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COMPARISON OF COMPETITION LAWS BETWEEN USA, UK, EU AND INDIA

Akhila Achuthan*

ABSTRACT:

The Indian Competition Act of 2007 is the regulatory body supervising domestic competition as is carried out by the businesses under its ambit and seeks to promote a healthy competitive environment while simultaneously encapsulating the needs of the society. In order to identify its pros and cons, effective analysis is needed to be done with regards to how competition works in other countries and what they do right to make their economy a reckoning force in the global marketplace. UK, USA and the EU as a whole are among the strongest international markets which would lead a simplistic derivation of the fact that perhaps internal competition legislations are a contributory in the same. The author, by way of this research attempts at identifying the uniqueness in the application of competition laws in these nations and at the same time intends to identify the deficiencies in the Indian Competition law by explaining the working of the current system to find out aspects that require further insight into.

Key words: *Economy, Markets, India, USA, UK, EU, Competition, Anti-competitive, Mergers, Acquisitions, Sectors.*

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INTRODUCTION

The World Bank in 1999 explained competition law as “*a situation in a market in which firms or sellers independently strive for the buyers’ patronage in order to achieve a particular business objective for example, profits, sales or market share.*”¹ Competition law is essentially the laws governing the concept of competition as it is understood within a country whose main aim is the progress of the economy while simultaneously giving newcomers and other smaller firms a chance.

Competition law can be compared to as the legislations to the people. It has a governing set of rules which all subjects are required to abide by and has enforcement authorities that take the requisite action against subjects in violation of the same.

Competition law in India: The history of Competition Law in India, in its modern application can be traced to the Monopolies and Restrictive trade Practices Act of 1969 (MRTP Act). This Act, at the time of initiation, was rather important as India was a young nation with a high-income disparity among its citizens and it was essential to prevent the abuse of the lower income entities with that of entities with more economic power. The MRTP Act, by way of its operation facilitated the entry of newer firms and gave the government a significant hold over existing ones. Being the newly developing economy that it was, government scrutiny was of the essence to ensure that all economic functions are lawful, fair and beneficial for society².

However, as the Economy progressed, the MRTP Act which was meant for facilitation of markets was discovered to have been evolved into a hurdle for businesses owing to severe government scrutiny and multiple license policies and tariffs. The then Prime Minister of India, P.V. Narasimha Rao along with the former Minister of Economics, Dr. Manmohan Singh, developed an ingenious new economic system which put an end to the infamous “License Raj”. They in conjunction, terminated the previous act under the New Economic Policy of 1991 three words guiding their future intentions. “Liberalization, Privatization and Globalization.”³

¹ Evolution of ‘Monopolistic and Restrictive Trade Practices’ as a Competition Law, Knowledge First, 28th January, 2019, <http://www.knowledgefirsteducational.com/evolution-of-monopolistic-and-restrictive-trade-practices-as-a-competition-law/>

² Monopolies and Restrictive trade practices Act 1970, GK Today, 24th September, 2011, <https://www.gktoday.in/gk/the-monopolies-and-restrictive-trade-practices-act-1970/>

³ Manu Balachandran, How Narasimha Rao fixed the Indian Economy, QuartzIndia, 6th October, 2016, <https://qz.com/india/799883/how-narasimha-rao-fixed-the-indian-economy-and-the-congress-party-only-to-be-forgotten/>

In 1999, the Raghavan committee⁴ was created to advise the government on the economic reforms necessary under competition law to maintain consonance with the modern international economy, based on whose findings in 2002, the Indian government enforced the Competition Act which was customized so as to ensure the existence of space for friendly competition while simultaneously creating barriers for unfair practices that would affect other members in the market and is the Act that is currently in use.

Along with the 2007 amendment which enabled the establishment of the Competition Commission of India (CCI)⁵, the Competition Act's primary focus points can be deemed as follows:

- a. Prohibition and prevention of anti-competitive agreements⁶
- b. Prevention and penalization of Abuse of dominance⁷
- c. Regulation of Combinations⁸
- d. Enabling of competition advocacy⁹

⁴Suni Pun, History and development of Competition Law in India, Ipleaders, 17th February, 2017, <https://blog.ipleaders.in/competition-law-india/>

⁵ Sharadul Thacker, Introduction Of The Competition (Amendment) Bill, 2007, Mondaq, 25th September 2007, <http://www.mondaq.com/india/x/52606/Trade+Regulation+Practices/Introduction+Of+The+Competition+Amendment+Bill+2007>

⁶ As defined and explained in Section 3, Competition Act, 2007

⁷ As defined and explained in Section 4, Competition Act 2007

⁸ As defined in Section 5, Competition Act, 2007

⁹ As explained in Chapter 7 of the Competition Act 2007

COMPARISON OF COMPETITION LAW BETWEEN INDIA AND USA

The Antitrust Law:

Competition Law in USA is synonymously referred to as its “Antitrust Law” and promotes vigorous competition among its subjects. By way of its legislations, it facilitates what is referred to as a free market Economy and seems to believe that the high competition will be mutually beneficial for both, consumers as well as suppliers as prices will be lower in order to attract consumers and participants in the market have to come up with innovative ways to ensure their product attracts more than that of another.¹⁰

There are three statutes enforcing competition law in USA which are as follows¹¹:

- a. The Sherman Act of 1890: It can be identified as an amalgamation of rules regarding mala-fide combinations and abuse of dominance and prevents events such as price fixing, creation of cartels, abuse of power by monopolies etc.
- b. The Clayton Act of 1914: This act seeks to keep the competitive spirit of the economy alive but attempting to prevent mergers and acquisitions that will hamper the same.
- c. Federal Trade Act 1914: It is the Act that led to the establishment of the Federal Trade Commission (FTC) as the enforcing authority of the aforementioned acts. Much like Chapter 7 (2007 Amendment) of the Indian Competition Act which gave establishment to the Competition Commission of India¹².

Difference between competition Laws of USA and India

India seems to be a more compassionate legislation when it comes to the comparison between competition laws of USA and India. USA treats competition law as a criminal law whereas India treats it as an administrative law. The Indian Competition Act attempts to be all encompassing with one act serving multiple purposes while the US Antitrust laws diversify them into three Acts i.e. the Sherman Act, the Clayton Act and the Federal Trade Act¹³. Indian competition law is concerned only if the outcome of a certain business function is anti-

¹⁰ Guide to Anti-trust laws, Federal Trade Commission, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws>

¹¹ Barclay Palmer, Understanding Antitrust laws, Investopedia, 20th May, 2019, <https://www.investopedia.com/ask/answers/09/antitrust-law.asp>

¹² Supranote 9

¹³ Supranote 11

competitive or not and is not concerned with the mens rea behind the creation of said function. However, in USA, intention plays a key role because, as mentioned previously, the Antitrust law is a criminal law and under common jurisprudence, an act is criminal only if the guilty act (actus reus) was backed with a guilty intention (mens rea)¹⁴.

In terms of enforcement, the CCI, as compared to the FTA, enjoys the privilege of issuing substantive laws, determine its own procedures, and has so far avoided bad legal precedents. However, unlike that of the FTA, it seems to be that there is a growing quantitative and qualitative need of staff in the CCI. The Indian competition law would also benefit from adopting some of USA's Antitrust policies such as providing clearer definitions of what anti-competitive activities are and perhaps even impose a penalty system (perhaps not as hard as the treble¹⁵ damage system that USA has) in order to act as a deterrent from future violators of the Statute.

COMPARISON OF COMPETITION LAW BETWEEN INDIA AND UK

About competition law in UK: UK's competition laws, prima facie, seem to create a centralized concentration of power i.e. with the British Parliament and bears influences of both, the common British competition system as well as that of the common European systems in place. The origin of modern competition law in UK can be traced back to the Fair-Trading Act 1973¹⁶ which was created to restrict the creation of monopolies by way of government authority that controlled the company's functions. In a way, it can be compared to India's competition laws before the abolition of the license raj.

As the economy progressed, and with the increasing need to strengthen relations between UK and other European nations, the Fair Trading Act was repealed to be replaced by the Competition Act of 1998 which made the UK competition law dynamic to accommodate the laws provided by the EU and other laws that will facilitate a steady economic growth by

¹⁴ William Schabas, Mens Rea, Actus Reus and role of the state, Oxford Scholarship Online, DOI:10.1093/acprof:oso/9780199653072.003.0006, <https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199653072.001.0001/acprof-9780199653072-chapter-6>

¹⁵ Will Kenton, Treble Damages, Investopedia, 23rd April, 2018, <https://www.investopedia.com/terms/t/trebledamages.asp>

¹⁶ Fair trading Act, 1973, <https://financial-dictionary.thefreedictionary.com/Fair+Trading+Act+1973>

creating better relations among its other European counterparts. The new law focuses on three primary aspects which are:

- a. Prevention of agreements that will prohibit healthy competition
- b. Banning abusive behaviour that seems to arise from having a dominant position in the market.
- c. Acting as a supervisory authority during mergers and acquisitions between large countries¹⁷.

Differences of competition law in UK and India:

The Indian approach to competition law after the 1991 policy¹⁸ seemed to be promotion of business initiatives by reducing governmental supervision only to assess compliance with the statutes provided. However, the UK laws, in contrast, seem to micromanage the inter-corporate agreements among its subjects in order to ensure that there is no scope for existence of monopolistic markets. The coin flips both ways when it can be said that the severe government scrutiny can dissuade innovation but also prevents companies from having a monopoly like power in the country.

In India, there are three enforcement institutions namely the Competition Commission, Director General and the Competition Appellate Tribunal whereas in UK, the enforcement authorities are Office of Fair Trading (OFT), Competition Commission, Director General of fair trading (with whom investigative powers are vested with) and CAT.

The general contrasting view of the two can appear as making the UK as a constricting Act whereas the laws in India seek to restrict unfair practices in a manner that enhances factors contributing to healthy domestic competition.

With respect to investigation, the UK competition law seems to have the upper hand. Indian Competition Act though talks about investigation but unlike U.K Competition Act it does not talk about the power of the enforcement authority to enter the business premises as talked about in Section 27 and 28 of the U.K Competition Act. The concept of privileged communication as provided under Section 30 of the U.K Competition Act is not included in the Indian Competition Act. This non-inclusion can affect the right of the undertakings or legal or natural

¹⁷ Competition Act 1998, UKORR, <https://orr.gov.uk/rail/promoting-competition/competition-act-1998>

¹⁸ Supranote 4

persons who are undergoing investigation. There also seem to be a lack of coordination between competition enforcement authorities in India as compared to what exists in UK.¹⁹

COMPARISON OF COMPETITION LAWS BETWEEN INDIA AND EU

Competition laws in EU: The general policy of laws in the European Union is the fact that they are mostly directive in nature and seek to establish harmony by uniformity. The only mandatory laws are those that deal with inter-governmental relations. Therefore, there is a significant amount of lack of enforceability. However, it is, as a multilateral agreement if being followed in its complete and truest essence, one that can create a united economic development among its members. A key difference of EU's laws as compared to those of other nations is that due to it being directive in nature, the laws are generally in the Public interest whereas those applied in other nations seem to be in the interest of public welfare. The difference between the two being where Public interest is the forwarding of a common sentiment whereas interest of public welfare is narrowed down to what regulating authorities perceive to be most beneficial for its citizens²⁰.

Competition laws in the EU seek to unify its members as one entity who compete against economies around the rest of the world. Its view can be compared to it perceiving all its members as one nation. While most governments seek to promote healthy competition within their territories, the EU, in contrast, seems to attempt to eliminate internal competition and instead promote competitions a united front by its members against the rest of the nations²¹.

Difference between competition law in EU and India: While the aspect of lack of enforceability is visibly expressed in the Treaty on the Functioning of the European Union as compared to that of Indian competition laws, there are more differences among the two. The starting of which is the title of the governing statute which in India is the Competition Act of 2007 whereas in the EU it is the Treaty on the Functioning of the European Union (TFEU)²². The Indian legislation attempts to define what constitutes an anti-competitive contract while

¹⁹Shrushti Dutt, COMPETITION LAW IN INDIA, US & UK: A COMPARITIVE ANALYSIS, 2012, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.646.4171&rep=rep1&type=pdf>

²⁰ EU Law, Application of EU law, https://europa.eu/european-union/law/application_en

²¹ Bertold Bär-Bouyssière and Patrick Van Eecke, EU: Competition policy in the digital era - Part I, Lexology, <https://www.lexology.com/library/detail.aspx?g=55fbe46f-6fbb-4c5d-9486-efd3e7fdbce1>

²²Treaty on functioning of the European Union, Thompson Reuters blogs, [https://uk.practicallaw.thomsonreuters.com/2-107-6192?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/2-107-6192?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

EU attempts to combat anti-competitive practices that arrive out of an agreement. In other words, India seems to attempt to identify the roots where as EU is focused on putting out the fires started by the roots. The same is demonstrated in the case of *European Night Services v. Commission* (1998)²³ where it was held that the agreements may be kept in two boxes: the ‘object box’ and the ‘effect box’. The agreements falling in the ‘object box’ are considered as obvious infringement of Art 101(1), whereas for agreements in the ‘effect box’, anti-competitive effect has to be proved.

SUMMARY OF DIFFERENCES

A brief idea of the differences between the aforementioned nations is explained in the table provided below:

Factor	USA	UK	EU	India
Reason behind creation	To emerge as a global economic frontrunner	To maintain a firm hold and control over private companies	To provide a set of common directing guidelines for harmonious relations among its members	To prevent a single supplier market.
Nature	Competitive with other economies	Controlling	Directional	Assisting and arbitrating
Mode of enforcement	Criminal	Penalty based	Subject to laws of the member nation	Administrative
Importance of intention of law	Important	Important	Not important	Not important

²³ *Night Services v. Commission*, JUDGMENT OF 15. 9.1998 — JOINED CASES T-374/94, T-375/94, T-384/94 AND T-388/94

Current governing act	Sherman Act of 1890, Clayton Act of 1914 and Federal Trade Commission Act of 1914	Competition Act 1998 and Enterprise Act 2002	Provisions of Treaty on the Functioning of the European Union	Competition Act 2002
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DEFICIENCIES IN CURRENT COMPETITION LAWS IN INDIA

While the competition laws in India try to be all encompassing and are definitely adequate on a domestic level, there needs to be a lot more done to make the Indian economy a prime competitor on the international front and these improvements can be incorporated from the laws of other nations. Some of the suggestions include:

- a. There is a need to focus on the development of larger industries as well. The Competition Act is, in no doubt, an essential component that increases business opportunities and providing a stable source of income thereby to its subjects. However, it also needs to get more competitive on the global front which means that it also needs to boost the most profitable companies in the market. And while it can be said that there are provisions which implicitly supplement the same, the act needs to take into purview that these companies could increase revenue if the laws were made a little more dynamic to their needs. Agreements must be termed as anti-competitive if they prohibit entry of other firms for sure. However, should the benefits of this agreement result in other public benefits such as increased employment, decreased inflation, increased GDP etc, the benefits must be taken into consideration and therefore the agreement must be allowed.
- b. There needs to be a spiralling concentration of focus with respect to promotion of industries. In an economy, there are three main sectors i.e. the primary (producing raw materials) sector, the secondary (manufacturing) sector and the tertiary (service) sector²⁴. Most of the Indian employ work in the primary sector and the Competition Act, which treats all three sectors on an equitable basis, takes away the need to focus

²⁴Tejvan Pettiger, Sectors of the Economy, Economics help, 19th July, 2019, <https://www.economicshelp.org/blog/12436/concepts/sectors-economy/>

resources on promoting the most profitable sector in the economy i.e. the tertiary sector. The law needs to be amended in a way that boosts the tertiary sector while simultaneously providing for the sustenance of those in the primary and secondary sectors. This may be done by giving subsidies to the primary sector workers but increasing scope of tax deductions to those in the tertiary.

- c. It needs to be more dynamic with the changing economy. At the time of its inception, the Competition Act boosted the Indian Economy as the fastest growing economy in the world. But as of 2019, it slipped down to number 7 in the ranks²⁵ which indicates that what worked previously isn't working now implicitly signifying a change in an economic variable that is yet to be taken into purview by the act. The act needs to leave itself enough scope to compete with an increasingly competitive global market which, as of the current act, is not set out as a priority.
- d. Needs to promote intra-industrial harmony to promote growth in international markets. When the benefits of an agreement outweigh the negatives of it being anti-competitive in nature, it must be taken into consideration. Upon reaching a situation of secured economic stability, the government may perhaps motivate entry into the market again by way of promotions made exclusive to said new entrants provided it can be discerned that their functions will not hamper the growth of the economy.
- e. The act needs to include punitive measures. Punishments act as a strong deterrent and will promote a sense of unity among various domestic industries in order to avoid penalties and criminal charges. The revenue generated from the imposed penalties too may contribute to an increase in the financial reserves of the nation which can then be used for purposes of sustainable growth and development.
- f. The act needs to segregate the various market sectors and provide rules for them independently. A uniform act was appropriate when the concern was economic growth. Now the concern has evolved into global competition which requires laws to be separated on the nature of the industry and be drafted in a way as to yield the most profits out of the industries by concentration of resources.

²⁵Shreya Nandi, India Slips to 7th position in Global GDP Rankings, 2nd August 2019, Livemint, <https://www.livemint.com/politics/policy/india-slips-to-7th-position-in-global-gdp-ranking-1564747117029.html>

CONCLUSION

The whole purpose of a comparative analysis is to highlight the contrasts between the subjects discussed to enunciate the costs and benefits each subject possesses. India's philanthropic approach in competition law is exceptional on a domestic basis but on the international front, seems to need to widen its scope for revision of its policies to be accommodating to global economic changes among other factors. A healthy competition system is the making of superpowers and if the proposed changes were to be incorporated, there can be an expectation of a revolutionary change. There's a reason that the term "deficiencies" were used and not the term "wrong". This is because it is not the act in itself that is erroneous. In a *ceteris paribus* case, the act would indeed be utopian. But there are some independent variables that affect the same that have, so far, not been taken into purview and on addition of these variables, there can be the arrival of the change that the Indian Economy needs.