ONE HOUSE, MULTIPLE FAMILIES: SHOULD ENFORCEMENT OF CONSUMER PROTECTION AND COMPETITION LAWS BE HOUSED TOGETHER?

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ABSTRACT

With the increasing integration of India's economy with the rest of the world, growth of Indian companies has surpassed expectations. As a result, Indian companies have grown phenomenally and have established dominant positions within India. At the same time, companies based outside of India have entered into India's burgeoning and profitable consumer market. Thus, Indian regulators must grapple with two concerns: first, ensuring that there is competition in the markets and second, protecting consumers. It is trite that both concerns are essentially about enhancing consumer welfare, albeit via different pathways. Ensuring competition in the markets is a macro-based, supply-side approach to enhancing consumer welfare: an indirect approach. Consumer protection is a micro-based, transaction-focused, demand side approach to enhancing consumer welfare: a direct approach. This paper posits that despite this differential, there are advantages to housing enforcement of competition and consumer protection under the same house. Overall, benefits of such an amalgamation far outweigh the costs. To conclude, this paper submits

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merely housing these two disciplines is not an adequate strategy, it must be complemented with an educational outreach program. It is critical to ensure that the burden of enforcing consumer protection is shared between the Competition Commission of India and consumers.

1. INTRODUCTION

Consumer Protection and Competition laws are often seen as complementary forces: they result in the same outcome, but undertake different pathways to do so. Each pathway has its own mechanism, thereby creating different implications en route to the outcome.

The crux of the matter is the consequences of this relationship and the extent to which they can be reconciled. In the event, that such a reconciliation creates synergistic value and cost efficiencies, an argument can be made for the combination of two separate agencies into one umbrella watchdog. However, as with all merger situations, one must take into consideration whether such reconciliation creates net value to justify the abovementioned amalgamation.

This paper will proceed on three fronts; first it will chart the different pathways that competition and consumer protection policies and laws undertake. Second, it will analyse the interplay between both disciplines and the implications that emerge. Finally, it will enumerate on the practicality of amalgamating two agencies into a single one.

2. COMPETITION POLICY AND CONSUMER PROTECTION POLICY

Competition policy deals with anti-competitive practices arising from the exercise of undue market power by firms that reduce consumer welfare.[1] This may take the form of higher prices with reduced quality, restrictions in product and service choices and finally, an overall inertia in innovation.[2] Thus, competition policies seek to increase consumer welfare indirectly: by ensuring that markets are regulated to optimize consumer welfare.[3] This rationale was recognised by the Supreme Court of India when it noted that competition law promotes economic efficiencies and creates markets that are sensitive to consumer preferences.[4] Hence, competition policies take a macro approach; they do not directly deal with individual transactions between consumers and businesses. Instead, the effects of competition policies on those transactions are indirect.

Competition law concentrates on maintaining the process of competition between enterprises and remedies behavioural or structural issues to establish effective competition in the market. This results in greater economic efficiency, greater innovation and overall enhancement

[1] United Nations Conference on Trade and Development secretariat, *United Nations Conference on Trade and Development*, U.N. CONF. ON TRADE & DEVELOPMENT (Apr. 29, 2014), http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf.
[2] Meglena Kuneva, *Consumer and Competition Policies – Both for Welfare and Growth*, EUROPEAN UNION (Feb. 22, 2008), http://www.eu/rapid/press-release_SPEECH-08-95_en.pdf.
[3] Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 S.M.U. L. REV. 103, 103-04 (2007).
[4] Harsha Asnani, *What Is the Relationship between Competition Law and Consumer Protection*, IPLEADERS (May 10, 2016), https://blog.ipleaders.in/relationship-competition-law-consumer-protection/.

of consumer welfare. Thus, consumers get access to a wider variety of goods at affordable prices, and at higher quality.

Consumer protection policies, on the other hand, govern individual transactions to improve consumers' capabilities to make well-informed decisions and to protect consumers' interests by removing consumer detriment.[5] The two disciplines focus on dissimilar market failures and offer different remedies, but are both aimed at supporting well-functioning, competitive markets that uphold consumer welfare. They are mutually re-enforcing.

2.1 INTERPLAY – IMPLICATIONS OF THIS RELATIONSHIP

Despite the apparent complementariness of both disciplines, the effects of one create adverse consequences in the other. Although, they serve to create the same outcome, they each adopt a different machinery to fulfil that. This creates distinct implications for each discipline, some of which may be in direct conflict with the other.

Generally, consumer protection policies enable competitive markets to flourish by removing information asymmetries, by providing access to accurate information. Accurate information indirectly forces markets to get more competitive by driving producers to lower costs and to increase value of their products for consumers.

Likewise, and using a different pathway, competition policies push companies to be more sensitive to consumer preferences. Consumers directly benefit as such policies drive down costs when companies undertake economies of scale and scope in the short run. In the long term,

[5] *supra* note 2.

competition drives innovation, as companies innovate to survive. Innovation in turn creates products with greater value in terms of quality and variety. Due to the commonalities of the policies and their intended implications, both sets of policy tools can be harmonised into one agency. However, it must be noted that both policies utilise different pathways to reach their objective.

The differences in machinery undertaken by both disciplines stem from the nature and role of the disciplines. Competition policy is a creature of supply-side economics[6]in that it *inter alia* works to safeguard the sufficient and affordable choices consumers have. For example, within the Indian context, section 4 of the 2002 Competition Act[7] recognises when a company is considered to be abusing its dominant position; when said company "limits or restricts technical or scientific development relating to goods or services to the prejudice of consumers."[8]

It is clear, that the provision aims to enhance competition by targeting market players because section 4 regulates abuse of "dominant position."[9] Companies that meet this "dominant position" are those that enjoy a position of strength, in the relevant market within India however defined, that allows said company to affect its consumers or the relevant market to its advantage. Section 4 should be read together with section 19(4) of the 2002 Competition Act to determine whether a company

[6] United Nations Conference on Trade and Development secretariat, *United Nations Conference on Trade and Development*, U.N. CONF. ON TRADE & DEVELOPMENT (Apr. 29, 2014), http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf.
[7] Competition Act, 2002, No. 12, Acts of Parliament, 2003, § 4.
[8] *Id.*, § 4(2) (b) (i) & (ii).
[9] *Id.*, § 4(2).

enjoys a dominant position. Section 19(4) provides that a dominant position is to be determined, *inter alia*, by the following factors:[10]

a. Market share of the enterprise;
b. Size and resources of the enterprise;
c. Size and importance of the competitors
d. Dependence of consumers on the enterprise;
e. Market structure and size of market;
f. Barrier to entry:
    i. Regulatory barriers;
    ii. Financial risk;
    iii. High cost of capital for entry into relevant market;
    iv. Marketing entry barriers;
    v. Technical barriers;
    vi. Economies of scale;
    vii. High cost of substitutable goods; or
    viii. Service for consumers.

In addition, Section 19 of the Act stipulates that the Competition Commission of India is empowered to take *suo moto* action to remove practices that have an adverse effect on competition, to promote and sustain competition and to protect the interests of consumers and ensure freedom of trade carried on by other market participants.[11] Taken together, competition law is predominantly focused on supply-side economics and this market-based approach is predicated on the elimination of market distorting behaviour by firms. The focus here therefore, is the regulation

[10] *Id.*, § 19(4).
[11] *Id.*, § 18.

of firm behaviour and not the regulation of transactions between consumer and the company. It should be noted that the Competition Act does not preclude scrutiny of individual transactions where said transaction is deemed anti-competitive. This recognises the intersection between prevention of consumer harm and anti-competitive. The prevalence of such confluences further augments the value for a single agency.

On the flipside, consumer policy deals with demand-side issues by removing deceptive or unfair practices, which perpetuate information asymmetry and other impediments, thereby, allowing consumers to exercise their choices effectively. The Competition Act, 2002 does not recognise unfair trade practices, unlike the Consumer Protection Act, 1986.[12]

Unpacking the inclusion of restrictive trading practices but not unfair trading practices further reinforces the assertion that competition law is "supply-side" focused. Unfair trading practices as defined in the Consumer Protection Act includes practices which involve having made a misleading or false representation as to the nature, quality of a good or service, etc. Thus, the focus is between the company and the customer; the nature of the relationship and preventing the vitiation of informed consent of the customer.

The demand-side polices are clear here as they seek to ensure that there is accurate information upon which demand is based, demand based on misleading or false representations creates a skewed picture of demand. For instance, unfair trade practice as defined in the Consumer Protection Act includes making a representation to the public regarding a warranty or

[12] *supra* note 4.

guarantee of a product or of any good or service.[13] Such a representation has the potential to affect demand for such a good or service as the provision of a warranty or guarantee may, in the eyes of the customer, increase the value of such good or service or reduce the cost of the product once the cost savings accrued from the warranty are factored in. Hence, this raises demand for a product that otherwise would not have been purchased, if the representation has not been made.

On the flipside, restrictive trade practices are included in the Competition Act. Restrictive trade practices unlike unfair trade practices (as defined by in the Consumer Protection Act), are macro in application. This is clearly seen from the way restrictive trade practices are recognised in the Competition Act; practices that have the potential of "preventing, distorting or restricting competition." Previously, the Monopolies and Restrictive Trade Practice Act, 1969 (MRTP) defined Restrictive Trade Practice as trade practices that impede the flow of capital or resources into production[14]Price manipulation and imposition of conditions that have an effect of applying unjustified costs and restrictions on the supply of goods[15] were instantiations of such practices. However, the definition of Restrictive Trade Practice was broadened when the MRTP was repealed and the Competition Act was passed.

Restrictive trade practices are recognised in the Competition Act as seen from the fact that with effect from 1 September 2009, all pending investigations regarding restrictive trade practices will be transferred to the Competition Commission of India. This is rightfully so, since the trade

[13] Consumer Protection Act, 1986, No. 68, Acts of Parliament, 1986, § 2 (1) (r).
[14] *supra* note 4.
[15] *Id.*

practices characterized as restrictive invariably touch on supply-side and macro- economics. Firms engage in restrictive trading practices by attempting to control the supply of goods or products in the market either by restricting production or controlling the delivery.[16] This is quintessentially a supply-side economics issue – the control of production or delivery of goods affects the supply of such goods in the market, in the former case, the absolute supply of the goods is restricted, in the latter cases, the customers' access to said goods is restricted. This contrast in legislative scopes lends great credence to the individual rationales that underpin the Competition and Consumer Protections Acts. Nonetheless, the different rationales and mischief that the Acts respectively address leads to a policy decision to separates these two disciplines into two enforcement agencies. However, it is the position of this paper, that despite the discrete nature of each Act, there is no need for such a division and that the enforcement of both Acts can be housed under one house.

The separation of these disciplines creates two problems – which can be resolved by better coordination of policies. First, there is a difference in consumer harm in competition policy as compared to consumer protection policy. In the latter, the failings in individual consumer transactions are construed as consumer harm, whereas, in the former, consumer harm is not exactly envisioned – it is under-theorized – as competition policy is focused on preventing harm to competition.[17]

[16] Shreyaa Chaturvedi, *Monopolistic and Restrictive Trade Practices Act, 1970*, IPLEADERS (Aug. 30, 2018), https://blog.ipleaders.in/mrtp/.

[17] United Nations Conference on Trade and Development secretariat, *United Nations Conference on Trade and Development*, U.N. CONF. ON TRADE & DEVELOPMENT (Apr. 29, 2014), http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf.

Competition policies drive firms to provide consumers access to information, however, this does not guarantee that such information may not be misleading or inaccurate.

For instance, the rapid deregulation under the guise of increasing the competition within the U.S. financial industry led to increased competition amongst financial institutions, this led to greater financial innovation without regulatory oversight. The pace of innovation outpaced regulatory development in the years preceding the 2007 sub-prime mortgage crisis. This eventually led to the financial crisis which causes harm to a great number of consumers.

This is an example where the focus on increasing competition in silo creates a myopic situation, where competition policy focuses on eliminating anti-competitive behaviour, but in doing so, creates a situation which may perpetuate harmful practices in violation of consumer protection policies.[18] For instance, if an individual transaction produces a sub-optimal result because of an unscrupulous merchant, competition law assumes that the merchant will be replaced by someone who meets the consumer's needs properly. Competition law wrongly assumes that the solution is always provided by the market. Those left unsatisfied before the merchant exits the market are too little in numbers to bring down the average. Those few do not constitute "harm to competition."

Therefore, across a mass of consumers, then, welfare may be optimized, but at an individual level, welfare declines. This blind spot

[18] Michael Adam et al., *The Effect of Anti-competitive Business Practices on Developing Countries,* U.N. CONF. ON TRADE & DEVELOPMENT (2008), https://unctad.org/en/Docs/ditcclp20082_en.pdf.

must be addressed by micro-level enforcement via the application of consumer protection framework. Therefore, macro-level approaches must be combined with micro-level approaches to plug lacunas that exist when policies are implemented. The merging of agencies will create a single agency with a wider portfolio and an expanded set of policy tools to solve these lacunas. Thus, whilst solving issues related to competition act, it can at the same time, address lacunas that occur at micro-level transactions that cause consumer harm.

The second problem arises when competition policy works a little too well. A well enforced competition policy will create competitive markets that provide incentives for firms to offer quality products and services at the best prices. This allays certain consumer protection concerns such as product and service standards.

However, an extremely competitive market may result in market failures when participants in the market engage in unethical behaviour to obtain a competitive advantage. This creates externalities that require regulations to be addressed – in this case, consumer protection regulations.[19] These externalities should not be addressed in silo, but rather by a broad application of policy tools under one agency since as mentioned above, solely focusing on competition issues may cause consumer harm. Likewise, unduly focusing on consumer protection policies may adversely affect competition in the economy. For instance, private hire companies such as Uber may face complaints regarding their pricing methods – surge-pricing – and local governments may ban this method or place limitations on them on the basis of protecting consumers.

[19] *Id.*

However, this detracts from the fact that surge-pricing allows for allocative efficiency - a by-product of increased competition. Allocative efficiency is critical to sustain a healthy business environment. Thus, myopically focusing on consumer law without taking into consideration effects on competition and vice-versa creates reduced economic gains all around.

In newly liberalized markets, incumbent firms may engage in locking in of consumers by increasing switching costs to competitors, while new entrants may engage in unfair trading practices to expand their market shares.[20] Consumer protection enforcement may be applied to end these practices, whilst balancing this with the need to ensure there is sufficient competition in the market.

Having two separate enforcement agencies creates poor policy co-ordination, overlapping jurisdictions and completion for resources. Whilst, these may create impediments to policy effectiveness of each agency, the issue is not about removing these impediments, but leveraging on the synergies that exist between them to create better policy gains. Specifically, housing these two agencies results in increased coherence in promulgated solutions. Separately implementing solutions may create disconnection between intended results and create unintended consequences, as such as the Sub-Prime Mortgage Crisis and the issues surrounding Uber's price surging. Housing both agencies under one

[20] United Nations Conference on Trade and Development secretariat, *United Nations Conference on Trade and Development*, U.N. CONF. ON TRADE & DEVELOPMENT (Apr. 29, 2014), http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf.

umbrella allows for simultaneous pulling of levers on supply-side and demand-side, thereby creating a much more calibrated approach.

For example, consumer protection measures imposed must not be too strict, as this will raise the barriers of entry for new entrants, thereby entrenching the positions of incumbent companies and eliminating the long-term goal of more competitive markets. The two types of policies should be coordinated to facilitate a whole-market approach. Competition and consumer authorities must share information and coordinate with each other. This reduces the chances of one policy creating adverse, unintended consequences on the other. Information sharing in the first step to greater policy coordination and improved efficiency. In a rapidly evolving world, where technology may create new markets and dominants players within a short span of time, any gain in efficiency would be a boon to regulatory development and enforcement.

2.2 CONSOLIDATION

The problems discussed above arise from a lack of coordination of policies. Policies and laws that are formulated in-silos are not cognizant of the effects of other policies. At the implementation stage, contradictory or overlapping implications arise, creating something similar to the "spaghetti-bowl" effect. There is an increasing trend to consolidate competition law enforcement and consumer protection in a single institution thereby creating synergistic value between these two functions.[21] A crucial synergy is that of better flow of information between the formerly-separated agencies as well as leveraging on the existing

[21] *Id.*

capabilities and information networks of each agency to create a multi-pronged approach.

3. A CROSS BORDER PERSPECTIVE: SINGAPORE'S APPROACH

Singapore undertook the decision to merge both agencies into one house because it recognised that a single agency would leverage the synergies that pre-exist in both agencies and that a streamlined central agency would allow for a more holistic assessment of competition and consumer protection policies.

Singapore, has recognised this trend as evinced by the recent creation of the Competition and Consumer Commission of Singapore ("**CCCS**"), formerly the Competition Commission of Singapore.[22] Given that competition polices may have consumer protection implications, a calibrated approach must be utilised. A single agency housing two functions allows for exchange of information and coordinated approaches to strengthen the joint framework. Such an amalgamation must allow for timely exchange of information between each side. The barrier between the two-disciplines must be porous and must allow external information to transfer and be utilised.

At present, the Singapore Tourism Board ("**STB**") and Consumers Association of Singapore ("**CASE**") are the first points of contact for consumer protection cases, after-which errant retailers who do not stop

[22] Tiffany Tay, *Competition watchdog gets new name, consumer protection powers*, THE STRAITS TIMES (Apr. 6, 2018), https://www.straitstimes.com/singapore/competition-watchdog-gets-new-name-consumer-protection-powers.

their unfair trading practices will be referred to the consumer protection body for investigation. Measures must be put in place to allow information from STB and CASE to diffuse through CCCS, starting from the consumer protection side and proceeding to reach the competition authority within. This would be a good leverage of existing information networks. Additionally, the competition authority must provide information from its studies and reports on competition issues in specific sectors that have effects on consumers. This process informs the consumer agency of its decisions in competition cases and reports on mergers that may affect consumers' interests such as the recent Grab and Uber merger.[23]

This seamless flow of information allows authority to identify and enforce measures against businesses that have been investigated and censured for anti-competitive practices and whose conduct have consumer protection implication. Similarly, this can be applied onto the Indian enforcement landscape as well.

4. CONSOLIDATION CHALLENGES – AN INQUIRY

It is clear that housing the two disciplines in one agency allows for the melding of know-how, economics of scale, manpower, and information transfer and therefore, ensuring that coordination of competition and consumer protection policies are a crucial element of the agency's institutional design. However, the question of whether a house

[23] Christopher Tan, *Competition watchdog issues interim measures to stop Grab, Uber merger*, THE STRAITS TIMES (Apr. 13, 2018), https://www.straitstimes.com/singapore/transport/competition-watchdog-issues-interim-measures-to-stop-grab-uber-merger.

with a divided mission would perform better than two separate houses arises. It can be argued that separation of the missions may create specialised skillsets and thus, each house would develop deep expertise in the demand side (consumer protection) and supply side (competition), which may create an overall positive net result on consumer welfare.

However, this positive net result is predicated on the assumption of perfect, timely transfer of information, which allows both agencies to ensure that their policies do not hamper each other. This faulty assumption together with lag time between implementation, outcome and other inherent issues with policy formulation may cumulatively distort the transfer of perfect, timely information. Therefore, to minimize such interferences, polices should be promulgated within one house.

Notably, the systematic question that needs to be answered is whether an agency, created to address competition issues can also protect individual consumers. A key concern is whether consumer protection enforcement should be handled by private individuals and not by public agencies,[24] given the micro-nature of individual transactions.

This may result in the opening of floodgates where individuals may approach the Competition Commission of India for every apparent consumer protection violation. This may place a strain on the Commissions' resources to administer to each complaint. This concern does not vitiate the argument that the two agencies should merge, but rather it highlights the fact the merger should be accompanied with other developments that complements the benefits of such a merger.

[24] Huffman, *supra* note 3.

It is more likely for individual litigants to seek recourse via Competition Commission of India, because the role of private enforcement vis-à-vis consumer protection is limited in India, compared to jurisdictions like the United States. The U.S.'s regulatory sphere has built-in incentives that favour and promulgate private suits.[25] Devices such as class-actions suits, punitive damages, together with contingency fee agreements with lawyers allow for private litigants to sue without incurring too much. However, India's legal system is devoid of such devices and as such, there is no incentive for a private litigant to enforce for a consumer protection issue where the legal costs may outweigh the cost of buying another product. As a result of these impediments, consumers would turn to C.C.I. to ventilate their claims as the C.C.I. is the enforcement agency.

Thus, C.C.I. should utilise a multi-pronged approach. Both competition and consumer projection polices utilise a regulatory framework and an enforcement mechanism to achieve their goals. However, private litigants must play a role as well. The domains of competition and consumer protection law is not solely the responsibility of public institutions. Private litigants must be aware of their rights and must be able to enforce those rights when necessary. Education and awareness is key to individual consumers taking responsibility and as such, C.C.I. should create outreach and educational programs to raise awareness. Only with such a multi-pronged approach, can a robust framework be created and enforced in India.

[25] *Id.*

5. CONCLUSION

Whilst, competition and consumer protection policies take different paths, they lead to the same outcome. Despite, this complementariness, contradictions may occur, due to differences in how each discipline works. To reduce differences, there must be better coordination in the formulation and implementation of policies. Competition policy increasing consumer welfare is not automatic, it must be followed by consumer protection – the alignment of demand-side and supply-side effects collectively enhance consumer welfare. This whole-market approach is required to solve any competition issues that create consumer protection problems.

This is predicated on successful and timely transfer of information. This can be achieved via agreements and systems implementation, however, given the difference in intermediate goals – competition policy focuses on protecting competition, whilst, consumer protection policy focuses on preventing consumer harm – each agency may tend to their mandate first.

To eliminate such a risk, this paper supports the notion of housing the two disciplines in one house. However, merging of the two agencies is not sufficient, it must be complemented with a new strategy beyond enforcement measures. Education and awareness of consumer rights is critical to ensure that the burden of enforcing consumer protection does not lie solely with Competition Commission of India, but with individual consumers as well.