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ANALYSIS ON THE ROLE OF COMPETITION COMMISSION OF INDIA IN COMBATING ANTI - COMPETITIVE PRACTICES.

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ABSTRACT:

In India the trend of earning through anti-competitive practises is gaining huge momentum that people try to find shortcuts very often. These anti-competitive practises affect the nation's economy to a huge extent. In order to curb such practises the Competition Act of 2002 has established the Competition Commission of India. So this research is to analyse the various roles and functions that the CCI performs to combat anti-competitive practises within the nation. And also the motive of the research is provide with some suggestions and recommendations so the CCI and perform its role better. Competition Commission of India though a much needed body in combating anti-competitive practises, is not allowed to function effectively and independently due to a huge amount of political interference. Further CCI is also having a very strict bureaucratic model that too many hierarchical problems exist within the organisational structure.

INTRODUCTION:-

The Competition Act, 2002 was enacted by the Parliament of India and governs Indian competition law. It replaced the archaic Monopoly and Restrictive Trade Practices Act, 1969. Under this legislation, the Competition Commission of India was established to prevent activities that have an adverse effect on competition in India.¹This act extends to whole of India except the State of Jammu and Kashmir. It is a tool to implement and enforce competition policy and to prevent and punish anti-competitive business practices by firms and unnecessary Government interference in the market. Competition laws are equally applicable on written as well as oral

¹ "Sub-section 1 of Section 7 of Competition Act 2002". *Indian Kanoon*.

agreement, arrangements between the enterprises or persons.² Among various factors that are drastically affecting the nation's economy, anti-competitive practises is considered to be an important one. Under the competition act of 2002, CCI has been established to combat such practises. In this research I will analyse the various functions and roles that CCI perform to combat anti-competitive practises with some suggestions and recommendations.

COMPETITION ACT AND COMPETITION COMMISSION OF INDIA:

The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, follows the philosophy of modern competition laws. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations (acquisition, acquiring of control and Merger and acquisition), which causes or likely to cause an appreciable adverse effect on competition within India.³ An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.

The objectives of the Competition Act are sought to be achieved through the Competition Commission of India (CCI). It is the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in the markets of India. The Commission is also required to give opinion on competition issues on a reference received from a statutory authority established under any law and to undertake competition advocacy, create public awareness and impart training on competition issues.⁴ Competition Commission of India is a body of the Government of India responsible for enforcing The Competition Act, 2002 throughout India and to prevent activities that have an adverse effect on competition in India. It was established on 14 October 2003. It became fully functional in May 2009 with Dhanendra Kumar as its first Chairman.⁵ An Act to provide, keeping in view of the economic development of the country, for

²"CCI will be in full operation next year". The Hindu. 2007-09-11. ISSN 0971-751X.

³"The Competition Act – Act No. 12 of 2003" (PDF). Competition Commission of India

⁴"CCI ruling on DLF: Changing the builder-buyer equation?". Money Control.

⁵"CCI through the eyes of the media: Doing well!". MoneyControl.com.

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ANTI-COMPETITIVE PRACTISES AND ITS IMPACTS:

Anti-competitive practices are business, government or religious practices that prevent or reduce competition in a market. Some of the anti-competitive practices includes, dumping, where a company sells a product in a competitive market at a loss. Though the company loses money for each sale, the company hopes to force other competitors out of the market, after which the company would be free to raise prices for a greater profit. Exclusive dealing, where a retailer or wholesaler is obliged by contract to only purchase from the contracted supplier. Price fixing, where companies collude to set prices, effectively dismantling the free market. Refusal to deal. Dividing territories, an agreement by two companies to stay out of each other's way and reduce competition in the agreed-upon territories. Limit pricing, where the price is set by a monopolist at a level intended to discourage entry into a market. Tying, where products that aren't naturally related must be purchased together. Resale price maintenance, where resellers are not allowed to set prices independently. Religious / minority group doctrine, where businesses must apply tribute to a significant (normally religious) part of the community in order to engage in trade with that community.⁶

Anti-competitive practices have implications for the economic growth and development of nations. Such practices restrict competition and deteriorate consumer welfare by creating entry barriers and price increases, which lead to efficiency and innovation concerns. Cartels are one of the most harmful anti-competitive practices and cause significant damage to the economy as well as to consumers.⁷

Abuse of a dominant position is another type of anti-competitive conduct, which can be exercised by large firms, both multinationals and state-created monopolies, such as utilities, transport and telecommunications, in relatively smaller markets. Rules on abuse of dominance aim to ensure free competition in markets, which creates incentives for firms to become more efficient and innovative. Such rules are also used to contribute to the equal distribution of wealth

⁶Michael Burgan (2007). *J. Pierpont Morgan: Industrialist and Financier*. p. 93. ISBN 9780756519872.

⁷"CCI will be in full operation next year". The Hindu. 2007-09-11. ISSN 0971-751X.

among different parts of the society. However, the level of economic development of countries and the size of their economies may create contradicting situations or factors from a competition's perspective.

Competition law and policy cross-cut many areas, one of which is intellectual property rights (IPR). IPR protection may endow companies with significant market power. While IPR policies increase incentives to innovate in an economy, they may cause efficiency losses due to abuse of market power by companies protected by IPR rules. In this respect, there is a trade-off between competition law and patent policy. This is even more so for developing countries considering the fact that innovating companies are usually situated in developed countries. Developing countries need to strike the right balance between competition and IPR policies, particularly patent policies, depending on their productive, imitative and innovative capacities as well as their openness to attract foreign direct investment from developed countries.⁸

It is usually difficult to practice anti-competitive practices unless the parties involved have significant market power or government backing. Monopolies and oligopolies are often accused of, and sometimes found guilty of, anti-competitive practices. For this reason, company mergers are often examined closely by government regulators to avoid reducing competition in an industry. Although anti-competitive practices often enrich those who practice them, they are generally believed to have a negative effect on the economy as a whole, and to disadvantage competing firms and consumers who are not able to avoid their effects, generating a significant social cost. For these reasons, most countries have competition laws to prevent anti-competitive practices, and government regulators to aid the enforcement of these laws.⁹The argument that anti-competitive practices have a negative effect on the economy arises from the belief that a freely functioning efficient market economy, composed of many market participants each of which has limited market power, will not permit monopoly profits to be earned and consequently prices to consumers will be lower, and if anything there will be a wider range of products supplied.

ROLE OF CCI IN COMBATting ANTI-COMPETITIVE PRACTISES:

⁸"Organogram | Competition Commission of India". www.cci.gov.in.

⁹"CCI to act as nodal agency to check anti-competitive practices". The Hindu Business Line.

The fair trade regulator has been in existence for over a decade, quietly shaping the commercial market; still the questions being dealt by the commission continue to grow ever more complex. The nature of commercial enterprise is such that at times it becomes difficult to predict, without sound legal advice, what would be deemed anti-competitive and what actions would be adjudged to have no appreciable effect on competition.¹⁰

In order to achieve its objectives, the Competition Commission of India endeavors to do the following,

- Make the markets work for the benefit and welfare of consumers.
- Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.
- Implement competition policies with an aim to effectuate the most efficient utilization of economic resources.
- Develop and nurture effective relations and interactions with sectorial regulators to ensure smooth alignment of sectorial regulatory laws in tandem with the competition law.
- Effectively carry out competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.

CCI, which became fully functional in 2009, effectively reflects a legislative shift from the binding mind-set that prevailed at the time of License Raj to a conducive regulatory ambience for enhancing consumer welfare by sustaining and encouraging competition in the market. It also functions as a means to support sector-specific regulatory bodies as the role of state as proprietor gets diminished across industries, especially utility and infrastructure, and private participation and ownership increasingly become the driver of economic activities, to ensure a level-paying field for all market participants. A key objective of CCI is to ensure that key players do not abuse their dominant position to involve in anti-competitive activities by using collusion or cartelization to gain control and market share in specific spaces.¹¹

¹⁰(1993). *The Antitrust Paradox* (second edition). New York: Free Press. ISBN 0-02-904456-1.

¹¹Joseph E. (2008). "antitrust enforcement," *The New Palgrave Dictionary of Economics*, 2nd Edition.

In fact, the Competition Act clearly prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations via mergers and acquisitions that may hurt competition. CCI is also expected to protect the interests of consumers and ensure freedom of trade in the market in addition to eliminate practices that curb competition. In addition, it is mandated to work in tandem to carry out competition advocacy. CCI has been probing several sectors especially real estate, entertainment, cement, petroleum, steel, travel industry, healthcare and education to nip anti-competition practices and strategies of a varied bunch of players.

In regard to Anti-Competitive Trade practices of Chemist Associations, the following activities undertaken by various chemist associations were adjudged to be anti-competitive by the Commission;

- Issuance of No Objection Certificate or letter of consent by such associations for opening chemist shop/being appointed stockists/distributor/whole-seller.
- Compulsory payment of PIS charges by pharmaceutical firms/manufacturers to associations for release of new drug/new formulation.
- Fixation of trade margins at different levels of sale of drugs/medicines.
- Issuance of instructions to chemists/druggists/shops/stockists/wholesellers/manufacturers restricting discounts on sale of drugs in retail or wholesale.
- Issuance of boycott calls by the associations to their members against any enterprise for not following the instructions of associations.

Further in regard to anti-competitive practices in film industry, in a recent order the competition commission dealt with Tie – in agreements prevalent in the film industry. In the film industry a film has three stages production, distribution & exhibition. Many times big production houses tie the exhibitors in by forcing them to accept exhibition of two films at once. In the instant case it was alleged by the informant ('Ajay Devgn Films Pvt. Ltd.') that 'YashRajFilmsPvt. Ltd.' had put a condition on single screen theatres that if they wanted to exhibit the film 'EkTha Tiger' they would have to simultaneously agree to exhibit another film 'Jab Tak Hai Jaan'. It was contended that such a conditions anti-competitive as it restricts the market available to other producers and thus adversely impacts competition. The reasoning given

by the commission was that; a. the exhibitors were at full liberty to either accept or reject the offer, b. No exhibitor had come-forth complaining against this condition, and c. No injury/loss was caused to the informant as he was able to procure for himself a reasonable number of single screen theatres for exhibiting its release 'Son of Sardar'. Hence upon consideration the Commission did not find such an agreement to be contravening the Competition Act.

In regard to abuse of dominant position the Coal India Limited case dealt by CCI is a very important one. In which the Commission while dealing with a case involving non-coking coal, used in power generation and which has no viable substitute, came down heavily on Coal India Limited. The Commission determined that Coal India Limited enjoys a near monopoly and there is extraordinary dependence of thermal power plants on Coal India Limited for supply of fuel to run the power plants. It was observed by the commission that the Fuel Supply Agreements were drafted by Coal India Limited in an arbitrary manner without any meaningful discussion with the other stakeholders.

Further some of the best example where the CCI has played its role to combat anti-competitive practices are,

- In December 2010, CCI instituted a probe to examine if there was any cartelisation among traders when onion prices touched 80 rupees, but did not find sufficient evidence of market manipulation.¹²
- In June 2012, CCI imposed a fine of ₹63.07 billion (US\$940 million) on 11 cement companies for cartelisation. CCI claimed that cement companies met regularly to fix prices, control market share and hold back supply which earned them illegal profits.¹³
- On 8 February 2013, CCI imposed a penalty of ₹522 million (US\$7.8 million) on the Board of Control for Cricket in India (BCCI) for misusing its dominant position. The CCI found that IPL team ownership agreements were unfair and discriminatory, and that the terms of the IPL franchise agreements were loaded in favour of BCCI and franchises had no say in the terms of the contract. The CCI

¹²Venkatesh, Mahua (15 August 2013). "Competition panel to probe hoarding, onion price rigging". Hindustan Times (New Delhi ed.)

¹³"Competition Commission of India imposes Rs 6,307 crore penalty on 11 cement companies". Economic Times. 22 June 2012.

ordered BCCI to "cease and desist" from any practice in future denying market access to potential competitors and not use its regulatory powers in deciding matters relating to its commercial activities.¹⁴

- In 2014, CCI imposed a fine of Rs. 1 Crore upon Google for failure to comply with the directions given by the Director General (DG) seeking information and documents.¹⁵
- On 17 November 2015, CCI imposed a fine of INR 258 crore upon Three Airlines. Competition Commission of India (CCI) had penalised the three airlines for cartelisation in determining the fuel surcharge on air cargo penalty of Rs 151.69 crore was imposed on Jet Airways, while that on InterGlobe Aviation (Indigo) and Spice Jet are Rs 63.74 crore and Rs 42.48 crore, respectively.

These are all about the effective roles and functions at various instances played by Competition Commission of India in Combating anti-competitive practices.

SUGGESTIONS AND RECOMMENDATIONS:

Competition authorities, especially in newer jurisdictions, need to play a proactive role to create awareness regarding benefits of competition in the market. Compliance, necessarily, is a step ahead of awareness regarding benefits of competition law, and involves concrete steps by market players to ensure that their organizations do not engage in anti-competitive conduct. Infusing culture of competition compliance is pivotal for controlling anti-competitive practices by market players.

Till now, CCI has followed a unilateral approach of limited advocacy in this area. In tune with the global trend, CCI needs to follow a multi-pronged approach towards promoting a culture of competition compliance in India.¹⁶ Creating awareness regarding benefits of Competition Law is important for promoting compliance by the market players.

In relation to competition compliance, till now, the role of CCI has been restricted to limited awareness generation without proactive advocacy. CCI in some orders directed the

¹⁴"CCI ruling on DLF: Changing the builder-buyer equation?". Money Control. 4 January 2013.

¹⁵"Competition watchdog slaps Rs.52.24 crore fine on BCCI". Live Mint. Retrieved 8 February 2013.

¹⁶ CCI holds round-table meeting with top corporates, emphasises Competition Compliance for Good Corporate Governance , Available at <http://pib.nic.in/newsite/erelease.aspx?relid=91809>

infringers to submit undertakings to follow the directions given in the order. Such type of orders to submit undertaking and not to repeat the conduct is different from directing to undergo training for competition compliance or to institute a competition compliance programme in the governance framework of the infringer company. Although in some cases CCI has given directions to the parties to amend their contracts, yet there seem to be no case where CCI has advocated training and adoption of a competition compliance programme to an enterprise.

Till date, there are no sentencing guidelines issued by CCI. Further, the varied nature of penalties imposed by the CCI underlines the lack of clarity and systemization in competition law.¹⁷In absence of any guidelines or guidance from CCI on competition compliance, the businesses have to fall back on the orders passed by the CCI.¹⁸

These are certain suggestions and recommendations that the CCI needs to follow for better eradication of anti-competitive practises in the nation.

CONCLUSION:

The Competition Commission in thus actively ensuring fair competition. The market dynamics are sought to be kept in equilibrium and no single player should be able to acquire a position where he is able to operate independently of market forces and in the process adversely affect competition. Thus, there arises a strong need for the Business Organizations today to remain vigilant and not be in contravention of competition laws. As is apparent from few of the cases discussed above many of the conducts and clauses which were regarded as industry standard earlier are drawing heavy flak from the Competition watchdog, for being anti-competitive. These are all about the effective roles played by the competitive commission of India to combat anti-competitive practises at its best.

¹⁷ Competition Commission of India v. Steel Authority of India Limited (2010) 10 SCC 744

¹⁸ Pradeep S Mehta, 'Need for a realistic penalty regime', Financial Express, 29th March, 2013,