Interface between Competition Commission of India and Consumer Protection Law

Abstract

With the liberalization of the economy and enhancement of market competition, the role played by Competition Commission as a regulator gains utmost importance. The Hon’ble Supreme Court in Ashoka Smokeless Coal Ind. P. Ltd. v. Union of India (2007) 2 SCC 640 has observed that in a market governed by free economy where producers fix their own prices, a level playing field is the key factor in a new economy. The aforesaid level playing field can be achieved when there is a choice and competition in the market for procurement of goods. If the policy of the open market as to be achieved the benefit of the consumer must be kept uppermost in mind by the State.

This essay explores the correlation between consumer protection and the Competition Commission of India. The essay begins by explaining perfect market conditions and ideal consumer behavior and then goes on to discuss what variations are present in reality. The author explains the need for rational behind consumer protection and also goes on to explain the different standards on which consumer protection policy can be based.

The author goes on to discuss the scope and preview of the concept of consumer under Indian law. The evolution of the competition law of India is also critically analyzed for a better understanding of how the needs of consumer protection changed over time. The essay goes on to discuss the effects of anti-competitive practices on the consumer and how the law provides for inquiry into alleged contravention of provisions relating to anti-competitive agreements, abuse of dominance and combinations by the Competition Commission of India. There undergoes a review of the cases accepted by the Competition Commission of India and a critical analysis of the reasoning behind various decisions.

To conclude the author argues that the Competition Commission of India plays a vital role in consumer protection by regulating the quality of the market.

Key words: consumer surplus, consumer welfare, perfect competition, total welfare standard
Introduction

To understand the need for regulation of the market to protect consumers we can look to the concept of a perfect market as a reference point. Even though the system of a perfect market is unattainable in reality, Trivedi argues that an inference can be drawn from the free market economic theory that if the characteristics of a perfects market are obtained there would no longer be a need for regulation.¹

Ramsay suggests the following characteristics of the perfect market:²

- There are numerous buyers and sellers in the market, such that the activities of any one economic actor will have only a minimal impact on the output or price of the market.
- There is free entry into and exit from the market.
- The commodity sold in the market is homogeneous; that is, essentially the same product is sold by each seller in the particular market.
- All economic actors in the market have perfect information about the nature and value of the commodities traded.
- All the costs of producing the commodity are borne by the producer and all the benefits of a commodity accrue to the consumer – that is, there are no externalities.

The theory of a perfect market can be looked at in conjunction with the theory of consumer choice.³ The theory of consumer choice assumes that consumers are rational maximizers of their own satisfaction. The theory suggests that the consumer knows what he wants and will make a logical and consistent choice. Secondly that the consumer will influence the producers and

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influence the way a market operates. The choices a consumer makes indicates to the producer of goods and services about the consumer’s needs and wishes. If a producer does not respond to consumer needs the producer will lose customer and will be forced to exit the market.

A perfect market exists only where the requirements set out by Ramsay’s list are met. We may still have a competitive market where not all the qualities of a perfect market are present. Similarly it can be recognized that different consumers may be willing to endure different levels of product safety and quality for different amounts of money.⁴

There is a need for consumer’s protection based on the rational that a consumer is a “weaker party”. Consumers are considered to be weaker than their contracting sellers as they are unable to protect their interests due to the lack of bargaining power.⁵ This view is based on the exploitation theory which argues that consumers are in need of protection for two reasons. First being that consumers have fewer options than a perfect market and have to purchase and contract terms set by large and powerful companies. Second being companies being able to exploit significant information and sophistication disparities in their favor.⁶

Though more recently the exploitation theory has been disregarded as a viable justification for consumer protection, as it does not take competition as a consideration while analyzing the market, it still provided a vital direction to the early argument of consumer protection.⁷ Economists argue that consumers today are deemed in need of consumer protection from an economic perspective not on the basis on being a “weaker” party at risk of exploitation but

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⁶ Ibid.
⁷ Ibid.
because consumers know less about the product and contracts than professionals. Thus the absence of an ideal market and an ideal consumer make an environment where presence of a regulatory body is of utmost importance.

**What is consumer welfare?**

The concept of consumer welfare is concerned with efficient transaction and cost-saving and with social aspects related to market safety and health of consumer. In economics the term is well defined. In the Marshallian demand curve analysis consumer welfare equals the difference between what the consumer is willing to pay and he/she actually pays. However the term is much debated in the world of anti-trust law. There are two groups, one which holds that the term should mean “consumer surplus” and the other group asserts that it should mean “aggregate welfare” or “total welfare”. Thus there are two standards, one supporting the maximizing of consumer surplus i.e., “consumer welfare standard” approach and the other focusing on productive and allocative efficiency in the market i.e., “total welfare standard” approach.

Competition law strives to achieve the goal of consumer welfare by regulating conduct between enterprises in the market. It lays down the legal framework for standard of proof required for investigation and litigation. On the hand consumer law deals with interaction of consumer with the enterprises with the effort to ensure a balance of power by giving the consumer information

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8 Ibid.
necessary to make a rationale choice. It aims to achieve consumer welfare by improving position of consumer in market transactions.\textsuperscript{14} While it is clear that competition law and consumer law strive to achieve the same goal, they pursue different standpoint and have different approaches to solve the goal. Yet these two fields complement each and achieve best for consumer interest when they are harmonized.\textsuperscript{15}

\textbf{Who is a consumer?}

Who then is a person who would be subject of the efforts of these two disciplines? The term consumer from an economic perspective understood as the final user of goods or services produced, manufactured and distributed for the purpose of consumption.\textsuperscript{16} However under the legal framework of India the term means different thing under the Consumer Protection Act, 1986 and the Competition Act, 2002.

A consumer under Section 2(1)(d) of Consumer Protection Act, 1986 means any person who buys any goods or hires or avails 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 other user of such goods or beneficiary of such services other than the person who buys any goods or hires or avails any services for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment, when such use is made with the approval of such person. The definition excludes a person who obtains such goods for resale or for any commercial purpose or hires or avails of such service for any commercial purpose.\textsuperscript{17}

\begin{thebibliography}{9}
\bibitem{14} Ibid.
\bibitem{17} The Consumer Protection Act, 1986 (Act 68 of 1986).
\end{thebibliography}
While interpreting the term “commercial purpose” the Hon’ble Supreme Court of India observed that by introducing an explanation to Section 2(1)(d) and using therein terminology such as “uses them by himself”, “exclusively for the purpose of earning his livelihood” and “by means of self-employment” the Parliament intended that for exclusion from the use of good from commercial purpose the same must be for the buyer himself, by employing himself for earning his livelihood.\textsuperscript{18}

Like the Monopolies and Restrictive Trade Practices Act, 1969 the Competition Act, 2002 provides for third parties to bring a complaint before the Competition regulatory body.\textsuperscript{19} The Competition Commission may inquire into the alleged contravention of the law on anti-competitive agreements and abuse of dominance on its own motion or on receipt of complaint from any person, consumer, or their association or trade association or on a reference made to it by the State Government or Central Government or a statutory authority.\textsuperscript{20} The term consumer under Competition Act, 2002 is of wider ambit than that in Consumer Protection Act, 1986. The competition policy is concerned with the supply-side and behavior of firms while the focus of consumer policy is on the demand-side structure of markets.\textsuperscript{21}

Under Section 2(f) of the Competition Act, 2002 a consumer means any person who buys any goods or hires or avails 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 other user of such goods or beneficiary of such services other than the person who buys any goods or hires or avails any services for consideration paid or promised or partly paid and partly promised,  

\textsuperscript{19} Pradeep S. Mehta, \textit{A Functional Competition Policy for India} 51 (Academic Foundation, New Delhi, 2006).  
\textsuperscript{20} The Competition Act, 2002 (Act 12 of 2003) s 19(1).  
\textsuperscript{21} Louise Sylvan, \textit{The Interface between Consumer Policy and Competition Policy}, paper presented at the Consumer Affairs Victoria Lecture, Melbourne, in honour of Professor Maureen Brunt AO.
or under any system of deferred payment, when such use is made with the approval of such
person. It includes buying of such goods for resale or for any commercial purpose or for personal
use and hiring or availing of services for commercial purpose or personal use. Therefore the
Competition Act, 2002 protects consumer rights even when the consumer is means to use the
good or services for resale or commercial purpose.

**Evolution of Competition Law in India**

It is pertinent to understand that the ability of the buyer of a good or service to approach the
Consumer Protection Redressal Forum or the Competition Commission has been framed by the
historical development in the field of competition law in India.

In 1969 the Monopolies and Restrictive Trade Practices Act was after the Parliament considered
the report of the Monopolies Inquiry Commission that had identified concentration of economic
power in the hands of a few large industrial houses. This concentration of power arose in an era
of rigid control by the central government of issue of capital by companies, issue of industrial
licensing, etc.\(^{22}\) The MRTP Commission introduced Part B on ‘Unfair Trade Practices’ and their
regulation by an amendment in 1984 through Sections 36A and 36E.

In 1985 the United Nations General Assembly passed what is known as “Consumer Protection
Resolution No. 39/248” indicating therein guidelines which governments could adopt for better
protection of interest of consumer. Indian government which was signatory to the resolution
enacted the Consumer Protection Act, 1986 for simpler and quicker redressal of grievances of

\(^{22}\) T.Rampappa, *Competition Law in India: Policy, Issues and Developments* 13(Oxford University Press, New
Delhi, 2\(^{nd}\) edn., 2012).
consumers.\textsuperscript{23} The Act provided consumers with certain rights including right to safety, right to information, right to choose, etc. which formed the Consumer Charter under Section 6.

The Consumer Protection Act, 1986 was farmed with the aim of protecting consumers from unfair practices of the business community, but the Act originally did not have a definition of unfair trade practice. In 1993, Section 2(1) (r) was incorporated and provided a self-contained code on “Unfair Trade Practice” on the lines Section 36A of the Monopolies and Restrictive Trade Practices Act, 1969.\textsuperscript{24}

Considering the changed business environment post- liberalization and globalization, the government felt the requirement to appoint a high-level Committee, under the chairmanship of S.V.S. Raghavan to study the economic scene and make recommendations for a competition policy to meet the needs of the new business environment in the country.\textsuperscript{25} Among its suggestions it mentioned the need for a Competition Law Tribunal (Competition Commission of India) to be the watchdog for introduction and maintenance of competition policy. Competition law was to deal with anti-competitive practices particularly cartelization, price-fixing and other abuses of market power and should regulate mergers.\textsuperscript{26} It also recommended for the transferring of provisions dealing with “Unfair Trade Practices” to Consumer Protection Act, 1986 and enacting a new law on competition expediently.\textsuperscript{27} Accordingly the Government passed the

\textsuperscript{24} Law Commission of India, 199\textsuperscript{th} Report on Unfair (Procedural and Substantive) Terms in Contract( August, 2006).
\textsuperscript{25} T.Rampappa, \textit{Competition Law in India: Policy, Issues and Developments} 6(Oxford University Press, New Delhi, 2\textsuperscript{nd} edn., 2012).
\textsuperscript{26} Report of the High Level Committee on Competition Policy and Law, 2000, para. 2.9.7.
\textsuperscript{27} Ibid, para 7.2.2.
Competition Act, 2002 which provided for establishment of the Competition Commission of India to achieve objects of the Act.\textsuperscript{28}

**Effect of Anti-competitive practices on consumers**

For the purpose of addressing its duty to eliminate practices having adverse effect on competition, promoting and sustaining competition, protecting the interest of consumers and ensuring freedom of trade carried on by other participants in markets in India,\textsuperscript{29} the Act provides for inquiry into alleged contravention of provisions relating to anti-competitive agreements, abuse of dominance and combinations by the regulatory body. The Act provides not only for protection of trade but also protection of consumer interest.\textsuperscript{30}

Section 3(1) is a general prohibition of any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.\textsuperscript{31} Section 3(3) deals with agreements between the competitors at the same stage of production in the same market. Such horizontal agreements are presumed to have appreciable adverse effect on competition.\textsuperscript{32}

On the other hands agreements which are between parties at different stages of production level and thus in different markets is considered to be violative of Section 3(1) only if they have appreciable adverse effect on competition. Thus while Section 3(1) and Section 3(3) is concerned with per se rule, Section 3(4) is to be tested on the basis of rule of reason. The restraint should not destroy competition and to determine the court must ordinarily consider peculiar facts of

\textsuperscript{28} The Competition Act, 2002 (Act 12 of 2003) s 7.
\textsuperscript{29} The Competition Act, 2002 (Act 12 of 2003) s 18.
\textsuperscript{30} T.Rampappa, *Competition Law in India: Policy, Issues and Developments* 57(Oxford University Press, New Delhi, 2\textsuperscript{nd} edn., 2012).
\textsuperscript{31} T.Rampappa, *Competition Commission of India v. Steel Authority of India* Civil Appeal No. 7779 of 2010 decided on 9\textsuperscript{th} September 2010.
\textsuperscript{32} The Competition Act, 2002 (Act 12 of 2003) s 3(3).
each case. To determine an appreciable adverse effect on competition the Commission considers among other factors the accrual of benefit to consumers.

For determining an abuse of dominant position by an enterprise the Commission gives regard to various factors including dependence of the consumers on the enterprise. Section 6 makes combinations amongst person or enterprises subject to the same test of not having appreciable adverse effect on competition within the relevant market. Thus competition law in India takes into account consumer interests. In certain cases the Competition Commission finding no prima facie basis rejected the matter exercising its powers under Section 26, but in some others it has taken the consumer welfare standard approach while determining existence of anti-competitive practice having appreciable adverse effect on competition.

The consumer welfare standard approach is apparent in *Belaire Owner’s Association v. DLF Limited, HUDA & Ors* where the informant had entered into standard form contracts with DLF Limited for allotment of apartments in their Group Housing Complex. The Commission directed the Director General to investigate into allegation of unfair and arbitrary terms in the contract in abuse of dominance by DLF. DG found the various clause of the agreement as violative of Section 4(2)(a) of the Act. The DG report took note of the effect on consumer stating the presence of information asymmetry. It stated that DLF formed the high-end residential market of Gurgaon and a customer wanting a flat would not approach even a lower priced flat in other part of Gurgaon. CCI considered the report of the DG and observed that the terms of contract were

33 *Board of Trade of City of Chicago v. US* 246 US 231 (1918)
34 The Competition Act, 2002 (Act 12 of 2003) s 19(3) (d).
37 Case No.19 of 2010.
‘unfair’ being in disregard on consumer’s rights. Such a practice by the dominant firm might be cause for small players to follow suit.

The Competition Commission of India took this approach in the case of Ramakant Kini v. Dr. L.H. Hiranandani Hospital\textsuperscript{38} where the opposite party required that patients seeking maternity services to use the stem cell supplier service of Cryobank exclusively and did not inform the informant that outside stem cell body would not be allowed inside to collect stem cell. It limited the choice of consumer who wanted to avail their maternity service to either stem cell service or choose some other hospital itself. The Competition Commission took note of the effect on consumer observing that patients who take maternity services of a maternity consultant develop a bond with them over time making it difficult for them to another hospital. Passing an order under Section 27 of the Act the Commission imposed a fine of Rs.3.81 crore on the hospital.

However these are exceptional instances of consideration of agreements which are generally considered to fall under unfair trade practices, the Commission does not take initiate inquiry into cases where there is no prima facie case of anti-competitive practices. There needs to be evidence which suggests existence of dominance to establish a prima facie case for the Commission to issue directions to the Director General to investigate. In the case of Neelam Sood v. M/s Raheja Developers Pvt. Ltd.\textsuperscript{39} wherein the informant complained of unfair and arbitrary terms in the Flat Buyer’s Agreement which they had entered into with the opposite party, a real estate developer, for the purchase of a flat in a residential complex. Finding that there was no evidence to suggest that the opposite party held dominant position in provision of housing services in Gurgaon, the Commission closed the case under provision of Section 26(2).

\textsuperscript{38} Case No.39 of 2012.
\textsuperscript{39} Case No. 62 of 2011.
This approach is again apparent in *Ohm Value Services Ltd. v. Janta Land Promoters Ltd.*\(^40\) the informant contended that the conditions laid out in the allotment letter by the opposite party for allotment of land for setting up non-polluting industries were unfair and in abuse of its dominant position. Clause 6 of the allotment letter allowed the opposite party to charge 18% interest per annum for delayed payments or cancellation of allotment but there was no provision for the informant to charge penalty for default or deficiency on part of the Opposite Party. The Commission observed that there was prima facie no evidence to suggest that the Opposite party holds a dominant position in the market for industrial plots in the State of Punjab, since it found that consumers in such a market had a choice of switching to other players in the market if they found the terms unfavourable.

Observing that there existed other market players in the relevant market of “the services for development and sale of residential units in Gurgaon” including DLF, Anantraj Group, Earth Infrastructure Group the Commission did not consider the terms of the Floor Buyer’s Agreement to be violative of Section 4 of the Act.\(^41\) Therefore it is clear that the Competition Commission sometimes considers instances of unfair trade practices though they are primarily concerned with relation between business and consumer when the business has the capacity to influence the market by imposing unfair conditions and leading the small players to follow suit.

\(^{40}\) Case No.45 of 2014.

\(^{41}\) *Shri Kirat Singh v. M/s Orchid Infrastructure Developers Pvt. Ltd, HUDA and Ors.* Case No.51 of 2014.
Conclusion

Unfair trade practices like discriminatory or unfair terms of contract, misleading advertising, excessive pricing have direct effect on consumer welfare, whereas restrictions on other practices have indirect impact on consumer welfare.\(^{42}\) The *Belaire Owner’s Association v. DLF Limited, HUDA & Ors*\(^{43}\) and *Ramakant Kini v. Dr. L.H. Hiranandani Hospital*\(^{44}\) cases show that in certain cases the Commission takes into consideration the effect on consumers. Though they have different approaches for remedy, competition law and consumer protection policy have the common aim of consumer welfare. To quote Mr. Subhod Prasad Deo, former Additional Director General of Competition Commission of India, “it seems that while it adopts the classical competition standard in most cases, it is, at the same time, not averse to adopting the consumer welfare standard.”\(^{45}\)

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\(^{43}\) Case No.19 of 2010.

\(^{44}\) Case No.39 of 2012.