



FAIR COMPETITION FOR GREATER GOOD – APPRECIATING THE ROLE OF ANTITRUST AGENCIES

Manish Mohan Govil, Adviser, Competition Commission of India

Recently, a spate of antitrust litigations worldwide against digital companies has elicited curiosity about the nature and scope of antitrust enquiries and the role of the competition agencies. At its core, Competition Law/Antitrust Law in any jurisdiction essentially means regulating the market forces that define the equilibrium between the producers and consumers. It aims to ensure that exclusionary, exploitative and collusive practices do not lead to chaos, resulting in unfair or disproportionate ability to leverage outcomes especially by those in dominant position.

A parallel can be drawn from recently concluded Olympic games by comparing markets with the sporting arena; at the heart of both is one defining principle – competition. To illustrate; competition was vitiated when Ben Johnson's record breaking 100-metre sprint at the 1998 Seoul Olympics was not the result of his capability but drug induced. Johnson was later disqualified for doping, as were other stars who have used steroids and performance-enhancing substances to win a race, putting to naught the work of those who train hard by fair means. These events led to the establishment of the World Anti-Doping Agency (WADA) in 1999, which adopted the motto "Play True". WADA monitors the World Anti-Doping Code and sets uniform standards to provide a doping-free environment for athletes.

The competition agencies in markets are akin to WADA in the sporting arena. Firms compete in markets to reduce their costs, trigger innovation and lower prices for the consumer. Competition provides firms with access to the world market and provides consumers with more choices at lower prices and better quality of goods. This leads to an increase in productivity that aids the growth of the economy. It also forces firms to innovate in order to fulfil the aspirations of people. However, if a dominant company uses "performance-enhancing drugs", in this case, capital burn, data, preferential treatments, and denial of access, they have the potential to kill or acquire companies that lack these resources, which ultimately harms consumers. Thus, there needs to be an expert body to inquire into the conduct of such a company to establish its complicity. That is precisely the purpose and objective of an antitrust inquiry.

Antitrust enquiries drew public attention when competition was vitiated in the US oil markets by John D Rockefeller and his monopolistic Standard Oil Company. With a quest to establish hegemony through mergers, acquisitions, elimination of competitors and ownership of lines of transportation and communication, he controlled nearly 90% of the US oil market and therefore, held the reins of finance and power. After his business practices and patterns of ownership were investigated by the

US Department of Justice under the Sherman Act of 1888, the company was dissolved into smaller entities that could compete in the market.

Markets have been evolving ever since antitrust actions were initiated to regulate the monopolistic actions of dominant firms. These markets are a complex web of buyers, suppliers and intermediaries, and each market operates within its own ecosystems. Firms compete with one another in their relevant markets to make profits in the same way that players and teams compete in different sporting events at the Olympics to win medals. However, high stakes in the markets can make them prone to distortions through collusion, information asymmetry and entry barriers. Sometimes, government regulations and litigations also may unwittingly aid market distortions.

The leitmotif of competition law is that, whereas dominance is not bad, abuse of dominance is, and firms should compete but not collude. The analytical framework of an antitrust inquiry requires three steps: formulating a theory of harm, collecting evidence through an investigation, and testing these evidences against legal principles. The theory of harm is based on the common economic principles of antitrust and, like all theories, evolves with time and place. Lately, platform-based business models, multi-sided markets with network effects, and economies of scale have rendered competition issues more complex, thus making enforcement challenging. Often at the cost of time these issues are contested before the courts on polemics rather than based on hard evidences collected through professional enquiry.

Most countries have some kind of competition authority to regulate the markets. The US has two very vibrant antitrust institutions—the Federal Trade Commission and the Department of Justice. In Europe, the office of the Director General of Competition is administered by the European Commission. The International Competition Network, the UNCTAD, OECD, and BRICS are some international forums where member competition agencies cooperate with each other. Unlike the West, the competition agency in India, i.e., the Competition Commission of India is a fairly young regulator, but it has evolved some very sound jurisprudence and capacity to frame anti-trust issues, keeping in view the economic development of India.

In 2020, the Tokyo Olympic Committee added a new word to its motto, which now reads “Faster, Higher and Stronger – Together”, signifying the nature of sports as a unifying factor that demonstrates the determination to excel even while facing an unprecedented health crisis. As we brace ourselves to meet the novel challenges of economic slowdown resulting from the pandemic, it is more important than ever before that the world unites to fight back. All players have to come together to meet the objective of making markets competitive. This will ensure that the fruits of economic benefits are distributed equitably and post-pandemic economic recovery is expedited. Therefore, a robust competition authority, with the capacity to make appropriate and timely corrections in the market through enforcement and advocacy, is the mainstay for fostering a competitive environment in the economy.

(The author is Adviser, Competition Commission of India, the views are personal)