) on this date in 1980.

On the interplay between the Act and the consumer welfare, Mr. R Prasad, in his Order in *Shri Pravahan Mohanty v. HDFC Bank Limited, Chennai & Ors.*³, observed that ‘under the Competition Act, 2002, one of the key elements is economic development in India and the other item is the protection of consumers. Maintaining and sustaining competition in the markets in India is only for the benefit of the consumers’.

Section 2(f) of the Act defines the consumer to mean any person who (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use; (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use. Highlighting the significance of the consumer welfare objective of the Act, the Supreme Court of India in the case of *Excel Crop Care Limited v. Competition Commission of India and Another*,⁴ noted as under :

In fact, the ultimate goal of competition policy (or for that matter, even the consumer policies) is to enhance consumer well-being. These policies are directed at ensuring that markets function effectively. Competition policy towards the supply side of the market aims to ensure that consumers have adequate and affordable choices.

CONSUMER PROTECTION : A KEY FACTOR FOR CONSIDERATION

The Act provides for (i) Prohibition of anti-competitive agreements; (ii) Prohibition of abuse of dominant position; (iii) Regulation of combinations; and (iv) Competition advocacy. An expert body called Competition Commission of India (the CCI / Commission) has been established under the Act, to act as the market regulator. In addition to preventing and regulating anti-competitive practices, the Commission also perform the advisory and advocacy functions, in its role as a regulator. In *Rajasthan Cylinders and Containers Limited v. Union of India and Another*,⁵ the Supreme Court noted as under :

³ Case No.17/2010

⁴ [2017] 138 CLA 95 (SC)

⁵ Civil Appeal No. 3546 of 2014

..... whereas on the one hand the economic policy of the nation has ushered in the era of liberalisation and globalisation thereby giving free play to the private sector in the manner of conducting business, at the same time, in public interest and in the interest of consumers, a regime of regulators has also been brought to ensure certain checks and balances. Since competition among the enterprises or businessmen is treated as service for a public purpose and, therefore, there is a need to curb anti-competitive practices, the CCI is given the task (as a regulator) to ensure that no such anti-competitive practices are undertaken. In fact, Section 18 of the Act casts a specific and positive obligation on CCI to eliminate anti-competitive practices and promote competition, interest of the consumer and free trade.

PROHIBITION OF ANTI-COMPETITIVE AGREEMENTS

Section 3 of the Act prohibits all such agreements in respect of goods and services which are likely to cause an appreciable adverse effect on competition within India. Known as anti-competitive agreements, they are classified into two parts, namely, horizontal and vertical. Whereas horizontal agreements, which includes activities of cartels and trade associations, are presumed to be anti-competitive, the vertical agreements are considered to be pro-competitive. To ascertain if an agreement is likely to have an appreciable adverse effect on competition, the Commission is required to have due regard to all or any of the parameters listed under section 19(3). One of these parameters is - the accrual of benefits to consumers. An agreement perceived to be an anti-competitive one may not be objected to, if it enhances the efficiency of the distribution process or contributes to consumer welfare. In *Mr. Ramakant Kini and Dr. L H Hiranandani Hospital, Powai, Mumbai In Re*⁶, the Commission observed that ‘one of the avowed objectives of the Act is to promote consumers’ welfare by preventing market distortions caused by such actions and agreements of the enterprises which militate against the competition and consumers’ interest. The competition law by its very nature envisages that there are situations where the Commission has a role and has to control behaviour of the enterprises



⁶ Case No. 39 of 2012

in the market place in order to achieve consumer welfare'. Commenting on the indulgence of the trade associations, the Commission, in *Bengal Chemist & Druggist Association, In Re*⁷, observed as under :

64.... When the trade associations indulge in taking commercially sensitive business decisions on behalf of the entire industry as to whether or not to offer discounts, 24x7 service, free home delivery etc., then competitive forces are not allowed to operate in the market for furtherance of one's business. Innovative business practices, superior services, consumer choice, lower prices, etc., take a back seat and do not become the guiding force for doing business. Consequently, not only the businesses suffer but irreparable harm is caused to the consumers. The consumers buy drugs as a matter of necessity to save themselves from suffering (pain/death). They are deprived of their legitimate right to get medicines prescribed by the doctors at competitive / cheapest rates by the impugned conduct of the trade association. In light of the above, it is concluded that the BCDA and its affiliated District/Zonal Committees have indulged in anti-competitive activities which have caused or is likely to cause appreciable adverse effect on competition.

65.... The activities of the BCDA are in conflict with the objects of the competition law as they cause restraint of trade, stifle competition and harm the consumers.

PROHIBITION OF ABUSE OF DOMINANT POSITION

Section 4 of the Act prohibits the abuse of its dominant position by any enterprise or any group. To be holding the dominant position, the enterprise should enjoy a position of strength 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.

Under the Act, an enterprise would be deemed to be abusing its dominant position if it indulges in any of the business practices specified under section 4(2). One such prohibited practice is - limiting or restricting the technical or scientific development relating to goods or services to the prejudice of consumers. The factors that can be considered by the Commission to conclude if an enterprise enjoys a dominant position are given under section 19(4). Two factors that relates to the consumer protection are (i) dependence of *consumers* on the enterprise; (ii) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for *consumers*. While disposing an appeal dealing with

“ Section 3 of the Act prohibits all such agreements in respect of goods and services which are likely to cause an appreciable adverse effect on competition within India.

section 4, the Competition Appellate Tribunal (now merged with the National Company Law Appellate Tribunal), held in *DLF Limited v. Competition Commission of India and others*⁸ as under :

The order of CCI as well as this judgment is expected to go a long way to ameliorate all the conditions of the customers. Competition law must be read in the light of the philosophy of the Constitution of India, which has concern for the consumers. If the consumer is exploited by a mighty builder, then such mighty builder cannot claim soft attitude from the State. We, therefore, refuse to bring down the penalty in any manner.

REGULATION OF COMBINATIONS

Section 5 and 6 of the Act regulate the combinations beyond monetary thresholds as prescribed under section 5 of the Act. The section covers three types of combinations, which may be resulted by (i) acquisition of shares, voting rights, assets or control; or (ii) acquiring of control over an enterprise where acquirer already has control over another enterprise engaged in identical or similar economic activity; or (iii) merger or amalgamation. Section 6 of the Act provides for mandatory approval of such combinations, by the Commission. The Act prohibits a combination if it causes or is likely to cause an appreciable adverse effect on competition within relevant market in India.

RELEVANT MARKET

While dealing with any matter under section 4 and section 6, the Commission needs to first delineate the relevant market. Relevant market is a combination of relevant geographic market and / or relevant product market. Relevant geographic market comprises the area for supply of the goods or services. Relevant product market comprises all those products or services which are regarded as interchangeable or substitutable by the *consumer*, by reason of characteristics of the products or services, their prices and intended use. It is interesting to note that while determining both - relevant geographic market and relevant product market, the Commission is expected to give due regard certain factors which include *consumer preferences*.

INDIVIDUAL CONSUMER DISPUTES GENERALLY NOT COVERED BY THE ACT

The Act is different from the Consumer Protection Act and the Commission has time and again highlighted the fact that individual consumer dispute with no competition concerns are to be preferred to the Consumer Protection Act. In the case *Sanjeev Pandey v. Mahindra & Mahindra*⁹, the informant complained about the delayed delivery of the vehicle. Dismissing the information the Commission noted that 'the informant has misunderstood the Act and probably confused it with the Consumer Protection Act, 1986. The scope of the Act is primarily aimed to curb the anti-competitive practices having adverse effect on competition and to promote and sustain competition in the relevant markets in India. Whereas

⁷ [2014] 121 CLA 196 (CCI)

⁸ Appeal No. 20 of 2011

⁹ Case no. 17 of 2012



the Consumer Protection Act, 1986 is aimed to protect the interest of individual consumers against the unfair practices being widely prevalent in the market.’ In the case, *Subhash Yadav vs. Force Limited and Ors.*¹⁰, the informant purchased a sports utility vehicle. He noticed many deficiencies in the vehicle like engine started overheating whenever the air conditioner was switched on. The gravamen of the informant in nutshell was that the performance of the vehicle purchased by him was much below satisfaction. Declaring the case to be an unfit one, the Commission closed the case. The Commission held that ‘It may be noted that the aim and object of the Act, is to prevent the practices having adverse effect on competition, to promote competition and thereby to protect the interest of the customers. In a nutshell, the purpose of this

“ Section 6 of the Act provides for mandatory approval of such combinations, by the Commission. The Act prohibits a combination if it causes or is likely to cause an appreciable adverse effect on competition within relevant market in India.

Act is to protect and promote fair competition in the markets in India. However, for the protection of individual consumer interest, there is another statute already in existence known as Consumer Protection Act, 1986, which mainly deals with protection of consumer interest against the deficiencies in services or goods being purchased by the consumers from the sellers.’

CONCLUSION

Fair competition is key to consumer welfare. Commenting on the duties of the Commission, the Supreme Court commented in *Rajasthan Cylinders and Containers Limited v. Union of India and another*¹¹ that ‘it is the duty of the CCI to ensure that the conditions which have tendency to kill the competition are to be curbed. It is also the function of the CCI to ensure that there is a competition so that benefits of such competition are reaped by the consumers’. By stimulating the process of competition between the enterprises, the robust competition regime helps in creation of the healthy competition culture in the market. A well-informed and well-functioning market ensures ongoing innovation, easy access, reasonable switching costs, freedom of choice, greater availability of goods and services at lower prices resulting in the consumer welfare.

¹⁰ Case no. 32 of 2012

¹¹ Civil Appeal No. 3546 of 2014