EVOLUTION OF CONSUMER WELFARE STANDARD IN INDIAN COMPETITION REGIME

-Nisha Kaur Uberoi† and Sanjeev Kumar Sriram‡

ABSTRACT

This article aims to discuss the ‘Consumer Proposition’ v ‘Competitor Proposition’ in the backdrop of the rapidly evolving competition law regime in India. It provides an analysis of the three schools of thought, i.e. the Harvard School of Thought, Chicago School of Thought and Hipster Antitrust Movement, which have over a period of time shaped antitrust jurisprudence and policy in the United States of America. It further analyses the influence of these schools of thought on the antitrust policy and decision making in India. Separately, given that the competition regime in India recently celebrated 10 years, the article also provides an insight into debates and amendments proposed in the High-Level Committee on Competition Policy and Law, which shaped the legislative text of the Competition Act, 2002 (hereinafter Act). The same is analyzed with a view to understand which proposition – ‘Consumer Proposition’ or ‘Competitor Proposition’ – does the text lean towards.

The article explores landmark decisions of the Competition Commission of India (hereinafter CCI), erstwhile Competition Appellate Tribunal (hereinafter COMPAT), National Company Law Appellate Tribunal (hereinafter NCLAT) and the Supreme Court of India (hereinafter SC), while examining the nature of Consumer Welfare Standard with regards to ‘Consumer Proposition’ and ‘Competitor Proposition’. Based on such precedence, the article concludes by predicting the development of the Consumer Welfare Standard in the near future, in a manner that ensures that markets operate efficiently by upholding healthy competition.

Keywords: Consumer Proposition, Competitor Proposition, Consumer Welfare Standard, Chicago School of Thought, Harvard School of Thought, Hipster Antitrust Movement, Competition Law and E-Commerce.

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* Partner and National Head of Competition Law, Trilegal.
** Senior Associate, Trilegal.
INTRODUCTION

What constitutes anti-competitive conduct depends significantly from whose perspective the question is viewed. Competition policies across the world have placed ‘consumer welfare’ as their paramount objective, which involves quintessential concepts such as keeping the costs of goods and services low and output high.\(^{45}\) The adage, ‘Protect competition, not competitors’ adopted in competition jurisprudence indicates the regulator’s resolve to protect markets, at times even at the cost of competitors.\(^{46}\) This stance is referred to as the ‘Consumer Proposition’. However, this approach has been challenged by thinkers who believe that there can be no healthy competitive environment without safeguarding the interests of its competitors.\(^{47}\) Not all \textit{per se} violations harm competition, but demonstrate an adverse impact on competitors, which needs re-evaluation.\(^{48}\) This is referred to as the ‘Competitor Proposition’.

This article aims to analyze both propositions within the Indian competition regime. It is divided into four parts. The first part delves into the ongoing debate between the two propositions. The second analyses the High-level Committee on Competition Policy and Law and Competition Act, 2002 to understand the objectives of India’s competition policy. The third explores case history, which brings forth the dynamic nature of consumer welfare standard. And the fourth predicts the evolution of the standard in the future.

CONSUMER v COMPETITOR PROPOSITION

The background of the debate on the ‘\textit{Consumer Proposition v Competitor Proposition}’ can be traced back to 1962, in \textit{Brown Shoe Co v United States},\(^{49}\) where the Supreme Court of the United States of America (\textit{hereinafter} US SC) adjudicated on the acquisition by Brown Shoe Co. of its competitor Kinney Co. Inc. Section 7 of the Clayton Antitrust Act of 1914 (\textit{hereinafter} Clayton Act) prohibits any merger which might substantially reduce competition or tend to create a monopoly.\(^{50}\) The District Court for the Eastern District of Missouri found such a merger to violate Section 7. While upholding the District Court’s

\(^{46}\) ibid.
\(^{48}\) ibid.
\(^{50}\) Clayton Act 1914, s 7; 15 USC, s 18.
decision, the US SC recorded this observation:

“[S]ome of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects.”

It is interesting to note that while this observation did not apply to the facts of the case, it was picked up by legal scholars and practitioners as a defence against anti-competitive conduct, especially by the big competitors.51 It stirred up a debate on which Proposition – Consumer or Competitor – should be given preference. The phrase was next used in Brunswick Corp v Pueblo Bowl-O-Mat, Inc52 where both parties were involved in the manufacturing of bowling equipment. Pueblo alleged that the acquisition of bowling centres that defaulted on equipment payments by Brunswick amounted to a violation of Section 7 of the Clayton Act and sought treble damages under Section 4. Rejecting the claim, the US SC held that treble damages could only be awarded for illegal presence in the market, with necessary proof of injury suffered, and that:

“The antitrust laws, however, were enacted for the protection of competition, not competitors. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.”53

The above judgments seemed to suggest that competitors should not be protected from acts that are the essence of competition – smart business actions might result in a loss of consumers to other competitors, but this is precisely what is expected from a well-functioning competitive regime.54

CHICAGO SCHOOL v. HARVARD SCHOOL

The Chicago School of Thought (hereinafter Chicago School), which gained popularity in the late 1970s, endorses such Consumer Proposition and propounds that markets should have minimum interference, regulated by the economics of price theory instead.55 A popular proponent of the Chicago School is Robert Bork, who in his seminal work The Antitrust

Paradox argued that the original goal of antitrust law was to preserve competition and not the interest of competitors.56

On the other hand, the Harvard School of Thought (hereinafter Harvard School), which has been in existence for much longer, since the early 1960s, endorses regulation of markets and protection of competitors for a successful competition regime, thereby siding with the Competitor Proposition. Its proponents such as Philip Areeda and Herbert J. Hovenkamp firmly believe that drafters of the Sherman Antitrust Act of 1890 were equally concerned with the protection of competitors writing, “Competitors were the principal protected class of the Sherman Act.”57

Historically, the Harvard School has been adopted by the US SC in determination of antitrust claims.58 However, a 2007 judgment paid obeisance to the Chicago School, further igniting the debate. Since 1911, minimum resale price maintenance (hereinafter RPM), i.e., a stipulated minimum amount only above which a retailer must sell a manufacturer’s products, was considered a per se violation, as decided by the US SC in Dr Miles Med Co v John D Park & Sons Co59 Proponents of the Chicago School were against categorisation of such violations, which ignored its pro-competitive effects. In Leegin Creative Leather Products, Inc v PSKS, Inc,60 PSKS Inc. failed to adhere to the RPM set by Leegin on its products by offering consumers a 20% discount, due to which Leegin stopped supplying its products to PSKS Inc. The US SC, overruling its decision in Dr Miles, held that vertical price restraints were no longer per se violations, and were to be tested on the ‘rule of reason’. On finding pro-competitive effects, the US SC upheld Leegin’s policy of refusing to sell to PSKS Inc. as lawful. This was a clear tilt towards Competitor Proposition.

THE HIPSTER ANTITRUST MOVEMENT

As the debate progressed throughout the decades, there emerged a group of antitrust thinkers who did not squarely identify with either schools of thought. The proponents of the ‘Hipster Antitrust’ Movement move away from excessive deference to either Consumer or Competitor Proposition, advocating for the inclusion of other factors such as income

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57 Herbert (n 47).
59 Dr Miles Med Co v John D Park & Sons Co 220 US 373 (1911).
60 Leegin Creative Leather Products Inc v PSKS Inc 127 S Ct 2705.
inequality and unemployment. They propose that the scope of antitrust should include “market structure, interest of competitors, and the power and influence of a particular entity in the relevant market they operate in,” the underlying reason being, “No company or entity should be too big or too powerful.” One of the foremost advocates of this ideology was Justice Louis Brandeis who in the 1930s wrote about the ‘curse of bigness’.

Neo-Brandeisians are especially typical of the top four technology companies – Facebook, Google, Amazon and Apple, which were investigated by the US Antitrust Sub-Committee for their alleged anti-competitive conduct. A report released on 6 October 2020, highlighted the excessive power these companies wielded. It stated:

“Companies that once were scrappy, underdog start-ups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons. Although these firms have delivered clear benefits to society, the dominance of Amazon, Apple, Facebook, and Google has come at a price. These firms typically run the marketplace while also competing in it—a position that enables them to write one set of rules for others, while they play by another, or to engage in a form of their own private quasi regulation that is unaccountable to anyone but themselves.”

These three schools of thought have helped shape the US Antitrust policy over the decades. Their impact has also been felt on the Indian competition regime, which is discussed in the following part.

**LEGISLATIVE HISTORY OF INDIAN COMPETITION REGIME- SVS RAGHAVAN COMMITTEE REPORT**

**A NEW COMPETITION LAW REGIME IN INDIA**


63 ibid.

64 ibid.


66 ibid.
The need to replace the archaic Monopolies and Restrictive Trade Practices Act, 1969, and align with India’s obligations arising from membership of the World Trade Organisation became evident post the economic liberalisation in 1991. India was emerging from excessive governmental control under the Industrial (Development and Regulation) Act, 1951, which allowed private players to operate only with licences (colloquially referred to as ‘License- Permit Raj’). Thus, a high-power committee was appointed to draft a new competition policy for a rapidly changing nation, which submitted the SVS Raghavan Committee Report (hereinafter the Report).

The Report indirectly acknowledged the 'Harvard v Chicago School' debate by referring to two approaches to competition policy for India. The first was a laissez-faire economy, with minimum regulatory intervention; and the second was free competition with regulatory structures in place to avoid its subversion. The Committee favoured the latter.

While defining the aims of competition policy, the Report noted that the “*Ultimate raison d’être of competition is the interest of the consumer*”, acknowledging that competition could not thrive in a vacuum, and supporting structures such as the advent of developments in internet connectivity were important. However, the need to protect competitors’ interests were not discussed, with the Report stating that

“In the absence of a proper competitive environment, we may find ourselves with a first-class competition law but no competition. We may also end up by protecting the competitor and not the competitive system.”

**DISCUSSIONS ON THE STRUCTURE OF SUCH NEW REGIME**

While discussing the structure of the new competition law, many members of the committee voiced their concerns for competitors when specific conduct was debate as anti-competitive, such as *per se* illegality of horizontal agreements and cartels. Such members advocated for the test of adverse effect on competition to be established. While the Committee proceeded to list down *per se* horizontal violations (now Section 3(3) of the Competition Act, 2002 (hereinafter the Act), it relented for vertical agreements, requiring the test of “*rule of

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68 ibid [1.1.9].
69 ibid [1.2.9].
70 ibid [4.3.8].
reason” to be met\textsuperscript{71} (now Section 3(4) of the Act). The Committee based its decision on the evolution of US antitrust law, noting its harsh treatment before, but its demonstration of significant pro-competitive effects with time.\textsuperscript{72}

Committee members also raised their concerns in supplementary and dissent notes to the Report. Dr. S. Chakravarthy laid emphasis by stating that:

“Indian policy makers need to analyse India’s competitive advantages and adverse factors rendering its products not competitive in the global market and address them with a view to laying down a level-playing field for its domestic producers and suppliers qua their global competitors”.

Dr Rakesh Mohan noted that modern competition policy and the enforced law had to be discretionary in its essential characteristics, and that removal of discretion through enlargement of categories of \textit{per se} illegality would be, “Worse than the cure”,\textsuperscript{73} thus clearly supporting the Competitor Proposition.

Mr Sudhir Mulji, who had quit the Committee (only to reluctantly return), also voiced his support for the Competitor Proposition. He stated that “It then dawned on me for the first time that we were not deliberating about issues connected with the economic concept of competition at all, but were concerning ourselves with the conduct and behaviour of economic agents. We were exhibiting that familiar ‘nanny syndrome’ of wanting an authority to approve or disapprove of our behaviour and punish or reward us accordingly. I saw it as a reversion to the license- permit Raj.”\textsuperscript{74} The Federation of Association of Small-Scale Industries (hereinafter SSI), through its President V.S. Narasimha, also highlighted the unequal position of SSIs with respect to large corporations, and the need to protect their interests.\textsuperscript{75}

In the final draft adopted as the main Act, the aims of competition policy in India were discussed, as detailed in the following part.

\textbf{THE PENDULUM OF CONSUMER OR COMPETITOR PROPOSITION}

\textsuperscript{71} ibid [4.4.1].
\textsuperscript{72} ibid [4.4.0].
\textsuperscript{73} ibid Supplementary Note to the Report by Dr Rakesh Mohan.
\textsuperscript{74} ibid Note of Dissent, Sudhir Mulji.
\textsuperscript{75} ibid letter.
UNDER THE ACT

The Report did not expressly envisage Competitor Proposition as within the ambit of consumer welfare. The Act, in its Statement of Objects and Reasons, states the following aims:

1. establishment of a Commission to prevent practices having adverse effect on competition,
2. to promote and sustain competition in markets,
3. to protect the interests of consumers and
4. to ensure freedom of trade carried on by other participants in markets, in India.

In the Act, both Consumer Proposition under (i) and (ii), and Competitor Proposition under (iii) and (iv) are given importance. Expanding on the objectives of the Indian competition regime, the Supreme Court of India (hereinafter SC) in Competition Commission of India v Steel Authority of India Limited76, held it as, “[T]o promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices”.77 The Court also stressed on the importance of time-bound disposal of disputes as an essential aim of the Act.78 Thus, a clear exercise in balance of both propositions was undertaken.

An analysis of case history brings forth the evolution of the dynamic nature of consumer welfare standard concerning the Consumer and Competitor Proposition, which is discussed in the foregoing paragraphs.

INDIAN COMPETITION JURISPRUDENCE

76 Competition Commission of India v Steel Authority of India Limited (2010) 10 SCC 744.
77 ibid 6.
78 ibid 125.
SHRI RAMAKANT KINI V HIRANANDANI HOSPITAL

One of the earliest cases to be decided by the Competition Commission of India (hereinafter the CCI) since the notification of Sections 3 and 4 of the Act in 2009 was Shri Ramakant Kini v Hiranandani Hospital. The order delivered after a three-year investigation in 2012, concerned the super specialty hospital’s arrangement with Cryobanks India. When an expecting mother availing the maternity services of the hospital sought a different stem cell banker to store her baby’s umbilical cord, she was informed that pursuing to the hospital’s exclusive agreement with Cryobanks India no other stem cell banker is allowed within the hospital premises. Allegations levelled against the hospital by the Informant mother included anti-competitive practice and the abuse of dominant position.

Dr Geeta Gouri, a CCI Committee Member, in her dissent, noted that the relevant market was ‘Market for maternity services in the city of Mumbai’ (rejecting the narrower definition adopted by the Director General (hereinafter the DG), which reduced the market share of the hospital from 62% to less than 1%, thereby refuting a Section 4(2) violation. For violation of Section 3(4), the allegations of tie-in agreement, exclusive supply agreement and refusal to deal were found to be devoid of merit. Dr. Gouri held that while on a mere per se evaluation of anti-competitive conduct, the hospital could be found guilty of violating Section 3, on an actual competition assessment no such appreciable adverse effect on competition (hereinafter AAEC) could be made out.

The majority opted for a pure Consumer Proposition analysis. Recounting the Preamble’s aim ‘to protect the interest of consumers and to ensure freedom of trade carried on by other participants in the markets in India’, the CCI stressed that it must analyse consumer welfare aspects of the agreement between the hospital and Cryobanks. CCI viewed consumer welfare in the limited scope of low prices and superior quality, holding that exclusive supply agreements did not benefit the customers and “Kill[ed] all competition replacing competition culture by commission culture”. It subsequently fined the hospital INR 3.8 crores (4% of the average turnover).

In 2015, the erstwhile Competition Appellate Tribunal (hereinafter COMPAT) rejected the

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80 ibid [51]-[52] (Dr Geeta Gouri).
81 ibid [76] (Dr Geeta Gouri).
82 ibid [18].
83 ibid [21].
majority decision and upheld Dr Gouri’s dissent, favouring a more nuanced competition assessment than strictly what the contours of either Consumer Proposition or Competitor Proposition offered.

COORDINATION COMMITTEE OF ARTISTES AND TECHNICIANS OF WEST BENGAL FILM AND TELEVISION V COMPETITION COMMISSION OF INDIA

In the Coordination Committee of Artistes and Technicians of West Bengal Film and Television v Competition Commission of India, the Coordination Committee had written to a channel broadcasting Mahabharata dubbed in Bengali to cease doing so in the interest of the growth of the Film and Television industry of West Bengal. The proprietor of the channel approached the CCI, claiming undue pressure to conform to anti-competitive practices.

The SC observed that the ambit of Section 3 extended to persons or enterprises or their respective associations engaged in agreements that directly related to economic activity. The DG in its investigation, and CCI in its order, pronounced the Coordination Committee to be suitably described as an ‘enterprise’, which was overruled by the erstwhile COMPAT, holding it as a trade union, thus not falling within the purview of the competition authorities. The SC disagreed holding that the Coordination Committee represented the economic interest of several film and television producers, distributors and exhibitors, thereby qualifying as an ‘enterprise’.

Upholding CCI’s analysis, the SC stated that

“The CCI rightly observed that the protection in the name of the language goes against the interest of the competition, depriving the consumers of exercising their choice. Acts of Coordination Committee definitely caused harm to consumers by depriving them from watching the dubbed serial on TV channel; albeit for a brief period. It also hindered competition in the market by barring dubbed TV serials from exhibition on TV channels in the State of West Bengal. It amounted to creating barriers to the entry of new content in the said dubbed TV serial. Such act and conduct also limited the supply of serial dubbed in

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84 Dr L H Hiranandani Hospital v Competition Commission of India 2015 SCC OnLine Comp AT 1166.
85 ibid.
86 Coordination Committee of Artistes and Technicians of West Bengal Film and Television v Competition Commission of India (2017) 5 SCC 17.
87 ibid [47].
Bangla, which amounts to violation of the provision of Section 3(3)(b) of the Act.”

By doing so, the SC balanced the nuances of Consumer and Competitor Proposition in its judgment.

**KAPOOR GLASS (INDIA) PRIVATE LIMITED V SCHOTT GLASS INDIA PRIVATE LIMITED**

The true weightage of the debate between the Consumer Proposition v the Competitor Proposition was witnessed in *Kapoor Glass (India) Private Limited v Schott Glass India Private Limited*. The majority opinion of the CCI found Schott Glass guilty of abusing its dominant position by favouring its joint-venture Schott Kaisha and offering loyalty rebates, i.e., discounts to its long-term consumers not offered to all other consumers, thereby eliminating competition and ousting other players from the market of borosilicate glass tubes in India. The dissenting order authored by Geeta Gouri was upheld by the erstwhile COMPAT. It stated that no consumer harm was observed, and Schott Glass’ justification of superior quality product made its conduct acceptable. It also declared that, “Being big is not bad, being abusive is bad.” Therefore, in this case although the majority opinion of the CCI analysed the conduct of Schott glass only the basis of the Consumer Proposition, the erstwhile COMPAT analysed both the Consumer Proposition and Competitor Proposition.

**MCX STOCK EXCHANGE V NATIONAL STOCK EXCHANGE & ORS.**

While investigating the allegation of abuse of dominant position by National Stock Exchange (*hereinafter* NSE) in the currency derivatives (*hereinafter* CD) market, CCI opined that the waiver of the transaction fee, admission fee and data feed charges by NSE amounted to an abuse of dominance and consequent violation of Section 4 of the Act. Corroborating its stance, the CCI stated that the NSE intended to acquire a dominant position in the CD segment by cross subsidising this segment of business from the other segments where it enjoyed a virtual monopoly. It further stated that “if competitors with small pockets resort to the similar zero transaction cost method adopted by NSE, (they) would incur huge losses in the longer run.” Thus, the CCI in this case very clearly

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88 ibid [48].
90 ibid [58].
92 ibid [33.1].
analysed the conduct of NSE by looking into the impact of such conduct on the competitors in the market, thereby giving importance to the Competitor Proposition.

The COMPAT while upholding\textsuperscript{93} the order of the CCI, stated that NSE’s no-transaction-fee policy could lead to a potential foreclosure of the market. It further opined that "transaction fee waivers are a legitimate new market entry strategy…… but the continuance thereof in the wake of the available facts was wholly incorrect."\textsuperscript{94} Accordingly, the COMPAT held such continuance of zero cost transaction to be "a classic example of exclusionary conduct"\textsuperscript{95}, against competitors’ interest.

**EAST INDIA PETROLEUM PRIVATE LIMITED v SOUTH ASIAN LPG PRIVATE LIMITED**

In another case,\textsuperscript{96} wherein the East India Petroleum Private Limited (hereinafter EIPL) alleged that South Asian LPG Private Limited (hereinafter SALPG) was denying them access to its LPG terminal infrastructure at the Vishakhapatnam Port, SALPG contended that such restriction imposed by them in no manner affected consumer interest, rather led to services being more cost-effective for consumers with improved efficiencies. The CCI rejected the contention of SALPG and described the argument as having a narrow view of efficiency. The CCI further stated that SALPG under the garb of lower cost of services and improved efficiencies, “Failed to take into consideration the inefficiencies/losses”\textsuperscript{97} that EIPL had suffered as a result of the denial to market access and its consequent. Delving upon the issue of ‘effective competition’, the CCI observed that, “Effective competition does not necessarily mean prevalence of the most efficient to the exclusion of relatively less efficient choices to consumer”.\textsuperscript{98} While assessing the restriction imposed by SALPG, CCI considered not only the nature of the conduct but also looked at the potential impact of such conduct upon its competitors.

\textsuperscript{93} National Stock Exchange of India Limited v Competition Commission of India (2012) SCC OnLine Comp AT 11.
\textsuperscript{94} Kapoor (n 89) [104]-[105].
\textsuperscript{95} ibid [112].
\textsuperscript{97} ibid [54.32].
\textsuperscript{98} ibid [54.36].
When this case went into appeal before the National Company Law Appellate Tribunal,\(^{99}\) (hereinafter NCLAT) and the COMPAT\(^{100}\) respectively, the appellate authorities upheld the conclusions arrived at by the CCI, following the Competitor Proposition.

**SHAMSHER KATARIA V HONDA SIEL CARS INDIA & ORS**

Another prominent case mandating the Competitor Proposition has been the *Shamsher Kataria v Honda Siel Cars India & Ors*\(^{101}\) (hereinafter Auto Parts case). The CCI penalised 14 car manufacturing companies for abusing their position in the spare parts supply market and leveraging it to protect the market for after-sale services and maintenance. The car manufacturing companies were indulging in restrictive trade practice by not providing original spare parts or the relevant information related to tools or technology relating to it in the open market. As a result of such practice, the CCI opined that “*Independent and multi-brand repairers who operated in the open market were denied market access in the aftermarket without any commercial justification*”\(^{102}\). Accordingly, it passed a Section 27 order mandating the sale of original spare parts in the open market without restrictions. Thus, the objective of the CCI having a constant focus on Competitor Proposition as a measure of safeguarding competition is clear.

**CHIEF MATERIALS MANAGER, SOUTH EASTERN RAILWAY V HINDUSTAN COMPOSITES LIMITED & ORS.**

The CCI, along with looking into the consumer interests, also investigates the interest of competitors and entities operating in the market, thereby signifying a gradual shift towards the Competitor Proposition. Recently, on 10 July 2020, the CCI passed a Section 27 order\(^{103}\) against ten entities and their officials for cartelisation in the Composite Brake Block (hereinafter CBB) market. The CCI while deliberating upon the imposition of a penalty for contravention under Section 3 and Section 48 of the Act, ordered the ten cartel participants and their officials to desist from such anti-competitive conduct in the future. In furtherance, the CCI refused to impose any monetary penalty upon the cartel participants or their officials, considering their admission to cartel participation and continued cooperation

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99 *South Asian LPG Private Limited v Competition Commission of India & East India Petroleum Private Limited* NCLAT Competition Appeal No 70 of 2018.


101 *Shamsher Kataria v Honda Siel Cars India Ltd* 2014 SCC OnLine CCI 95.

102 ibid [20.5.85].

during the investigation period. The CCI also coupled in the current economic situation prevailing as a result of the COVID-19 pandemic and the low turnover of the Micro, Small and Medium Enterprises (hereinafter MSME) cartel participants in the CBB market segment to be relevant factors for not imposing any monetary penalty.

**PRIMA FACIE ORDERS UNDER SECTION 26(1)**

Apart from the already decreed upon orders discussed above, the CCI recently passed two *prima facie* orders under Section 26(1) of the Act, which signifies the evolving Indian competition landscape to a more competitor intensive proposition.

Firstly, in the *Delhi Vyapar Mahasangh v Flipkart Internet Private Limited & Amazon Seller Services*\(^{104}\) case, the Informants contended that Flipkart and Amazon were indulging in anti-competitive practices, namely – exclusive launch of mobile phones, preferential selling on the marketplace platform, deep discounting and preferential listing. The CCI upon opined that the allegations would require further investigation, to deliberate upon whether such practices were being used as an exclusionary tactic to foreclose competition and consequently cause AAEC. Thus, the CCI is looking into the potential effects of alleged anti-competitive conducts resorted to by an enterprise, upon its competitors and the competition landscape of the market at large, apart from just looking into the effects of such conduct upon consumer welfare alone.

Secondly, in the *Rubtub Solutions Pvt Ltd v MakeMyTrip India Pvt Ltd (hereinafter MMT) & Oravel Stays Private Limited (hereinafter OYO)*\(^{105}\) case, the CCI discussed the exclusivity restriction imposed by MMT on Treebo. As per the exclusivity agreement, Treebo was not permitted to list its hotels located in Category A cities (72 hours before check-in date) and Category B cities (30 days before check-in date) on Booking.com and Paytm portals (two of MMT’s competitors). Category A included 29 cities and Category B included 25 cities. Having analysed these exclusivity conditions imposed by MMT, the CCI *prima facie* observed such condition to be unfair, exploitive and exclusionary in nature. The CCI stated that Treebo was denied an opportunity to list its hotels on other OTA platforms like Booking.com (the closest competitor to MMT) and Paytm and gain access to such platforms during the busiest booking periods, thereby denying market access to these OTA

\(^{104}\) *Delhi Vyapar Mahasangh v Flipkart Internet Private Limited* 2020 SCC OnLine CCI 3.

\(^{105}\) *Rubtub Solutions Pvt Ltd v MakeMyTrip India Pvt Ltd & Oravel Stays Private Limited* CCI Case No 1 of 2020.
platforms who were the competitors of MMT. Therefore, a clear mandate of the CCI, viewing a particular conduct in terms of the Competitor Proposition is visible.

Thus, it is clear that CCI and appellate authorities have viewed an alleged anti-competitive conduct relying upon both the Consumer and the Competitor Propositions, keeping in mind the objectives of the Act, laid down in its Preamble.

**FUTURE OF CONSUMER WELFARE STANDARD**

**THE MARKET STUDY ON E-COMMERCE**

The issues discussed by the CCI in its recently released “Market Study on E-commerce”\(^{106}\) report, also highlights the gradual evolution in the outlook of the CCI towards the Competitor Proposition. One such issue is with respect to ‘parity clauses’, which require the sellers or retailers on an e-commerce platform to quote or offer the lowest price or/and best terms on their platform, thereby restricting such sellers or retailers from offering better terms or prices on their websites or other e-commerce platforms.

E-commerce platforms usually function by charging commission from sellers or retailers who list their products on the platform. When a new e-commerce platform intends to enter the market, it may charge lower commission rates to attract sellers or retailers to list their products on its platform. This is where these parity clauses imposed by incumbent e-commerce players may act as an entry barrier to this new entrant because bound by such parity clauses the sellers or retailers cannot quote lower price or terms on the new platform despite the lower commission rates. Thus, the very idea of a parity-clause and the principle governing it may often hinder the entry and consequent sustenance of a competitor in the market, thereby not only causing entry barriers but also potentially driving out existing competitors from the market.

**ADVANCEMENTS IN THE DIGITAL LANDSCAPE**

In recent years, India has witnessed rapid growth in the digital space on an unprecedented scale. Competition jurisprudence across the world, until very recently adjudicated upon the conduct of an enterprise depending upon its impact on consumer interest. The digital economy is largely data-oriented and services offered to consumers are mostly free of cost.

Such services offered for free, with the present competition law jurisprudence in place cannot be coined predatory, owing to minimal or almost zero cost incurred in providing the service. Thus, these zero-cost platforms like Google and Facebook which offer free services to consumers often escape the CCI’s attention, thereby gradually emerging into dominant or near-monopoly players in the relevant markets they operate.

Having witnessed this concentration of market power with a select few big data companies and their potential dominance in the sectors they operate, the CCI gradually feels the urge to widen its scope of conduct assessment in the digital space. It is now of the opinion that consumer interest cannot be viewed as the only determinant or criterion for assessing a particular conduct, because monopolisation and consequent elimination of competition defeat the very purpose of competition policy. Thus, this Market Study report and its due emphasis on the effects of parity-clauses upon competitors in the market signify the CCI’s outlook towards a more competitor intensive proposition.

One of the many emerging competition law phenomena, which may be included in the Competitor Proposition, is that of ‘private enforcement’. The principal idea of private enforcement is that an injured party out of an established anti-competitive practice can impose a claim for compensation upon the infringing party to make good the loss suffered or the loss in profits suffered as a consequence of that established anti-competitive practice. The legislative backing to this concept of private enforcement comes from Section 53N of the Competition Act, 2002. As per the provision, the NCLAT can award compensation to any person who has suffered loss or damage as a consequence of any established anti-competitive practice. Sub-section (1) of Section 53N enumerates who can claim compensation. It includes- Central Government, State Government, local authority, any enterprise, any person. Thus, private enforcement may soon emerge to be one of the most prominent Competitor Proposition instruments with respect to competition law in India.

**CONCLUSION: COMPETITION LAW- A PARADOX TO THE IDEA OF ‘THE ROAD NOT TAKEN’**

The competition law principles do not embark upon the idea of ‘The Road Not Taken’ by Robert Frost, where the competition authority has to choose between one of the two available divergent paths. Competition authorities and courts of law recognise the need to harmonise the Consumer Proposition and Competitor Proposition, with their interplay
achieving the desired balanced result. For instance, in *Competition Commission of India v Fast Way Transmission*\(^{107}\) the SC while holding unilateral termination of carriage agreement by the dominant broadcasting network as a denial of market access under Section 4(2)(c) of the Act, refused to fine the enterprise, as the affected channel consistently performed poorly. Thus, while the Consumer Proposition standard was applied to ascertain abuse of dominance, it appears as though the Competitor Proposition was also applied in not penalising the entity.

For markets to operate efficiently, the need of the hour is to ensure that consumer preferences are well met without compromise on innovation, which can only occur when competition forces are at play. One of the golden principles of economics as laid down by Adam Smith is that ‘Human wants are unlimited’. Thus, consumers are always looking for something new, better and different. This is where the need for the Competitor Proposition comes in because if the number of sellers goes down to one or a mere select few, their incumbency will restrain innovation and not meet the ever-growing human wants or consumer needs.

Thus, to ensure that markets operate efficiently, competition authorities should give due importance to the interest of consumers and competitors while analysing a particular conduct and its potential effects.

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