Competition Law and Competition Issues in Aviation

Dr. Kapil Sharma
NALSAR

What is Competition?

- “the process of rivalry between business enterprises for customers – is a fundamental feature of a flexible and dynamic market economy. In order to respond to demand for better products at lower prices, competing producers, suppliers or service providers are encouraged to innovate, lower their costs by reducing slack and increase productivity”

Role of Competition

- Benefits
  - Consumers
  - Business
  - Economy

What is Competition Law?

- The law which takes cognizance of distortion in the market and other impediments is the competition (or anti-trust) law and the institution that oversees the functioning of the markets is the competition regulator.
- Competition Law is codification of rules designed to promote and sustain market competition.

History of Competition Law in India

- Monopolies and Restrictive Trade Practices Act (MRTP Act), 1969
- The then Finance Minister (Shri. Yashwant Sinha) in the budget speech in 1999 had announced:
  - "The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our conditions."
- High Level Committee on Competition Policy and Law was constituted under chairmanship of Mr. Raghavan
- The Competition Act, 2002

Competition Commission of India and its Evolution

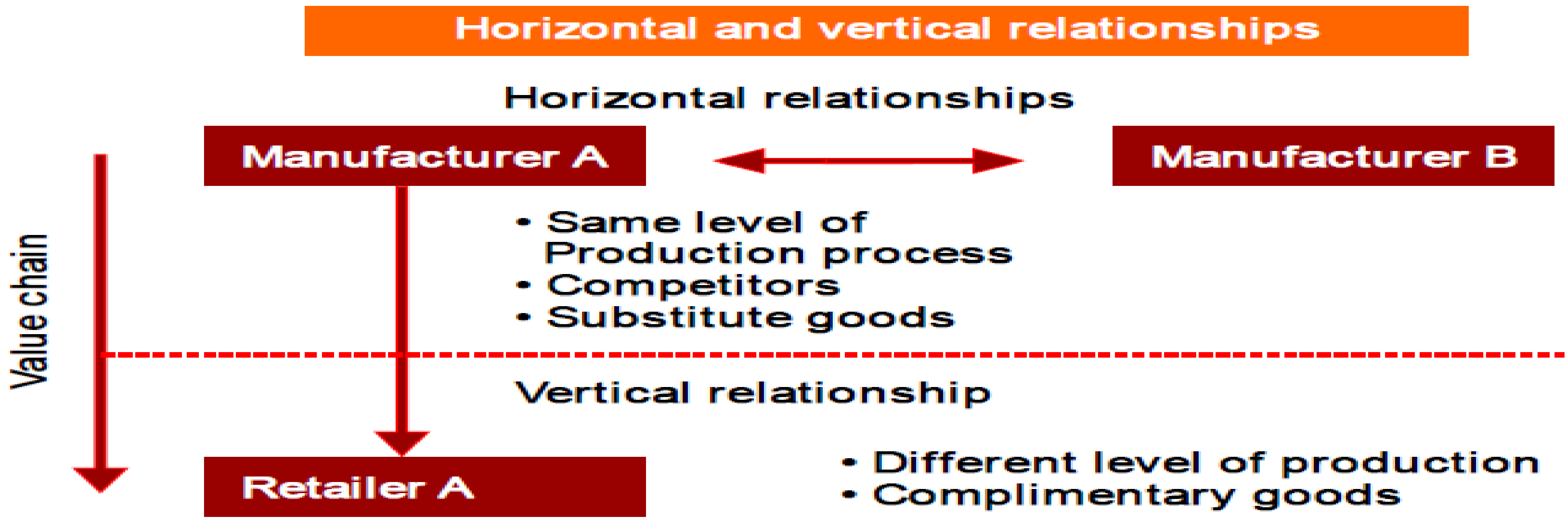
- Established in 2003
- Become fully operational in 2007
  - Brahm Dutt vs. Union of India
- The Amendment Act of 2007
  - the Commission as a seven-member (CCI)(one chairperson and 2-6 members) expert Body to function as a market regulator for preventing and regulating anticompetitive practices in the country and to carry on the advisory and advocacy functions in its role as a regulator;
  - the Competition Appellate Tribunal (COMPAT) as a three-member quasi-judicial body to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission.

Substantive Provision of the Act

- Anti-competitive Agreement (Section 3)
- Abuse of Dominance (Section 4)
- Regulation of Combinations (Section 5 & 6)

Prohibition of Anti Competitive Agreement

- Horizontal and Vertical Agreements



Horizontal agreements (Section 3(3)

- Directly or indirectly determine purchase or sale prices: Fixing of prices
- Limit or control output, technical development, services etc
- Share or divide markets
- Indulge in bid-rigging or collusive bidding

Vertical Agreements (Section 3(4)

- Tie-in arrangements
- Exclusive distribution agreements
- Refusal to deal
- Resale price maintenance

Horizontal Versus Vertical Agreement

- There is a presumption in the Act that the four types of horizontal agreements mentioned above are presumed to have adverse effect on competition which is similar to per se rule.
- The presumptive rule is not applicable to vertical agreements which are subject to the rule of reason analysis i.e. the positive as well as the negative impact of such agreements on competition will have to be taken into account before coming to any conclusion. This also applies to agreements entered into by way of joint ventures that increase efficiency in production, supply, distribution, storage etc.

Factors considered for Inquiring into Agreements

- creation of barriers to new entrants in the market;
- driving existing competitors out of the market;
- foreclosure of competition by hindering entry into the market;
- accrual of benefits to consumers;
- improvements in production or distribution of goods or provision of services;
- promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services

Prohibition of Abuse of Dominance (Section 4)

- Dominant position is a position of strength enjoyed by a firm which enables it to behave/act independently of the market forces i.e. in the determination of price of the product
- The Act specifies a number of factors such as market share, size and resources of the firm, market structure etc. that should be taken into account while determining whether an enterprise is dominant or not.
- **Relevant market**
  - **Relevant geographic market** is a geographical territory in which competition conditions in a relevant market of a product are sufficiently the same for all participants in such market and therefore this territory can be separated from other territories.
  - For example, in view of the high transportation costs in cement, the relevant geographical market may be the region close to the manufacturing facility.
  - **Relevant product market** is defined in terms of substitutability. It comprises of all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.
  - The market for cars, for example, may consist of separate 'relevant product markets' for small cars, mid-size cars, luxury cars etc. as these are not substitutable for each other on a small change in price.

Classification of Abuse of Dominate Position

- **Exploitative Practices**
  - Directly or indirectly imposing unfair or discriminatory prices in purchase or sale of goods or service
    - Discriminatory pricing
    - Predatory pricing
    - Excessive pricing
  - Directly or indirectly, imposes unfair or discriminatory condition in purchase or sale of goods or service
- **Exclusionary Practices**
  - Limiting production of goods or provision of services or limiting or restricting technical or scientific development
  - Indulges in practice or practices resulting in denial of market access
  - Imposing conditions which are irrelevant to the contract entered into
  - Using its dominant position in one relevant market to enter into, or protect, other relevant market

Combination Regulation (Section 5 & 6)

- Combinations mean mergers, amalgamations of companies or acquisitions of control, shares, voting rights or assets of one company by another company or group. Good combinations lead to a more efficient business which passes on some of those efficiency savings to its customers.

Ex-ante regulation of Combinations

- Combinations should not be permitted to create, enhance, or entrench market power or to facilitate its exercise
- Combinations enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm consumers as a result of diminished competitive constraints or incentives
- Unilateral effects - Firms can enhance market power simply because of elimination of competition through merger or acquisition.
- Coordinated effects - merger can also result in increased risk of joint dominance through coordinated, accommodating, or concerted behavior among remaining market players in relevant market
- Post-combination, unscrambling a merger may also involve high socioeconomic costs.
- Regulation of combination provides legal certainty to business, had the combining enterprises taken clearance after filing notification

Example

- Suppose there are four firms in a market having the following market shares:

Firm Name	Market Share (%)
A	50
B	40
C	5
D	5

- If a firm 'A' merges with firm 'B' then such post-merger entity A+B will capture almost the whole market thereby impinging on the competition in the market. Such market power may incentivize the businesses in exploiting the consumers. The Competition Commission's role is to screen mergers for potential anti-competitive effects. The Commission decides whether the combination should be approved, prohibited or approved with modifications to the combination. The modifications are made on the basis of how the anti-competitive effects could be alleviated. In competition parlance such modifications are termed as 'Remedies'. Remedies can either be: a) Structural; or b) Behavioural.

Thresholds for Combinations

		2016 (Existing Threshold)			2024 (Revised Threshold) #		
		Assets		Turnover	Assets		Turnover
Enterprise level	India	> 2000 INR Crore	OR	> 6000 INR Crore	> 2500 INR Crore	OR	> 7500 INR Crore
	In India or Outside India	> USD 1 bn with at least > 1000 INR Crore in India		> USD 3 bn with at least > 3000 INR Crore in India	> USD 1.25 bn with at least > 1250 INR Crore in India		> USD 3.75 bn with at least > 3750 INR Crore in India
OR							
Group Level	India	> 8000 INR Crore		> 24000 INR Crore	> 10000 INR Crore		> 30000 INR Crore
	In India or Outside India	> USD 4 bn with at least > 1000 INR Crore in India		> USD 12 bn with at least > 3000 INR Crore in India	> USD 5 bn with at least > 1250 INR Crore in India		> USD 15 bn with at least > 3750 INR Crore in India

Factors considered for Inquiring into Combination

- actual and potential level of competition through imports in the market
- extent of barriers to entry into the market;
- level of combination in the market;
- degree of countervailing power in the market;
- likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
- extent of effective competition likely to sustain in a market;
- extent to which substitutes are available or arc likely to be available in the market;
- market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
- likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;
- nature and extent of vertical integration in the market;
- possibility of a failing business;
- nature and extent of innovation;
- relative advantage, by way of the contribution to the economic development, by any combination having or likely to have
- whether the benefits of the combination outweigh the adverse impact of the combination, if any.

Key points about competition cases in aviation

- **Oligopolistic nature:**
  - The aviation industry is considered oligopolistic, meaning a small number of large players dominate the market, making collusion easier to occur.
- **Market power abuse:**
  - Cases can arise when a dominant airline uses its market power to unfairly disadvantage smaller competitors by manipulating prices or routes.
- **Airline alliances:**
  - While alliances can be beneficial for passengers, they can also be scrutinized for potential anti-competitive behavior if they limit competition on certain routes.

Examples of competition cases in aviation

- **Price fixing and fuel surcharge collusion:**
  - Investigations into whether airlines coordinated to raise fuel surcharges on flights, impacting passenger costs.
- **Capacity management coordination:**
  - Concerns about airlines deliberately limiting flight capacity on certain routes to maintain higher prices.
- **Algorithmic price manipulation:**
  - Allegations that airlines use sophisticated algorithms to dynamically adjust prices based on market demand, potentially leading to coordinated price increases.
- **Market foreclosure:**
  - When an airline uses exclusive agreements with airports or travel agents to limit access for competitors.