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VERTICAL RESTRAINTS AND COMPETITION!!

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ABSTRACT:

It's extremely difficult to correctly assess welfare in the case of vertical agreements. Jurisdictions with higher expertise in welfare like the US(United States) and EU(The European Union) have also struggled to maintain an optimal situation in the case of public welfare. This article tries to find out whether vertical agreements have any ambiguities or have any pro-competitive effects in the long run. The objective is to assist the CCI (Competition Commission of India) and to let them know whether there are any harsh effects of the competition on the welfare of people or whether there will be some damaging effects later on. When some leading cases were minutely checked, we found out that there are a few infirmities in CCI. It includes some legal ambiguities, and the economic analysis is not up to date. Thirdly most of the CCI is relying on the European Union, although the economic state of the EU is far vaster and more advanced compared to India.

INTRODUCTION:

In the market, vertical agreements have been a popular way to sell products and labor instead of direct sales. Resorting to vertical agreements also imposes certain restraints on parties. These restrictions are often pro-competitive as they bring forth upfront the incentives and profits of both manufacturers and buyers. At the same time, if such restrictions are relaxed, it might soften competition that might result in an inferior quality of goods. Therefore, to understand the concept of vertical restraints a sophisticated understanding of both law and economics is necessary as in the absence of proper competition, there might be a possibility of inefficiency and thus leading to no welfare.

This article also minutely studies some vertical agreement cases to know about the structure and judgment strategy of the Competition Commission of India. Although it's not appropriate to study old cases and judgments as the economy is improving day by day yet it's necessary. This article compares the judgments by CCI to the EU and US jurisprudence as these jurisdictions have attained maturity and experience after dealing with vertical restraints through the years. The analysis is mindful of the legislative nature of the Indian Competition

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Act, of 2002. The scrutiny led to three infirmities: Firstly, the interpretation of the act revealed certain legal ambiguities. Secondly, the economic analysis is incoherent. Thirdly, the CCI is over-relying on EU Jurisprudence.

LEGISLATIVE SCHEME OF SECTION 3 UNDER THE INDIAN COMPETITION ACT, 2002:

Section 3(4) of the Indian Competition Act sets out provisions against anti-competitive vertical agreements. This section notes that:

Any agreement between businesses or individuals operating at various stages or levels of the supply chain in various marketplaces regarding the production, supply, distribution, storage, sale, or price of, or trade in, goods or the provision of services, including

- 1) tie-in arrangement;
- 2) exclusive supply agreement;
- 3) exclusive distribution agreement;
- 4) refusal to deal;
- 5) resale price maintenance.

shall be an agreement in contravention of subsection 1 of section 3 sets out certain provisions against all anti-competitive agreements which are rendered void if such agreements harm competition in India.

LEGAL ANALYSIS -SOME AMBIGUITIES

This part highlights certain ambiguities in the legal analysis of CCI's judgments. It's not possible to differentiate between legal and economic analysis in competition law as almost always economic analysis has to be studied before giving the legal analysis. However, for the sake of clarity, the analysis in this paper discusses examples where the interpretation of legislative provisions led to ambiguities.

ECONOMIC ANALYSIS - DEFICIENCY FOUND

This section investigates the application of economic analysis in some vertical restraint cases. These cases were decided following section 27 of the act, where we found that in an

anti-competitive agreement, deeper economic analysis is required before imposing any sort of liability or a legal judgment.

Case reference: Ghanshyam Dass Vij vs. Bajaj Corp Ltd & Ors. (2015)

In this case, the petitioner who was a distributor of Ayurvedic products made the allegation against the opposition party, a fast-moving consumer goods company (FMCG) that the latter imposed vertical restraints on the sale of hair oil. The report read that sections 3(4)c, 3(4)d, and 3(4)e had been violated. The decision by CCI appears to be unclear to date.

While the judgment, in the beginning, agreed to the violation and presence of such practices but towards the end the CCI raised doubts over the actual implementation of the alleged charges. It's still not clear what part of the downstream was uncovered. Yet in the absence of this crucial step, any balance of effects under section 19(3) cannot be undertaken scientifically. The CCI held out the judgment, that both the parties should have a significant market position to cause any adverse effects on the competition, which was not done.

OVERRELIANCE ON EU JURISPRUDENCE:

The CCI has indeed benefitted a lot by looking at the judgments and working processes of more mature jurisdictions. However, it has led to mechanical transplantations of certain concepts that fall outside the legislative mandate of India. For example in the Samsher Kataria case, on one side the CCI showcased its ability to engage in complex legal-economic analysis however it also put forth certain judgments that Indian Competition Act, 2002 does not permit. The CCI went out to follow the EU jurisprudence strategy of eliminating competition in respect of certain substantial parts of the products in question. The CCI also borrowed the "special responsibility" concept that requires the top firms in the EU not to allow distorted competition in the legal market.

PROPOSED SOLUTIONS:

In case of legal ambiguities, Legal ambiguities are caused as a result of limited interpretation. This article has shown that we can carve out a third analysis of case laws that are neither horizontal nor vertical may help in such a process. This article also showed that the best solution is through the legislative route by way of amendment.

In case of economic ambiguities, a fuller economic analysis is necessary to get rid of economic deficiency. The rigor in defining relevant markets in Kataria's case is missing in others. Proper analysis should be done in the case of the economy to find out what can be improved. The CCI needs a better analytical framework in vertical agreement cases. As discussed in Section 4, the first analytical step is to determine the market position of the parties in question and also the determination of market shares. Drawing a counterfactual inquiry can also help to determine anti-competitive effects.

In case of overdependence over EU Jurisprudence, the CCI has to be careful about the borrowing of concepts and has to make sure that it doesn't borrow concepts that the Indian legislature doesn't mandate. As a solution, while the CCI looks towards EU Jurisprudence for guidance, reliance should be on the study of economics that will be per the Indian legislative mandate.

CONCLUSION:

To correctly assess welfare in the case of vertical agreements is a difficult task from the point of law and economics. The lesson drawn in this article is that it should strengthen its analysis and keep it up to date with the current economy. In case of legal ambiguities, the remedy is to derive a third category of agreements that are neither horizontal nor vertical. It also strengthened the economic analysis as it revealed there is no coherent framework. Finally, the article revealed that over-relying on EU Jurisprudence has led to the borrowing of concepts that don't fit with the Indian legislative mandate which needs to be fixed.